

FEBRUARY 14, 2014 BULLETIN TO ALL LABOR & EMPLOYMENT CLIENTS

NLRB'S "QUICKIE" ELECTION RULE MAKES QUICK RETURN

You may recall the NLRB's "quickie" election rule that was in effect in May 2012, and struck down on procedural grounds on May 14, 2012 in *Chamber of Commerce of the U.S. v. NLRB*, 879 F.Supp.2d 18 (D.C. Cir. 2012). Now that those procedural impediments no longer exist, the newly-appointed Board has acted fast to reissue the same quickie election rule by issuing a Notice of Proposed Rulemaking on February 5. The proposed rule will improve union odds of winning NLRB elections by significantly shortening the time between the filing of a petition and the election, giving employers much less time to educate employees before they cast their ballots. A few of the significant features of the "resurrected rule" include:

- **Excelsior List.** Employers will be required to provide a list of eligible voters, including (where available) their phone numbers, e-mail addresses, home address, work location, shift and classification in electronic form directly to the union within two days after the Regional Director schedules the election, absent agreement of the parties to the contrary or extraordinary circumstances.
- **Immediate written response to petition will be required.** An employer will be required to submit a written statement of position no later than the date of the scheduled hearing (usually seven days after the date of the petition). It must include the parties' position on all issues relating to the appropriateness of the petition, or a party forever waives every argument and defense not set forth in this position statement.
- **The "20% Rule" eliminating most pre-election hearings.** The proposed rule shifts resolution of most disputes concerning the eligibility of employees to vote to a post-election hearing. If the only genuine issues concerning eligibility would constitute less than 20% of the proposed voting group, the hearing will be closed and such "disputed" employees would be permitted to vote subject to challenge.
- **Election.** The election will be set for the "earliest date practicable." The proposed rule removes certain "mandatory" time periods, so there is no "minimum date" by which to hold an election. The current NLRB target of around 40 days will be reduced to about 17-20.
- **Post-Election.** While maintaining a seven-day period after the election for filing objections to the election, the NLRB will have unfettered discretion regarding whether to hear and decide appeals.

Conclusion. The upshot of all these changes is to drastically reduce the time between the filing of a petition and the election. Employers will have much less time to inform their employees about the drawbacks of union representation. This change comes on top of the NLRB's decision in the *Specialty Healthcare* case, which allows unions to organize employees in smaller bargaining units. Statistics clearly show that unions have a much higher rate of success with quicker elections and smaller voting groups.

Best Practices. Because the proposed rule will create what has been described by dissenting Board members as a “vote now, understand later” situation, employers should take proactive steps to avoid being caught off guard by union organizing.

- Train management and front-line supervisors to recognize and deal with troublesome workplace issues and/or signs of union organizing at the earliest possible time.
- Identify potential voting groups and take steps to avoid vulnerability to union organizing in small voting groups.
- Have a “ready to go” avoidance team and campaign in the event your company is taken by surprise by a union petition. Time is of the essence; it will be too late to assemble a capable response team and develop an employee communication strategy in the short amount of time between the petition and the election.

The attorneys in Cohen & Grigsby's labor and employment group are available to assist in taking proactive measures to best position employers to prevent and respond appropriately to union organizing activity.

More Information

Please contact any member of the Cohen & Grigsby Labor & Employment Group at 412.297.4900 if you have any questions regarding this information. To receive future bulletins by e-mail, please send an e-mail to info@cohenlaw.com.

Copyright © 2014 by Cohen & Grigsby, P.C. (No claim to original U.S. Governmental material.)

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without prior written permission of Cohen & Grigsby, P.C. and is intended to alert the recipients to new developments in the area of labor & employment law. The hiring of a lawyer is an important decision that should not be based solely on advertisements. Before you decide, ask us to send you free written information about Cohen & Grigsby's qualifications and experience.