



LABOR & EMPLOYMENT

# ALERT

## COURT INVALIDATES NLRB UNION ELECTION RULE

By Scott Cooper

On May 14, a federal district court judge struck down the National Labor Relations Board's controversial new union election rule. Judge James Boasberg of the U.S. District Court for the District of Columbia held that the rule is invalid on procedural grounds, as the Board did not have a necessary three-member quorum when it voted to enact the rule in December 2011.

Judge Boasberg noted that his decision was not made on the merits of the Board's rule, and that "nothing appears to prevent a properly constituted quorum of the Board from voting to adopt the rule if it has the desire to do so."

Specifically, Judge Boasberg opined that Board member Brian Hayes — who was, at the time, the NLRB's lone Republican member — was not provided an adequate opportunity to consider the measure. Instead, the Board's two other members at the time voted in favor of adopting the rule on December 16, and also forwarded the rule for publication later that day. This, according to the Judge Boasberg, meant that Hayes had only a brief period of time to consider the rule, and should not be deemed to have been legally present for the vote. Accordingly, because Hayes was not legally present for the vote, the Board lacked its necessary three-member quorum, and any action taken without a valid quorum is invalid.

"Had someone reached out to [Hayes] to ask for a response," the ruling explained, "as is the agency's

usual practice where a member has not voted, or had a substantial amount of time passed following the rule's circulation, moreover, it would have been a closer case."

The contentious rule, which went into effect on April 30, adopted six amendments to the NLRB's election process, and provided 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 the discretion to permit or disallow the filing of briefs after pre-election hearings;
- 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.

Judge Boasberg's decision invalidating the Board's election regulation means that the NLRB will need to discontinue its brief practice of operating under the new rules. Chairman Mark Gaston Pearce said in a statement that the Board is reviewing the court's

decision and is considering its response.

Employers who have had workers file representation petitions since April 30 should contact qualified counsel to see if there is any basis to challenge election proceedings conducted under the new rules.

As always, we will continue to monitor the rule

changes and update our clients as necessary. If you wish to speak with the author of this Alert, please contact 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 & Employment Department](#).



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