A Timely Analysis of Legal Developments

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Pick Up the Pace: New NLRB Regulations Force Employers to Respond More Quickly to Election Petitions

By Tom Dowd

When the National Labor Relations Board adopted a new rule in December 2011 modifying certain NLRB election procedures, there was substantial speculation about how these changes would be implemented and their practical effect. With the changes applicable to cases filed after April 30, 2012, the NLRB's Acting General Counsel, Lafe Solomon, has issued a lengthy General Counsel's Memorandum (GC 12-04) designed to provide detailed guidance to the NLRB's Regional Directors, who are responsible for implementing the new rule.

The goal of the new rule is to speed up the processing of election petitions so that there is not a substantial delay between the date a petition is filed and the date an election takes place. Currently, the NLRB has a time target of holding an election within 42 days after a petition is filed. The General Counsel's memorandum does not officially change this 42-day time target, **but the streamlined procedures make it possible for an election to be scheduled within 18 days after the petition is filed or even faster in some circumstances.**

The new procedures will have their biggest impact on petitions that seek to represent multiple employee classifications and petitions that raise issues regarding a potential voter's supervisory status or other statutory exclusions from a voting unit. The new procedures delay the resolution of such eligibility issues until after the election. They also limit the range of evidence that parties can introduce at hearings in support of their positions. Employers that are not prepared to move quickly in response to the filing of a petition may find themselves unable to properly defend their legal rights and unable to exercise some level of control over the pre-election process. More importantly, employers who have not acted proactively may have a difficult time winning a hurry-up election.

Scheduling a Hearing

Currently, when a petition is filed with the NLRB, the regional office automatically sends out a Notice of Representation Hearing that same day scheduling an initial hearing within seven to ten days (usually seven days). An employer may use this time to find legal counsel and determine whether the bargaining unit that is sought by the union includes all employees who have a similar community of interests and whether there are supervisors, professionals, confidential employees and other individuals who are improperly included in the proposed bargaining unit. There are a number of other considerations that may need to be examined during this time period as well,

such as joint employer status or the involvement of supervisors in the gathering of union authorization cards. As a result, it is not unusual for an employer to ask the NLRB's regional office to postpone the hearing for a few days (no more than 14 days total from the date the petition was filed). Doing so allows the employer and union an opportunity to see whether they can work out disputed issues and avoid the need for a hearing. According to the NLRB, employers and unions historically have been able to work out pre-election issues informally – and stipulate to an election date and time – in roughly 90% of their cases prior to the NLRB's implementation of its new rule and accompanying guidelines.

The new guidelines require the Regional Director to schedule the initial hearing for a date that is five working days (typically seven calendar days) after the petition is filed, which is the shortest possible time permissible under the NLRB's decision in *Croft Metals, Inc.*, 337 NLRB 688 (2002). While the Regional Director can still grant a postponement up to an additional seven days, Regional Directors are under pressure to make sure that the requesting party has a genuine conflict (such as a conflicting court proceeding) with the scheduled date and that the postponement is not simply an effort to gain more time for preparation. If a postponement is granted, the postponement is likely to be as short as possible (two to three days) rather than routine approval of a seven-calendar-day postponement. The practice on postponements is likely to vary from region to region.

The grounds for the postponement must be set forth in writing and in detail, and the General Counsel's Memorandum encourages Regional Directors to approve a postponement only if the requesting party agrees to participate in a pre-hearing conference either in-person or by telephone on the day prior to the rescheduled hearing date to discuss and narrow the issues that will be raised at the hearing. The requesting party also may be required to stipulate in advance to certain matters that are not in dispute (jurisdiction, labor organization status) and agree in advance not to ask for any extension of time in the unlikely event that briefs are permitted at the end of the hearing.

Timing of Elections

Most employers prefer to avoid the costs of going to hearing, and this is largely why 90% of elections are held pursuant to stipulated agreements that identify the date, time and location of voting periods, as well as descriptions of who can and cannot vote. Employers also are typically willing to stipulate if the date that is selected for the election falls roughly within the same time frame as when the election would have been scheduled if the employer had gone through all the hoops and hurdles associated with a hearing. Prior to the new rule going into effect, the average date for a scheduled election was 38 days from the date the petition was filed – which was well within the NLRB's 42-day time target.

