

Quickie Election Rule Finalized Before Year End

As predicted, the National Labor Relations Board (the “NLRB” or “Board”) has published a final rule amending its union election process. The “quickie election” rule, which the Board rushed to finalize before losing one of its three remaining members at the end of the year, will significantly change the process for contesting petitions for union elections and limit an employer’s opportunities to challenge the process before an election is held. It is scheduled to take effect on April 30, 2012.

The final rule essentially eliminates some pre-election rights of employees and employers in order to shorten the time before a representation election takes place. Specifically, the final rule amends existing procedures by:

- Giving the hearing officer authority to limit the pre-election hearing to matters relevant to “question[s] concerning representation.” As the Board clarified in its commentary about the final rule, while the “regional director must determine that a proper petition has been filed in an appropriate unit in order to find that a question of representation exists, the regional director need not decide all individual eligibility and inclusion questions... and the hearing officer need not permit introduction of evidence relevant only to disputes concerning the eligibility and inclusion of individuals.” The Board provided additional commentary regarding whether proffered evidence would be relevant to voter eligibility/inclusion as opposed to unit appropriateness. The practical consequence of this change is that employers may not know which employees are eligible to vote until after the election takes place.
- Authorizing the hearing officer to decide whether to permit briefing after the pre-election hearing, including the subjects to be addressed and the timing for filing.
- Consolidating the appeals process for Board review of pre-election issues and issues concerning the conduct of the election into a single post-election procedure. By eliminating the possibility of appealing pre-election matters, the time between the filing of an NLRB election petition and an election will be reduced significantly. Our best current estimate is that the time will be reduced so that there may now be approximately 28-35 days between the filing of the election petition and the election. For additional information regarding the timing of the election under the new rule, please see [*Quickie Election Resolution Adopted, Be Prepared*](#).
- Ending the practice of delaying the scheduling of elections to permit time for a pre-election appeal.
- Narrowing the circumstances in which a request for special permission to appeal to the Board would be granted. Such permission would be granted only in extraordinary circumstances when it appears that the issue addressed in the appeal would otherwise evade review.
- Giving the Board discretion to hear and decide any appeals to the election process, whether they concern pre-election or post-election issues.

The full text of the final rule can be accessed at http://www.nlr.gov/sites/default/files/documents/3240/nfrmfinal_0.pdf.

The final rule does not address other issues set forth in the Board's initial Notice of Proposed Rulemaking published in June 2011, including the following:

- Electronic filing of election petitions;
- Mandatory scheduling of hearings seven days after the notice of hearing is served;
- Filing of position statements by the parties;
- Inclusions of telephone numbers and e-mail addresses on the Excelsior voting list; and
- Reducing an employer's time to file an Excelsior voting list from seven to two working days.

The Board received over 65,000 written comments in response to its June 2011 proposed rulemaking, including comments submitted by Jackson Lewis LLP on behalf of several industry and professional associations. Many of the issues raised in these comments are addressed in the Board's commentary regarding the final rule. In July 2011, the Board held a two-day public hearing in which 66 speakers testified, including Jackson Lewis D.C. Region Partner Harold Weinrich; the Board also cited Mr. Weinrich's testimony in its comments about the final rule.

In its efforts to move along the quickie election rule, the Board adopted a modified version of its proposed rulemaking during a hearing on November 30th by a 2-1 vote, with Republican Member Brian Hayes voting against the Resolution. Member Hayes's dissent is not included in the December 22nd final rule. The Board notes, however, that it has delayed the effective date of the rule so that Member Hayes "will have over 90 days after he received a final draft of this final rule to write a dissent and have it published prior to the effective date of the rule." Because Member Becker's recess appointment is set to expire at the end of the year leaving the NLRB with only two members, the Board would have lost its authority to act on the proposed rule if it waited until Member Hayes drafted his dissent.

There is already litigation challenging the quickie election rule, including the process the Board followed in promulgating the final rule.

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Since employers will have significantly less time to provide employees with facts that would result in an informed choice in any NLRB election, it is more important than ever for companies to consider a comprehensive preventive labor relations program. Please do not hesitate to contact the Jackson Lewis attorney with whom you normally work for legal advice regarding the Board's rules and options for employer consideration.