A Timely Analysis of Legal Developments

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On June 21, 2011, the National Labor Relations Board issued a Notice of Proposed Rulemaking revealing proposed changes to election rules that would dramatically change the way union representation petitions are processed, seriously impair an employer's ability to assess and respond to an election petition, and foster increased unionization.

NLRB Proposed Rules Would Make it Easier for Unions to Organize

By Alan I. Model

The Employee Free Choice Act (EFCA) sought, among other things, to promote unionization through card checks rather than secret ballot elections. The law failed in Congress and is highly unlikely to be re-considered in light of the upcoming 2012 elections. The National Labor Relations Board, however, is now pursuing, by administrative fiat, a path that is likely to result in increased unionization in a different way than EFCA. On June 21, 2011, the NLRB issued notice of a proposed rulemaking to change the way representation elections are processed under the National Labor Relations Act. The announced regulatory process to consider the changes is limited to a 2 1/2 - month period with limited public participation.

The preamble to the rulemaking states that the "proposed amendments are designed to fix flaws in the Board's current procedures that build in unnecessary delays, allow wasteful litigation, and fail to take advantage of modern communication technologies." The facts, however, do not indicate that the current secret ballot process is flawed or skewed against unions. Indeed, initial elections in 2010 were held in a median of 38 days after the filing of a petition, and unions won 67.6% of all elections. Post-election objections are filed in less than 10% of NLRB representation cases. (For more background on EFCA and related election data, see the July 2008 Littler Report, "The Employee Free Choice Act: A Critical Analysis.")

The proposed rulemaking seeks a dozen changes to the current election process. While NLRB Chairman Wilma Liebman states that the proposed rulemaking does not "regulate how election campaigns are run by unions or employers," the proposed changes do in fact change how elections would be conducted. As dissenting NLRB Member Brian Hayes has stated about the proposed rulemaking:

> Thus, by administrative fiat in lieu of Congressional action, the Board will impose organized labor's much sought-after 'quickie election' option, a procedure under which elections will be held in 10 to 21 days from the filing of the petition. Make no mistake, the principal purpose for this radical manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining.

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The proposed changes, most of which are aimed at shortening the time period between the filing of a petition and the election, include these mandates:

Pre-election hearing is to be held within seven days from the filing of the petition. The proposal seeks to end the current practice of scheduling pre-election hearings within 14 days from the petition filing. Forcing a pre-election hearing more quickly, however, would cut into an employer's time to assess the scope and composition of the petitioned-for unit and other voter eligibility issues. This could have the unexpected consequence of unnecessarily causing more pre-election hearings in lieu of entering into stipulated election agreements (which, statistically, is the current norm).

Voter eligibility issues are to be deferred to post-election challenges instead of being addressed at a pre-election hearing. The proposal is that parties could choose to raise eligibility issues via the challenge procedure post-election rather than at the pre-election hearing. The proposal further states that eligibility issues involving less than 20% of the bargaining unit would automatically be deferred until after the election. Delaying voter eligibility issues until post-election may have facial appeal if the only goal is to expedite the election, but the failure to define the proper bargaining unit pre-election could, in actuality, disenfranchise voters. Voters should be certain that their vote will count or they may choose not to participate. In short, if the bargaining unit for which voters cast their ballots is defined post-election, the voters have been denied their right to make an informed decision. This concern is greatly complicated when the disputed voters are statutory supervisors and there is a question about whether or not the individual meets the definition of "supervisor." Also, the employer should have the right to know who is a supervisor prior to an election so that it can properly conduct a campaign. Otherwise, an employer may inadvertently violate the law through communications that would be proper to a supervisor but improper to a member of the voting unit.