The NLRB's regional offices still want to encourage stipulated election agreements rather than hearings because hearings require substantial use of scarce agency resources. So, if the parties agree to an election date that is not much different from the date that would be set after a full hearing, the regional office is likely to accept the date and move forward. But the acceptable date no longer will be 38 days after the petition is filed.

What is the new time frame for elections? If the petitioning union wants to push for a quick election, the election date could be **within 18 days after the petition is filed**. If the employer is not willing to agree to such a quick election, the union may well push for an early hearing in hopes that the NLRB will schedule the election that quickly (or with minimal delay), even after a hearing.

The timing of an election depends on a number of factors. An employer must be given five working days' (typically seven calendar days') notice of the pre-election hearing. If no postponement is granted and if the hearing takes place on the seventh day, then a record is created at the hearing with the evidence that the parties choose to submit on issues like: (1) the date, time and location of the election; (2) reasons why the election cannot be held as a matter of law; or (3) large-scale voter eligibility questions. As will be discussed later in this article, the NLRB has put into place a number of measures designed to curtail the amount of evidence introduced at a hearing, but in most cases there will be some form of record created. The NLRB representative who writes the post-hearing decision must wait for that transcript to be developed so the transcript can be reviewed prior to issuance of the decision.

In the past, transcript preparation typically took three days, and a decision could be issued as quickly as one day after the NLRB's receipt of the transcript. That means a decision would likely be issued within four days after the close of the hearing, which is 11 days after the petition was filed. At that point, the employer will be ordered to prepare within seven days a list of the eligible voters, referred to as an *Excelsior* list. The election can be scheduled the day after the NLRB receives the *Excelsior* list if the union waives its right to use the *Excelsior* list information to contact voters. If things move this quickly, then the election could be scheduled within 18 days after the petition was filed.

It is possible, of course, for an election to be scheduled even faster than 18 days if there is no need for a transcript of the pre-election hearing or if the transcript is prepared in less than three days. It is also possible for the election to be held more than 18 days after the petition is filed if: (1) there is a brief postponement of the hearing date; (2) the hearing involves complex issues that require a lengthy record and post-hearing briefs; (3) the petitioning union wants to use all or some of the 10 days that it is allotted to use the *Excelsior* list to contact eligible voters; or (4) there is a logical reason to schedule the election on a different date when voter turnout is likely to be higher.

The petitioning union's ability to waive the 10-day period to use the *Excelsior* list is an important factor in how long it will take to schedule an election. It also may be an important clue as to how much employee support the union perceives it has. The *Excelsior* list gives the union the names and home addresses of all eligible voters, and historically most unions have wanted the full 10 days to send literature to voters and conduct home visits to lobby for support. The General Counsel's guidelines, however, now create a new waiver form that the NLRB will provide to petitioning unions, giving them the opportunity to waive the full 10-day period, thus shortening the timeframe. The new waiver form states that the union can designate the number of days it wishes to waive.

As noted earlier, the General Counsel did not change the current 42-day time target, and that is largely because it wants to gather some practical experience about average processing time under the new rule. Once it has done so, it will likely announce a new time target as a guideline for its Regional Directors. In the meantime, employers can still enter into stipulated election agreements in which they agree upon an election date with the union and seek NLRB approval of the stipulated date. Unions are likely to push for dates in the 16-21 day range if they are willing to waive the *Excelsior* period, or 26-31 days if they feel the *Excelsior* list will be of some campaign value to them.

In the unlikely event that the employer and the union both want to have an election date that is more than 31-33 days after the petition was filed, the parties can anticipate some push-back from most regions, with the level of push-back probably depending on how many days beyond 31-33 are being sought by the parties. Regional Directors are being judged by how quickly they can get the parties to an election. While the pressure exerted by the NLRB on the parties may vary from region to region, all Regional Directors will feel the need to demonstrate that they have shortened their average pre-election periods, and they will not want lengthy voluntary pre-election periods that increase their average time in getting petitions to a vote.

