



LABOR & EMPLOYMENT DEPARTMENT

# ALERT

## UPDATE: NLRB PROPOSED AMENDMENTS TO ELECTION RULES AND REGULATIONS

By Brian Caufield and Scott Cooper

On November 30, 2011, the National Labor Relations Board (NLRB) met in a public session and voted 2-1 to approve a final rule adopting six amendments to the NLRB election process, all of which are aimed at reducing unnecessary litigation in election cases. The amendments provide for:

- Giving hearing officers at pre-election hearings the authority to limit the proceeding to matters relevant to the question of whether an election is appropriate;
- Allowing hearing officers to permit or disallow the filing of briefs after pre-election hearings, depending on whether or not the case presents issues that would benefit from post-hearing briefing;
- The consolidation of appeals concerning pre- and post-election issues—which have always been maintained and addressed separately—into a single, post-election procedure;
- The discontinuation of the practice of delaying the scheduling of elections in order to permit the parties time for a pre-election appeal;
- Limiting the circumstances under which the Board would grant a special request for appeal; and
- Simplified appeal procedures.

The rule was published in the Federal Register on December 22, and will take effect on April 30, 2012. The six components of the final rule are part of a more extensive rule that was proposed in June and commented

on in July 2011. In July, the Board held a two-day public meeting on the overall proposal, which drew more than 65,000 public comments. The vast majority of the proposals made in June have not been included in the final rule, and will be left for continued consideration by the Board.

Some who offered commentary on the more extensive rule proposed in June, including Fox Rothschild, noted that the scant time between the union's filing of a petition seeking to represent employees, issue preclusion and the potential to be denied a hearing, would not lead to a decrease in litigation. Instead, litigation would increase because of the likelihood that parties would 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 timing of the rule is important because Board Member Craig Becker, a Democrat, was given his seat on the Board only by way of a recess appointment, and that appointment will end in the final days of 2011. When Becker's appointment expires, the Board will lose its three-member quorum. President Obama has announced his intention to nominate new members to the Board, but it remains to be seen whether the nominees will be confirmed by the Senate, or whether President Obama will have to resort to recess appointments in order to maintain the Board's quorum, which is necessary for it to decide cases and make major rule changes.

The rule is the source of some controversy in Washington, D.C., as Republicans in the House of Representatives worked to pass the Workforce Democracy and Fairness Act on November 30 by a 235-188 vote. Because of the Democratic majority in the Senate, however, it is unlikely that the legislation will become law.

We will continue to monitor the rule changes and update our clients as necessary. If you wish to speak with the authors of this Alert, please contact Brian Caufield at 973.994.7537 or [bcaufield@foxrothschild.com](mailto:bcaufield@foxrothschild.com), or Scott Cooper at 973.994.7513 or [scooper@foxrothschild.com](mailto:scooper@foxrothschild.com), or you may contact any member of Fox Rothschild's Labor and Employment Department.

---



Fox Rothschild LLP  
ATTORNEYS AT LAW

Attorney Advertisement

© 2011 Fox Rothschild LLP. All rights reserved. All content of this publication is the property and copyright of Fox Rothschild LLP and may not be reproduced in any format without prior express permission. Contact [marketing@foxrothschild.com](mailto:marketing@foxrothschild.com) for more information or to seek permission to reproduce content. This publication is intended for general information purposes only. It does not constitute legal advice. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations. This publication is based on the most current information at the time it was written. Since it is possible that the laws or other circumstances may have changed since publication, please call us to discuss any action you may be considering as a result of reading this publication.