Parties are required to complete "Statement of Position Forms" and state their position on the unit issues before evidence is heard at a pre-election hearing. The proposal requires a party to complete a Statement of Position Form to identify the issues for hearing and the basis for taking such positions. Then, at the start of the hearing, before any evidence is heard, the parties must formally state their position on the scope (multi-location vs. single location) and composition (which job classifications are covered) of the unit. Failure to raise an issue in the Statement of Position Form (which appears to be akin to a formal pleading) and before the hearing commences would bar a party from later litigating that issue. These proposals severely restrict an employer's ability to assess the appropriateness of the petitioned-for unit, obtain legal counsel, make an informed decision, and, if need be, effectively litigate the issue at a pre-election hearing, all of which would have to be done within seven days.

Employers are required to provide a preliminary voter list to the union before the pre-election hearing. The proposal mandates that the non-petitioning party (*i.e.*, employer) produce a preliminary voter list including the names, work location, shift and classification of unit members by the opening of the pre-election conference. This mandate is unnecessary, because under current practice a party could subpoena the same information from the other party for the pre-election hearing. Significantly, however, this mandate provides a union with a roadmap to facilitate its further organizing of the employer's workforce. For example, assuming there are 100 employees in a warehouse, a union can obtain 30% support on authorization cards (which are not checked for authenticity under current Board processes), file a petition, obtain the preliminary voter list with information for all 100 employees, and then withdraw its petition at the hearing. The petition then could be re-filed after the union had the data it wanted to better organize the unit.

Employers are required to provide a final voter list within two days after the election is scheduled. This proposal requires the list of voters produced by the employer to include names, addresses, phone numbers and email addresses. The transparent purpose of accelerating the employer's submission of the voting list (referred to as the *Excelsior* list) from seven days to only two days is to facilitate organizing. Requiring an employer to provide phone numbers and email addresses, which is not currently required by law, potentially raises employee privacy issues. In addition, requiring an employer to rush to obtain accurate information for a final voter list within only two days of the scheduling of an election may lead to more post-election disputes as to the sufficiency/adequacy of the voter list. This proposal also calls into question whether an employer must turn over employees' company-issued email addresses. Employers would be wise to review and revise their email policies to ensure compliance with the current state of NLRB precedent and anticipate the disclosures presented in this rulemaking.

Parties are required to wait until after the election to appeal a Regional Director's ruling in directing an election. In denying a party the right to appeal an adverse pre-hearing decision, the proposal seeks to expedite when elections are held. This new approach could result in the parties wasting time and resources directing campaign-related information to employees who may ultimately be found not to have been eligible to vote. One example is a Regional Director directing a multi-location election in a unit of multiple stores, with hundreds of employees, only to have the Board at the post-election stage determine the unit should have been a single store with a fraction of the employees. Any "savings" in time before an election would be more than off-set by the post-election litigation.

Post-election disputes are to be heard within 14 days of the election and appeal rights to the Board are discretionary. By mandating a hearing within 14 days of the election, the proposal eliminates any meaningful investigation into the veracity of a party's objections. This would result in more post-election hearings and delay the certification of the election results. The proposal also eliminates mandatory review of post-election disputes by the Board and empowers the Board with the discretion to hear a post-election dispute or defer to the Regional Director for a final decision.

These are the lightening rod issues, although there are other proposed changes, including the electronic filing of documents. Employers are legitimately concerned that the proposals would seriously impact their ability to adequately assess and respond to a petition and use their NLRA Section 8(c) free speech rights to educate and inform employees of the facts and issues relevant to the union petition. Expediting the election process and pushing towards a quicker election with less procedural pre-election steps would most likely result in increased unionization. Moreover, forcing the parties to go to a quick pre-election hearing and plead their positions on the unit issues before evidence is taken at a pre-election conference, and deferring appeals of Regional Director decisions until post-election, are recipes for legal complications and uncertainty of results.

Employers should pay close attention as the rulemaking process moves forward through the summer, and pro-active employers should begin thinking about their labor strategies to counter these and other changes on the cusp of being decreed by the NLRB. Littler will continue to monitor the rulemaking process and provide updates and guidance to employers. Employers also may wish to respond to the NLRB proposal through associations and other groups. For answers to questions about the proposed rules, or submitting comments on them, please contact Littler attorneys Alan Model or Stefan Marculewicz.

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