The New Guidelines' Effect on Hearings

As a whole, the new guidelines are designed to streamline hearings, including the amount of evidence received at the hearing and the number of issues addressed at a hearing. Pre-hearing conferences are supposed to be scheduled more often than in the past so that the hearing officer can prepare for the hearing and narrow the issues, and the hearing officer is supposed to keep the hearing record as short as possible. The primary changes are as follows:

- **Individual Eligibility:** Unless the eligibility of 10% or more of the voters is in dispute, the hearing officer is directed to not take evidence on an individual voter's eligibility or the eligibility of a similarly situated group of voters. Instead, the hearing officer is supposed to leave such issues for resolution after the election – assuming that one of the parties challenges the voter's eligibility during the election, and assuming the voter's ballot potentially makes a difference in who may win the election. This is true even if the issue is whether someone is alleged to be a seasonal employee, office clerical, managerial employee, parent, spouse, statutory supervisor or independent contractor. Regional Directors have the discretion to permit litigation over eligibility issues, but the "general rule" (as stated in GC 12-04) is that the eligibility of less than 10% of the voters should not be a pre-election issue.
- **Jurisdictional or Union Status Challenges:** A hearing officer is supposed to try to get jurisdiction issues resolved at a pre-hearing conference so as to not take time at a hearing, but there are circumstances where a party can put on evidence at the hearing challenging jurisdiction. However, an employer's pre-hearing refusal to provide information reasonably requested by the NLRB may permit a hearing officer to limit the amount of evidence an employer can offer at the hearing regarding jurisdiction. Challenges to the status of a labor organization similarly are supposed to be dealt with on a pre-hearing basis and thereby minimized as an issue at the hearing.
- **Evidence Limitations and Offers of Proof:** Prior to the new rule, the NLRB not only permitted the litigation of individual eligibility determinations, it also broadly permitted the parties to put on a wide range of evidence in support of its arguments, and the NLRB tended to err on the side of inclusion of evidence rather than exclusion. The General Counsel's new guidelines, however, make it clear that this

is no longer the case. For example, if a party has a legal obligation to overcome a particular presumption or carry a particular burden of proof, the hearing officer can require the party's counsel or other representative to make an "offer of proof" (an oral summary of what the witness is expected to say), and, if the hearing officer finds the offer of proof lacking, the hearing officer can preclude the testimony of the witness in whole or in part, as the hearing officer deems appropriate. Thus, employer counsel or representatives need to do some serious preparation to make sure that their offer of proof about the witnesses' anticipated testimony is sufficiently detailed to overcome a presumption or carry a burden of proof so that the witness will be permitted to testify. On significant points, the guidelines suggest that the hearing officer take a break to talk about the issue with regional management, but the stated NLRB goal is clearly to streamline the hearing and minimize the amount of record evidence. Indeed, prior to the hearing, the regional office can issue a Notice to Show Cause Order requiring a party to essentially make an offer of proof so the region can determine whether a hearing is necessary at all on a particular factual issue or point of law.

