
NLRB Issues Quickie Election Rules

By Kurt M. Graham, Kurt A. Miller, Thomas P. Brady / Dec 16, 2014

On December 12, 2014, in a victory for organized labor, the National Labor Relations Board ("Board") approved new rules that will allow it to speed up the scheduling of union elections and, as a result, quite possibly make it easier for unions to secure election victories. The rules will become effective on April 14, 2015. **Currently, the time between the filing of the petition and the election is 38 days. Under the new rules, a Regional Director could hold elections between 10 and 20 days of the filing of the petition for election. This will seriously hamper the employer's ability to campaign against the union.**

According to the Board, the rules are intended to remove "unnecessary barriers to prompt resolution of questions of representation by reducing needless litigation." The new rules make a number of procedural changes to the Board's election processes, including:

- Permitting for the electronic filing and transmission of election petitions and other documents.
- Requires the employer to post and distribute the Board's detailed notice of the filing of a petition and potential for an election.
- Employers must state their position responding to the petition one day prior to the pre-election hearing and provide information concerning employees included in the proposed unit.
- Generally, the Regional Director will hold the pre-election hearing eight days after the filing of the petition and the hearing will continue from day-to-day until complete.
- Limiting the presentation of evidence in pre-election hearings to genuine issues of fact material to the existence of a "question concerning representation."
- Under the new rules, those issues would have to be resolved, if necessary, after an election has been held.
- Allowing parties to only file post-hearing briefs with the permission of a Regional Director, rather than as a matter of right. Traditionally, parties have been given 14 days after receiving the hearing transcript to file a brief. This provided the employer with more time to campaign against the union. It is anticipated that a Regional Director will not permit briefs except in extraordinary cases.
- Eliminating parties' right to seek full Board review of a Regional Director's pre-election rulings and delaying Board review of such rulings (provided they have not been rendered moot by the election results) until after an election unless there are "extraordinary circumstances" for the Board to grant an immediate appeal.
- Making Board review of post-election disputes discretionary.
- Discontinuing Board policy that a Regional Director will not schedule an election for at least 25 days after the direction of an election. The Board's longstanding practice has been to delay voting for at least 25 days after direction of election in order to give the Board sufficient time to receive and consider parties' pre-election requests for review of a Regional Director's rulings.
- Within two business days of the direction of election, employers must electronically transmit to the other parties and the Regional Director a list of employees with contact information, including more modern forms of contact information such as personal email addresses and phone numbers if the employer has such contact information in its possession. The list should also include shifts, job classifications, and work locations. The list may only be used for certain purposes. This replaces the seven day time limit under the former rules and includes information that was formerly not required, like personal email addresses.
- Finally, the Board shortened the time for objecting to election conduct; limited the hearing of the objections and required the Regional Director to issue a final decision.

How Do the New Election Rules Impact My Business?

The end result is that the new election rules will substantially shorten the timeframe for a union election depending on the situation. Since many employers use the time leading up to a union election to talk to their employees about the costs and impact of joining a union, the rule changes will consequently limit the amount of time employers have to express their viewpoints on unionization to their workers and also impact employees' ability to make an informed voting decision. As a result, employers should begin making preparations now to engage in effective union avoidance strategies and prepare for the possibility of the filing of a future election petition in which they may have little to virtually no advance notice of a pending union election and little to no ability to challenge employees' eligibility to vote until after the election has taken place. We suggest employers:

- Review your organization and determine if changes are necessary and practical to avoid small "micro units" which will permit the union to organize a small group of employees and later expand to more units in the workplace.
- Review your organization's non-solicitation and non-distribution policies and the enforcement of those policies;
- Review the organization's email and electronic communications policy to limit its use by employees during an organizing campaign;
- Train management and supervisors on the warning signs of a union organizing drive;
- Perform a union vulnerability assessment;
- Train management and supervisors on what they can legally do during a union organizing drive; and
- Prepare a campaign strategy, including handouts, for opposing a union organizing drive.

Unions will certainly attempt to use the new rules as an opportunity to more quickly organize non-union workplaces, and to also expand their representation of those workforces that have been partially organized. Prior preparation by the employer may avoid many of the problems caused by the new Board rules.

If you have any questions about how the new Board election rules will impact your business or workplace, please contact Thomas P. Brady at (313) 965-8291 | tbrady@clarkhill.com, Kurt Graham at (616) 608-1144 | kgraham@clarkhill.com, or Kurt Miller at (412) 394-2363 | kmiller@clarkhill.com, or your Clark Hill Labor and Employment attorney.