



Inside The Beltway

Keeping You Informed

A publication of Nixon Peabody LLP's Washington, DC office

DECEMBER 1, 2011

Critical developments in labor and employment law

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Quicker Elections Coming SOON...NLRB to proceed to amend representation case procedures with final rule expected before December 31, 2011

Executive Branch/Administration

National Labor Relations Board—representation case election procedures

On June 22, 2011, the National Labor Relations Board published a Notice of Proposed Rulemaking to “remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation.” To achieve its goal of conducting elections quickly, the proposed rule essentially “consolidate[s] requests for Board review of regional directors’ pre- and post-election determinations into a single, post-election request.” 76 Fed. Reg.: <http://www.gpo.gov/fdsys/pkg/FR-2011-06-22/pdf/2011-15307.pdf>

The Board conducted an open meeting on July 18 and 19, 2011, where more than 60 speakers presented comments regarding the proposed rule. Nixon Peabody counsel John Raudabaugh spoke on behalf of the National Federation of Independent Business. Formal comments to the proposed rule were due by August 22, 2011. More than 65,000 comments were submitted. : <http://www.regulations.gov/#!documentDetail;D=NLRB-2011-0002-28124>

Following weeks of political and media commentary regarding the Board’s proposed “quickie” or “ambush” election rule, the Board conducted a public meeting and vote to proceed in preparing a scaled down final rule on November 30, 2011. <https://www.nlr.gov/news/board-chairman-releases-details-election-proposal-wednesday-vote> Board Chairman Pearce explained the revised proposal as “limiting subjects that can be raised in a pre-election hearing to those that are directly relevant to the election, and... postponing any election-related appeals to the Board until after the election.” Chairman Pearce and Member Becker, whose recess appointment ends once Congress adjourns in December, voted in favor of proceeding to draft a revised final rule. Member Hayes voted against the proposal noting that the revised proposal remained “fundamentally flawed.” Hayes also noted that the Board majority’s rush to issue a final rule makes proper deliberation impossible and that a vote on a rule by a mere three-member Board is improper.

The following chart compares the content of the initial proposed rule with the imminent, final “scaled back” rule:

NLRB Representation Case Procedures	
Proposed Rule	Forthcoming Final Rule
1. Allow for electronically filed election petitions.	NO
2. Expand pre-election Excelsior (eligibility) list requirement to include employees’ telephone numbers, email addresses, work location, shift, and classification.	NO
3. Employer must electronically serve all parties with the Excelsior list at the same time it is filed with the NLRB Regional Office.	NO
4. Employer must prepare and serve the Excelsior list within two days versus the current seven days.	NO
5. Representation case hearing to begin seven days following service of notice of hearing.	NO
6. Absent a Consent or Stipulated Election Agreement, Statements of Position would be due no later than the date of the hearing.	NO
7. Postpone resolution of voting eligibility and/or inclusion of individual employees in the appropriate unit to post-election if necessary. Limit pre-election appeal to the Board and make post-election review discretionary.	YES
8. Hearing Officer authority to entertain evidence only regarding material facts.	YES
9. Evidence in a representation case hearing to be limited to a genuine dispute regarding a material fact to an issue in dispute, including unit appropriateness, if raised in the Statement of Position.	NO
10. If the only remaining issue at a representation case hearing is the eligibility or inclusion of persons who would constitute less than 20 percent of the unit, the hearing will close.	NO
11. Oral argument at representation case hearing permitted but post-hearing briefs discretionary with the Hearing Officer.	YES
12. Eliminate post-hearing 25-30 day waiting period prior to the scheduling of an election.	YES
13. Notice to Employees of Election to be emailed to employees by Regional Office, posted by employer, and emailed to employees by employer if email communications with employees is customary.	NO

14. No election shall be scheduled for a date earlier than ten days following the date the Excelsior (eligibility) list must be filed and served (which is two days following employer's receipt of notice of election petition filing).	NO
15. Eliminate Regional Directors' authority to transfer a case at any time to the Board for decision.	YES
16. Post-election objections must include a written offer of proof supporting the objections and must be filed within seven days following the tally of ballots.	NO

The Board is now drafting its “scaled down” final rule to issue prior to Member Becker’s departure upon the expiration of his recess appointment later this month. Although the final rule appears to be less onerous than the initial proposed rule, the key changes are retained—allowing for elections to be scheduled in a much shorter time period by eliminating the 25-30 day post hearing delay and postponing, or even ignoring, legitimate issues for review regarding voting eligibility and unit scope. Chairman Pearce made clear that those provisions of the proposed rule that are not included in the forthcoming final rule will remain viable for future Board action once the Board returns to at least three members following Member Becker’s departure.

Interestingly, also on November 30, 2011, the House of Representatives approved 235-188 the Workforce Democracy and Fairness Act (H.R. 3094) <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3094rh/pdf/BILLS-112hr3094rh.pdf> which would establish a minimum 35 day time period between the filing of an election petition and the holding of an election, and effectively override the Board’s recent decision in *Specialty Healthcare* endorsing “micro” units. [http://www.nixonpeabody.com/publications_detail3.asp?ID=3980&NLID=92] It is doubtful the bill will pass the Senate.

The bottom line is a significantly shorter “critical period” between the filing of the election petition and the election. Because unions organize for long periods prior to formally filing a petition for election and because the period between the petition filing and election will now be significantly reduced by as much as three to four weeks, employers are once again advised to “campaign” daily, engage employees now, and be prepared.

We will keep you informed of key developments as the case proceeds. For further information on the content of this alert, please contact your Nixon Peabody attorney or:

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