Schnader
ATTORNEYS AT LAW

Schnader Harrison Segal & Lewis LLP

NEW YORK PENNSYLVANIA CALIFORNIA WASHINGTON, D.C. NEW JERSEY DELAWARE

LABOR & EMPLOYMENT
ALERT

JUNE
2011

Labor Board Walks Where Congress Fears to Tread

By Scott J. Wenner and Michael J. Wietrzychowski

In the June 22 *Federal Register*, the National Labor Relations Board ("NLRB") published a Notice of Proposed Rulemaking ("Notice") that will significantly change the representation election process by expediting the pre-election period. *76 Federal Register 36812-36847*. Using the rationale that it is "streamlining" the representation election process, the NLRB plans to accomplish through expedited rulemaking part of what the Obama Administration failed to do when Congress could not pass the Employee Free Choice Act. Although the NLRB rarely engages in rulemaking of this scope and importance, this week's Notice comes as little surprise given the open advocacy for its adoption by the AFL-CIO and other unions that were left disappointed at the close of the 111th Congress last December and given the current pro-union Democratic majority at the NLRB. As many employers learn of a unionization campaign only after the petition for election is filed, often months after the union has begun quietly campaigning, the expedited election process would give unions a considerable advantage, as employers will have far less time to convey their message during the truncated pre-election period.

The Nuts and Bolts of the Proposed Rule

Under the NLRB's present rules, the Board is encouraged to hold representation elections within 45 days of the filing of a representation petition. The proposed rules seek to slash that period significantly. The thrust of the proposed rules is to expedite the election process. It would accomplish this largely by:

- permitting electronic filing of election petitions and other documents and requiring that the union be given the eligibility list in electronic form to speed up processing;
- scheduling pre-election hearings to begin no more than seven days after a petition is filed;
- deferring litigation over voter eligibility issues that pertain to less than 20 percent of the bargaining unit until after the election rather than adjudicating eligibility disputes before an election is conducted;
- eliminating pre-election appeals of rulings made by a Regional Director; and
- reducing from seven to two days the time within which an employer must file and provide to the union a list of eligible voters.

Much of the time sought to be cut out of the representation election process would be accomplished by deferring until after an election most issues concerning voting and eligibility, as well as bargaining unit issues that presently are, and always have been, addressed in advance of the election. Also to be deferred until after the election would be review of any and all decisions of the Regional Director concerning the election, which until now have been subject to review before an election is conducted.

Modified Pre-Election Hearing Process

Under the proposal, before or at the commencement of the pre-election hearing, within seven days after the petition is filed, the employer would be required to complete a statement of position questionnaire articulating a detailed position on the issues it plans to raise at the hearing, including: (i) the appropriateness of the bargaining unit proposed; (ii) any proposed exclusions or inclusions to or from the unit (including the identity of each employee to be excluded or included); (iii) whether any bar to the election exists; (iv) the date and other details of the election; and (v) any other issues it will raise at the pre-election hearing. It appears that failure to raise an issue in the position statement, even at this very early stage, will bar the employer from offering evidence on that issue or cross examining witnesses on that issue. This represents a radical departure from present practice under which no such disclosures are mandated despite a lengthier period of time to prepare for a pre-election hearing. As noted by the Board member who dissented from the proposed rule, the sanctions for failing to identify and disclose all of the issues at so early a stage is certain to disadvantage small employers who lack counsel, labor relations staff or the personal experience to identify and address the issues within a week.

Under the proposed rules, the union would present its re-

(continued on page 2)

(continued from page 1)

sponse to the employer's points after the employer opens the pre-election hearing by covering the issues identified in its statement of position. However, evidence would be accepted at the hearing only when there is a genuine issue of material fact related to the existence of a "question concerning representation" — i.e., whether a petition has been filed concerning: (i) a unit appropriate for the purpose of collective bargaining, or (ii) a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. While the existence of such disputes would be noted, they would not be resolved before the election unless the issues affected at least 20 percent of the proposed bargaining unit. Further, even if affecting 20 percent of the proposed unit and litigated before the election, requests for NLRB review before the election would not be permitted. The NLRB's intent is to hold elections at the earliest possible time and consolidate all appeals of any kind relating to the election in one post-election appeals process.

Criticism

Member Brian Hayes, the Board's lone Republican member, filed a highly-charged dissent from the proposed rule in which he criticized both the Board's rulemaking process and the substance of the proposed rule. With respect to the process, he criticized the majority for irresponsibly expediting the consideration of a rule that could have a considerable impact on the outcomes of representation elections, observing that the last time a rule change of this scale was considered (the 1987 healthcare bargaining unit rules), two years, four public hearings, and multiple revisions and comment periods preceded issuance of a final rule. Further, special efforts to obtain the views of the affected industry were taken. Nothing similar is proposed here.