- **Bars to an Election:** To the extent that there are reasons why an election cannot be held as a matter of law – such as the legal doctrines of contract bar, recognition bar, successorship bar or election bar – the issue should be litigated at the pre-election hearing, but the hearing officer is supposed to use the "offer of proof" option to the maximum extent possible to streamline the evidence supporting the arguments.
- **Multi-Facility, Multi-Employer and Changing Unit Issues:** This includes questions as to whether an employer is a single employer with another entity, whether employees from multiple facilities should be included in the same bargaining unit, and whether a unit is about to undergo a substantial operational change that would make a unit designation inappropriate. These issues may be included in a pre-election hearing, but, again, the hearing officer is supposed to limit the record by "offers of proof" where appropriate.
- **Post-Hearing Briefs:** Post-hearing briefs have been the norm in the past. The revised rules, however, clearly discourage the filing of post-hearing briefs, and the hearing officer is instructed to consult with regional office management before determining whether to permit briefs. If briefs are denied, a party is permitted to make a closing argument. One alternative is for a party to draft its brief prior to the hearing based on the evidence it intends to offer at the hearing, with appropriate case citations in support of the party's legal position. This brief can then be submitted at the end of the hearing as part of the record before the hearing closes. When determining whether to permit a brief, the hearing officer and Regional Director are supposed to consider: the number and complexity of issues; the significance of the issues; the settled or unsettled nature of the applicable law; and whether issues are novel or unusual.
- **Special Appeals:** The new guidelines emphasize that a party's ability to appeal hearing issues to the NLRB in Washington, D.C. (Section 102.65(c) of the NLRB's Rules and Regulations) is very limited and is designed only for "extraordinary circumstances" when it appears that the "issue will otherwise evade review." Moreover, a special appeal does not put a scheduled election on hold or otherwise delay the processing of a petition.
- **The Decision:** As noted earlier, it typically takes three days to get a transcript of a hearing, and the regional office will not issue a decision prior to receipt and review of the transcript because the decision-writer must review the transcript prior to finalizing a decision. However, the General Counsel's guidelines push the region to start the decision-writing process as quickly as possible following the conclusion of the hearing. Section 9(c)(1) of the NLRA prohibits the hearing officer from prematurely writing the decision or from making recommendations about the outcome of the pre-election hearing. But the hearing officer must develop a report and meet with the decision-writer as soon as practical to speed the decision-writing process. In this way, the decision-writer may be able to start work before the transcript arrives. For obvious reasons, there are no guidelines on how quickly a decision must be drafted, but the guidelines note the importance of avoiding steps that might slow the decision-writing process.
- **Direction of Election:** The decision will be e-mailed or faxed to the parties, and the parties will have an opportunity to state their positions on the method, date, time and place of the election, but the regional office will move expeditiously to finalize things. If there are certain classifications that are being allowed to vote even though there is a dispute as to the eligibility of those employees, then the Notice of Election, which is posted at the employer's facility, will include a paragraph telling employees in that classification that no decision has been made about their eligibility to vote and that they may vote, though their votes may be challenged and only counted after a subsequent hearing, if the votes are dispositive.

- ***Excelsior* List:** When the decision and Direction of Election is issued, the employer will be given seven days to submit to the NLRB a list of the names and addresses of all eligible voters. If there is a dispute about whether a particular classification is eligible to vote, then the employer's *Excelsior* list should separately list the individuals from the disputed classification on a different page from the rest of the names on the list.
- **Post-Election Procedures:** The Regional Director will review challenges to ballots and objections to the election results and determine whether the challenging party's offer of proof merits a hearing to take supporting evidence. A hearing officer will develop a report on the basis of the hearing's evidence, and the parties may file exceptions with the Regional Director challenging the hearing officer's findings. Parties can file requests with the NLRB's Washington, D.C. Board Members to review the Regional Director's decision, but those requests can be summarily denied. This is a significant change from past procedure in which, if an employer stipulated to an election agreement, the employer had a right to have objections and challenges determined directly by the NLRB's Washington, D.C. Board Members.

Problem Areas

Specialty Healthcare Situations

In *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), the NLRB made it easier for unions to organize groups of workers because, under the decision, instead of requiring that all employees who shared a community of interests be in the same bargaining unit (a bigger group for the union to organize), the NLRB said that a subgroup of the larger group could be organized so long as the subgroup share similar interests and the excluded classification of employees did not share an "overwhelming community of interests" with the employees in the smaller group. The burden of proof is on the employer to demonstrate the "overwhelming community of interests."

Under the General Counsel's new guidelines, the appropriateness of subgroup units is an issue that needs to be decided in a pre-election hearing, but it is typically a very fact-intensive analysis that would require a full record and many witnesses. It remains to be seen whether the push for speedy elections and for small records of evidence at hearings will result in hearing officers demanding "offers of proof" on key evidentiary points or prohibiting testimony that the employer feels is critical to meet its burden of proof on the issue. To the extent that employers are precluded from introducing the evidence that they feel will prove their case, the NLRB's new procedures may force employers to refuse to bargain with a union so that the employer can challenge the validity of election results in appellate court proceedings.

