Dinsmore

NLRB's New "Ambush Elections" Rule

January 4, 2012 by R. Scott Summers and Alina Klimkina

On December 21, 2011, the National Labor Relations Board (NLRB) announced its intent to adopt new rules to amend its procedures governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining with their employer. Published in its final form on December 22, 2011, this rule claims to expedite the union election process, as well as to eliminate unnecessary litigation, delay, and duplicative regulations.

Generally, an employee, union, individual, or organization who wants the Board to determine whether the employees wish to bargain collectively through a union must file a petition in the Board's regional office. The Regional Director will then serve the petition on the interested parties and conduct an investigation to determine if there is enough interest to justify processing the petition and holding an election. In processing the petition, several types of pre-election disputes may arise among the parties. These disputes may involve issues such as whether the Board has jurisdiction over the parties, eligibility of employees to vote, and whether certain employees should be considered an appropriate part of a voting group.

If the parties are unable to reach an agreement on pre-election matters, a hearing is typically held by the Regional Director of the Board. At this hearing, the union, employees and employer present evidence relevant to the dispute, after which the Regional Director either dismisses the petition or schedules an election. An election is typically not set for sooner than 25 days after the decision by the Regional Director to allow the parties to request the full Board to review the Regional Director's decision. This process can take time, as it should, to allow for all interested parties to present evidence supporting its position and to ensure that the affected employees and the employer are allowed ample time to consider this extremely important issue of representation.

In recent years, only about 10 percent of NLRB election cases have proceeded through the hearing process. On average, the elections in the cases in which hearings have been held have been conducted no later than 101 days after the election petition was filed with a regional office. In cases where there has been a stipulation on pre-election issues, the average time from filing of petition to election has been on average 45 days. The stated goal of the new amendments is to improve efficiency and address discrete sources of inefficiency inherent in NLRB's rules. Based on the numerous comments filed with the Board as part of the rulemaking process and as the Board's own statistics show, there was no manifest need under the old procedure requiring the radical changes the Board has now adopted.

The new amendments are primarily focused on procedures followed by the NLRB in the minority of cases (10 percent or less) in which parties cannot agree on pre-election issues. Unfortunately, the changes unnecessarily affect elections in all cases. The first change with the implementation of the new rule is to narrow the purpose of the pre-election hearings to a determination as to whether a question of representation exists; in other words, whether the union has presented enough valid authorization cards to justify conducting an election. All other questions that were considered at the pre-election stage under the old rules are set aside and considered, if at all, only after an election as been held.

Additionally, under the new rule, and contrary to current practice, the individual conducting the pre-election hearing will have authority to limit testimony only to issues which are relevant to representation. The hearing officer will also have discretion to decide whether or not to accept post-hearing briefs. In his or her discretion, the hearing officer will likewise have the ability to decide the subject matter and timing of the briefs to be filed, if any.

Furthermore, the parties' right to file pre-election requests for review of a regional director's decision will be eliminated. Instead, all requests for Board review will be deferred until after the election. If possible, these requests will be consolidated with requests for review of any post-election rulings. The 25-day recommended waiting period for scheduling elections will also be eliminated. As such, there will be no pre-election review that could delay the resolution on questions of representation.

The new rule will also set forth a narrow set of circumstances under which a request for special permission to appeal to the Board may be made. Under the new rule, appeals to the Board will be done in a single post-election request for review, thereby avoiding piecemeal litigation at different stages of the process. New uniform procedures for resolving election objections will be created as well. Once effective, the new rules will bestow wider discretion on the NLRB to reject post-election appeals that it determines present no serious issue for review.

The bottom line for employers is that elections will occur very quickly (perhaps as soon as 10 days) after the petition for election has been filed. Additionally, legitimate questions such as whether the petitioned for unit of employees is appropriate under the law, whether certain employees are supervisors and therefore ineligible to vote and other fundamental issues will not be heard until after an election is held if at all. In many instances the lack of clarity on these issues will cause confusion during the election and may profoundly affect the outcome of the election. Rather than improving efficiency and discouraging litigation, these new rules will likely result in less efficiency, cause more confusion for employees and employers and create increased litigation post election in turn lessening labor-management stability.

The Board is deliberating further on several remaining proposals. The amendments that have been enacted have sparked controversy. On December 20, 2011, the United States Chamber of Commerce and the Coalition for a Democratic Workplace filed a complaint against the NLRB in the United States District Court for the District of Columbia. The Chamber and the Coalition challenge the NLRB's new amendments, calling it the "ambush election rule," in hopes of blocking its implementation.

These newly enacted amendments will impede the ability of employers to express their views regarding election decisions and prevent employers from bringing effective challenges to union organizing. In effect, these "ambush election" rules provide a distinct advantage to unions by assisting them in their organizational campaigns by minimizing the employer's opportunity to respond. In many cases, the campaign will be over before the employer even knows it was in one. If the time between petition and election is indeed shortened to somewhere between ten days and two weeks, few employers will be able to effectively muster together a campaign and education program setting forth its arguments for or against third party representation.

If the present challenges to the rule are unsuccessful, the amendments in question will take effect on April 30, 2012. Prudent employers are encouraged to become familiar with these new rules. Training for managers and supervisors to recognize early warning signs of activity, the rules around what can be said and done in regard to third party activity and understanding both employer and employee rights and responsibilities in an organizing setting now take on more importance than ever and may be the only defense available to employers in this new era of "ambush elections".