As for the substance, Member Hayes unflinchingly opined that the principal purpose of the "radical manipulation of our election process is to … eviscerate an employer's legitimate opportunity to express its views about collective bargaining… . In truth, the 'problem' which my colleagues seek to address through these rule revisions is not that the representation election process generally takes too long. It is that unions are not winning more elections." He identified the goal as an imposition of the "quickie election" which organized labor has long sought — "a procedure in which elections will be held in 10–21 days from the filing of the petition" — and which clearly imposes an insufficient time to allow the employer to express its views.

The dissent also analyzed results for 2010 that were reported by the Acting General Counsel which he characterized as "outstanding":

- 95.1 percent of initial elections were conducted within 56 days of the date of petition;
- initial elections were conducted a median of 38 days after the petition was filed;
- the agency exceeded its target in closing 86.3 percent of its representation cases within 100 days;
- average time to election was 31 days among all categories of elections;
- pre-election decisions were issued in a median of only 37 days after hearing; and
- post-election challenges that required hearing were decided in a median of 70 days after the hearing.

Member Hayes concluded that the data did not support the need to: (i) eliminate most pre-election evidentiary hearings and requests for review; (ii) defer decision on most issues now decided pre-election in contested cases; (iii) impose unreasonable pleading requirements and deadlines that could lead to forfeiture of the right to contest; and (iv) eliminate the right of post-election NLRB review of contested issues.

Rulemaking Process Going Forward

Federal agencies engaged in rulemaking are bound by the Administrative Procedure Act, 5 U.S.C. §551, *et seq.* ("APA"). One of the purposes of the APA is to ensure public participation in agency rulemaking. The APA directs that a Notice of Proposed Rulemaking be published in the *Federal Register* to inform interested parties and the public as a whole of the substance of a proposed rule, their right to submit comments on that proposal, relevant deadlines and dates, and the time and location of a public hearing on the issues.[1]

The NLRB's Notice has provided for a 60-day period within which to submit comments on the proposed representation election rules, which will be made publicly available, most likely by posting them. A subsequent 14-day period has been given within which to reply to comments submitted during the initial comment period. In addition, the Notice declared

(continued on page 3)

1. In the Notice, the Board asserts that it is seeking comments even though in its view the proposed rules are exempt from the notice and comment requirements of the APA, as they deal with "rules of agency organization, procedure or practice," which the statute vests to agency discretion without the need for formal process.

(continued from page 2)

that the NLRB intends to publish a notice of public hearing to be held in Washington, D.C. on July 18–19, 2011, which is during the initial comment period, at which it will receive oral comments on the proposed amendments.

How Employers Can Be Heard

The NLRB reported that in 2010, unions won 66 percent of 1,571 elections conducted by the agency. Yet, even so, unions represent just 6.9 percent of private employees and 11.9 percent of all American workers, according to the Labor Department. While unions blame their decline on threats, coercion and unlawful election tactics by employers, the percentage of elections won by unions has actually increased considerably from the 50 percent figure in 1990, while the unionized percentage of the workforce has continued to decline from more than 20 percent in 1980. With unions now winning two of every three elections, something other than a purportedly unfair election process must account for the steady decline in union representation.

Employers interested in participating in the comment process may do so directly or through counsel or another representative, on or before August 22, 2011. Comments may be submitted electronically through the Federal eRulemaking Portal (http://www.regulations.gov) or by mail to Lester A. Heltzer, Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570. The NLRB's Notice of Proposed Rulemaking can be found at http://www.gpo.gov/fdsys/pkg/FR-2011-06-22/html/2011-15307.htm.

Tips on Remaining Union Free

Most employers that remain union free do not remain so by accident. Rather, successful companies establish and implement a comprehensive strategy before any signs of union activity arise. It is more important than ever to be proactive because you may no longer have the time between the election request and the election to address the union's campaign. Union avoidance training should be akin to harassment training — do not wait for the signs before educating the workforce. The cornerstone of a successful strategy includes:

- *Training your managers and supervisors.* Training should include identifying union signs, what management can and cannot say or do, and what managers must be saying and doing.
- *Communicating personally and positively with your employees.* The more face-to-face time the better. Email and phone calls are not sufficient substitutes.
- *Identifying issues fueling employee unhappiness and addressing them head on.* Addressing problems doesn't necessarily mean doing what the employees request. If you decide not to change something, explain to employees the reason you did not take action.
- *"Selling" your company.* Continually educate employees on how their benefits, pay and other terms and conditions rate favorably against the competition.
- *Identifying weak managers and supervisors.* Invest in additional training and oversight to turn them into better managers.
- *Discussing unionization with your employees.* Develop a plan and talking points for managers and others and have them discuss openly and directly what unions are and why you believe the company would be better off without a union.
- *Developing strategies to respond to hotspots of union activity.*

If you have any questions or comments about the proposed rules or unionization generally, please contact the authors using the information provided below. ◆

For more information about our Labor and Employment Practices Group, or to request to speak with a member of the group at a particular Schnader office location, please contact:

Scott J. Wenner, Chair
212-973-8115
swenner@schnader.com

Michael J. Wietrzychowski, Vice-Chair
856-482-5723
mwietrzychowski@schnader.com