Ineligible Voters

By establishing a 10% threshold rule for taking evidence on the eligibility of individual voters or classifications of voters, the NLRB may have inadvertently created circumstances in which such individuals may elect not to vote. The NLRB's plan in such circumstances is to announce to such voters in the Notice of Election that the voters' status has not been determined and that the voter's ballots will not be intermingled with the other voters. Instead, the challenged voters' ballots will be separately held and later opened if the ballot may affect the election results, meaning that there is a substantially greater chance of the voters' co-workers and managers knowing how they voted in the election. In these situations, these fringe voters may be disempowered sufficiently to not even bother to vote.

Even if the failure to rule on such individuals does not discourage them from voting in the election, the failure to rule on their status creates problems and delays. If the union is ahead at the time that all non-challenged votes have been counted, but the number of challenged votes could shift the election results, then the NLRB needs to hold a hearing on the status of the challenged voters and thereby delay the election results and potentially the bargaining process. If the union wins the election and the votes of these employees are not dispositive, the parties still face the problem of not knowing whether the individuals or classifications are part of the bargaining unit. Absent agreement of the parties on the issue, one party is likely to have to file a unit clarification petition, setting up a hearing on the same issue and, again, delaying the bargaining process because the scope of the represented unit has not yet been determined.

The Unique Role of Supervisors in an Election Campaign

Many union organizing campaigns are not centered on wages and benefits, but instead on fair treatment by supervisors. In an election campaign, supervisors are most often the first line of communication between an employer and its workforce. Supervisors can commit unfair labor practices if they are not properly trained, but if an employer believes a particular employee is a supervisor and turns out to be wrong in that belief then efforts to tell that non-supervisor what the non-supervisor can and cannot say is in itself an unfair labor practice.

By intentionally deciding **not** to determine in advance of an election whether a disputed employee is or is not a supervisor, the NLRB has unnecessarily created a dilemma for employers that can easily affect the validity and lawfulness of the employer's entire pre-election campaign and the employer's communications efforts with employees.

Reduced Opportunities for Employer Communication with Employees

Employers know that the longer the election process takes, the more opportunities they have to educate employees and win the election. A cardinal rule in union campaigns is that the passage of time is always to the employer's benefit. In fact, employers often are behind at the time a petition is filed, but are able to turn the tide in a 38-42 day period. The NLRB knows this as well and with the implementation of these new rules is adjusting the playing field in a way that favors unions. Granted, this revised process is not an extreme as the "card check" approach that was envisioned under the now-abandoned Employee Free Choice Act. However, the new expedited process for petitions certainly increases the odds of a union winning an election.

Knowing the risk of these new rules, employers *must* be more proactive. That means greater training of supervisors to be aware of union issues and greater emphasis on acting in a way that would not result in the employee disaffection, lack of communication and lack of empowerment that can create a union campaign. Employers in an industry targeted for union organizing (such as healthcare) or in union-active locations (such as California or New Jersey) also need to be prepared in another way. Such employers will not have time to belatedly work through the details of a 42-day campaign. Instead they may need to have a campaign ready to launch when needed, knowing that a vote could occur as early as 18 days after a petition is filed. Other employers would be wise to assess their union susceptibility through workplace audits, with the assistance of counsel if the employer wants the audit information to be shielded by the attorney-client privilege.

Conclusion

The NLRB's regional offices will likely need some time to develop a sense of uniformity on pre-election procedures, notwithstanding the guidance set forth in the General Counsel's Memorandum. This is true both with respect to the procedures used in hearings – particularly the extent to which offers of proof are used as a basis for precluding the introduction of evidence – and the timetable for scheduling elections. The new guidelines are clearly designed to maximize the amount of pressure that regional offices can exert on employers to stipulate to election agreements and thereby reduce the expenditure of agency resources on hearings and pre-election matters. However, there is a price to be paid for such expediency, and only time will tell whether the balance genuinely favors the position of the two Board members who pushed through these procedural changes back in December 2011.

Finally, employers should be alert that other election rule issues are still being considered by the NLRB. These would include options such as requiring employers to provide not just employee names and addresses as part of an Excelsior list, but also requiring the disclosure of telephone numbers and email addresses. Such changes are not ready for near future implementation, but the Board has clearly stated that they may still be developed for eventual application.

Tom Dowd is a Shareholder in Littler Mendelson's Washington D.C. office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Dowd at tdowd@littler.com.