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LABOR & EMPLOYMENT DEPARTMENT

ALERT

# NLRB Proposes Revised Election Rules

## Fox Rothschild Testifies Before NLRB and Will Submit Comments

By Brian A. Caufield

On June 21, the National Labor Relations Board (NLRB), the federal agency governing private sector labor relations, proposed revisions to its regulations on representation elections that it conducts, in which employees vote by a secret ballot to determine whether they wish to be represented by a union.

According to the NLRB, the revisions are intended to reduce unnecessary litigation. On July 18, I was one of 59 labor relations professionals to testify before the NLRB at its public hearing. I testified in opposition to the revisions, noting that, from the employer's perspective—which this alert is also based upon—the revisions, if adopted as is, would increase litigation, not reduce it. I reasoned, as explained in more detail below, that because of the extremely short amount of time from the union's filing of the petition seeking to represent certain employees, issue preclusion and the potential to be denied a hearing, employers would not favor stipulating to an election. Instead, employers would likely err on the side of caution and raise issues that may not, after a proper and thorough investigation, be genuine issues subject to litigation.

The current practice is that an employer typically has between 14 and 18 days from the initial filing of the petition to assess whether there are any issues raised by the petition that require litigation, such as whether certain classifications of employees should be included with or excluded from the unit of employees sought by the union. If so, a representation hearing is held, whereby witnesses are examined and other relevant evidence is admitted. One to three weeks later, a regional director of the NLRB issues a decision and, along with that decision, either directs an election or dismisses the petition. If an election is directed, there is a waiting period of 25 to 30 days before the election can be held to allow the employer or union the opportunity to file an appeal of the regional director's decision with the NLRB.

The revisions provide, among other things, that a hearing would be set for seven days from the date of the filing of the petition. There is no guarantee the hearing would go forward, but an employer must attend the hearing (or face an election without being heard) and file a Statement of Position that identifies the issue(s) it wishes to litigate as well as other specific details about the employees sought to be represented. An employer that fails to raise litigable issue(s) in the Statement of Position, except for jurisdiction, would be forever barred from raising such. If the contents of the Statement of Position and/or a verbal offer of proof do not reveal that the issue(s) to be litigated would effect 20 percent or more of the employees sought by the union, the hearing would not go forward and an election could be directed in as early as 12 days.

In the event a hearing does go forward, the revisions provide there would no right to appeal the regional director's decision before the election; rather, the appeal

of any pre-election determinations could be made after the election, coupled with any post-election issues (i.e., determinative challenges and objections). Moreover, regional directors can bifurcate the decision and direction of election into two by first directing the election and then issuing a decision no later than the time the tally of ballots issues at the close of the election.

As I told Chairman Liebman in a colloquy after my testimony, many employers are generally unskilled in the area of labor relations, as the issue of union representation is often joined upon the filing of the petition. Thus, for those employers that do not have outside counsel it may take several days to determine exactly what the NLRB does and then several more days to decide to "go at it alone" or select adequate labor counsel. In this situation, under the revisions, there would be very limited time for one to adequately investigate the factors necessary to determine whether to stipulate to an election in a unit of employees sought by the union or to litigate certain issues raised by the petition. My testimony before the NLRB revealed that I would err on the side of caution here and not stipulate to the election. The reason for this is that if I stipulated and then a few days later determined that negotiating in an expanded bargaining unit would be more appropriate for my client, I would be foreclosed from litigating the issue. Under the revisions, there really is only one sure way to protect your client's interests and that is to, at the very least, raise the issue in the Statement of Position and argue to the Hearing Officer that the issue effects at least 20 percent of the employees sought to be represented by the union.

Other "bones of contention", I had with the revisions, some of which were echoed at the public hearing by former NLRB members, labor practitioners and academics, include:

- The determination to move forward with the hearing rests with Hearing Officer who is, often times, not a long-term NLRB employee, especially considering that Regions of the NLRB develop representation case ("R-case") teams designed to teach newer agents the R-case process. A decision not to move forward is final and may be the result of an inexperienced agent.
- The bifurcation procedure mentioned earlier creates undue pressure on regional directors to issue decisions by the time the tally of ballots issues, possibly a mere 12 days from the date the regional director is presented with the record in the hearing. This rush to judgment may breed faulty decision making.
- The time in which the employer educates employees on the issue of unionization is significantly reduced by the rush to the voting booth. Not only do employers use the time between the filing of a petition and the election to educate employees, but employees also use this time to investigate and research the union seeking to represent them. Today's secret ballot voter is much more educated about the process than ever before and limiting the time for them to learn about the process may lead to a less educated voter and ultimately an unintended election result.

If the revisions are adopted as introduced, it is my belief they will increase litigation and cause a severe detriment to the rights of employees to self-educate prior to making their choice in the voting booth.

Comments regarding the revisions are due on August 22 with reply comments permitted 14 days thereafter. Fox Rothschild will submit comments consistent with this alert and the testimony provided to the NLRB. The firm welcomes any discussion about the revisions, the impact they are likely to have on your business plan and any other labor issue you may be facing. For more information, please contact Brian A. Caufield at 973.994.7537 or bcaufield@foxrothschild.com or any other member of the firm's Labor and Employment Department.