Proskauer

National Labor Relations Board Issues New Rules Looking to Speed up Union Election Process

December 18, 2014

On December 12, 2014, the National Labor Relations Board (NLRB or the Board) issued its long-promised revision to its representation-case procedures. In its 733-page final rule, the Board outlined various changes that will take effect on April 14, 2015. The Board claims to have had several objectives for its final rule, including: streamlining and simplifying Board procedures to prevent delays, modernizing the process in light of new technology, and increasing transparency and uniformity across regions. In fact, while somewhat less extreme as the original proposals presented by the Board two years ago (often referred to as the "ambush election proposals"), these are a series of significant changes to the way unions will organize through Board-certified elections, and could make it far more difficult for employers to respond to campaigns.

Key provisions from the Board's finalized rule are detailed below.

Speeding up Elections

- Elections will no longer be stayed for 25 days following the issuance of a decision on a petition. In the past, an automatic stay existed to allow the Board time to consider any requests for review of the regional director's decision.

- Employers will be required to identify any issues they have with a petition in a Statement of Position one business day before a scheduled pre-election hearing. The petitioner will be required to respond to any issue raised by the non-petitioning party at the beginning of the petition hearing.

- The Board will no longer be required to review regional director post-election rulings as to which no party has raised an issue.

- At the pre-election hearing, parties will only litigate those issues necessary to determine whether an election should be conducted. Certain eligibility and inclusion issues that do not have to be decided before the election may be deferred to the

post-election stage.

Expediting the Filing and Hearing Process

- Parties can file election-related documents (*e.g.*, election petitions, election notices, voter lists, etc.) electronically. NLRB regional offices also can deliver notices and documents electronically. Previously, the Board did not allow for the electronic submission of documents.

- Pre-election hearings will begin eight (8) days after a hearing notice is served on the parties. The regional director may exceed that time frame in "complex cases." Parties also can request an extension if they can show "special" or "extraordinary" circumstances that necessitate the delay.

- Upon filing a petition, petitioners must serve on all parties simultaneously a copy of the petition, a detailed Agency description of representation-case procedures, and a Statement of Position form.

- Hearings are expected to be closed with oral argument, and written briefs will only be allowed if the Regional Director determines they are necessary.

New Employer Posting and Providing More Information to the Union Earlier

- In the newly required Statement of Position, employers must identify for the union the job classifications, shifts, and work locations of all prospective voters.

- Employees now will receive earlier and more detailed information about the election process. Within two business days of the region's service of the petition, employers must post a "Notice of Petition for Election," which provides employees with information about the petition and their rights.

- Election Voter Lists (commonly called "Excelsior Lists") must be submitted within two (2) business days after an election stipulation is approved or Regional Director's direction of election is issued, not seven (7) days.

- Employers must now include personal phone numbers and email addresses on the Excelsior List provided to the union – something that was never required before.

Implications

The new rules will change the pre-election organizing process in contested (i.e., non-stipulated) representation cases dramatically.

By limiting the scope of hearings and speeding up the election process, employers will have a more limited window than under the current rules to discuss issues regarding unionization with their employees. Moreover, if a Regional Director does not allow voter eligibility issue to be addressed prior to the election, employers may be unable to rely in a campaign on individuals they believe to be supervisors but the union believes to be eligible voters, without significant risk of unfair labor practice charges and election objections.

Further, providing union access to telephone numbers and email addresses opens up new avenues of communication to labor organizations. These disclosures will be required, without any opportunity for employees to opt out of the disclosure of their personal information.

Although the NLRB claims to look to streamline the election process, its rules may have the opposite effect. By limiting review opportunities during the election process, employers may be forced into more refusal-to-bargain cases in order to gain Board (and perhaps federal court) review of issues that might otherwise have been appealed during the election process.

The rules do not take effect until April 14, 2015, and it is widely anticipated that there will be litigation in an attempt to block the changes. Congress also may attempt to vacate the rules through legislative means. We will, of course, continue to provide updates on these changes throughout the New Year.

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