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NLRB Proposes New Rules on Union Elections

On June 22, 2011, the NLRB proposed changes to its rules and regulations governing representation case procedures. The proposed changes, if adopted, are expected to shorten the time between the filing of a representation petition and an election to determine whether or not employees want to be represented by a union.

Background

Section 7 of the National Labor Relations Act (NLRA) gives employees the right to bargain collectively through their chosen representatives and to refrain from such activity. The NLRA authorizes the National Labor Relations Board (NLRB or Board) to resolve questions as to whether an employer should recognize a union as the employee representative by conducting a secret ballot election. The NLRB has established standard procedures in representation cases through its issuance of rules, regulations, and internal policies.

Under current rules, the NLRB's Regional Directors have the authority to process representation petitions through the conduct of an election, subject only to discretionary review by the NLRB. When the NLRB grants review, the Regional Director would proceed with the election (unless the NLRB ordered otherwise) but delay counting the votes until the NLRB issues its decision. Any party that has not waived the right generally may obtain NLRB review of a Regional Director's resolution of any post-election dispute, including challenges to voter eligibility or objections to the conduct of the election or conduct affecting the election results.

The Proposed Regulations

On June 22, 2011, a divided NLRB [proposed](#) broad changes to the current election process. The NLRB's proposed changes to the representation election process would impact the scheduling and scope of pre-election hearings, voter lists, resolution of eligibility and unit inclusion questions, and the Board's appeal process. Under the proposed regulations, the election timeline would be accelerated largely by deferring litigation of voter eligibility issues until after the election and eliminating pre-election requests for Board review of disputed issues.

BUCK COMMENT. *Information released by the NLRB's General Counsel indicates that the average time from the filing of a petition to an election was 31 days in 2010. If adopted, the proposed changes are expected to shorten the time between the petition filing and election to as little as 10 days.*

The Board has provided a side-by-side [comparison](#) of the current and proposed election procedures. Among other significant changes, the proposed regulations would:

- Reduce the scheduling of pre-election hearings to within seven days from the filing of an election petition (from the current 14 days) and require post-election hearings within 14 days of the election;
- Defer litigation of most voter eligibility issues until after the election rather than addressing at a pre-election hearing;
- Require employers to provide a final list of eligible voters in electronic form within two days after an election is scheduled, including employee telephone numbers, home and email addresses (when available) along with the employee's work location, shift, and classification;
- Consolidate pre- and post-election appeals to the NLRB into a single post-election proceeding; and
- Make NLRB review of post-election decisions discretionary rather than mandatory.

BUCK COMMENT. *In public Board hearings on July 18 and 19, 2011, the business community voiced its opposition to the proposed election changes that speakers on behalf of unions viewed as modest.*

Although current NLRB rules require the unit's scope to be established and found appropriate before the election, the proposed regulations would defer litigation of voter eligibility and inclusion questions affecting less than 20% of all potentially eligible voters of the bargaining unit until after the election. Only questions affecting 20% or more of the proposed bargaining unit would be resolved pre-election. In other cases, employers would have to proceed to an election without knowing who would or would not be included in the bargaining unit.

BUCK COMMENT. *By deferring litigation and resolution of voter eligibility issues in dispute, the new rules would allow otherwise ineligible voters (such as supervisors or independent contractors) to cast ballots that may affect the vote tally.*

An employer can speak through its supervisors against unionization, but certain communications between management and non-supervisory employees who are eligible to vote in the election are not allowed. Under existing rules, supervisory status under the NLRA can be determined pre-election. Because the proposed regulations would delay resolution of such issues until post-election, employers' communications with individuals who are thought to be (but ultimately are determined not to be) supervisors may invalidate the election.

Under the proposed regulations, key election issues such as voter eligibility, supervisory status and scope of the bargaining unit would be waived if not raised prior to the pre-election hearing. Thus, employers and unions would have to identify critical issues and define their positions within a newly compressed timeframe between the petition and the hearing. The proposed elimination of pre-election requests for Board review of regional rulings would also introduce a new measure of uncertainty as disputed issues will not be resolved before employees vote. Although the parties could still file objections to the conduct of the election or conduct affecting election results within seven days after the vote tally, the proposed regulations would add a requirement that a party filing objections would have to *simultaneously* file a written offer of proof supporting the objections.

BUCK COMMENT. *Although the proposed regulations have not changed the Board's general policy to hold election petitions in abeyance where a party to the petition files a concurrent unfair labor practice*

charge alleging interference with employee free choice, the Board's request for comments on this "blocking charge" policy suggests that changes may be considered.

Conclusion

If, as expected, the Board adopts the proposed changes, the current representation election process would dramatically change for most private sector employers and employees. Union elections would be conducted in an expedited timeframe, and employers would have less time to engage employees about unionization after an election petition has been filed. Employers should closely monitor the rulemaking process as it moves forward, and begin to consider whether they will need to change their labor or employee communications strategies in the near future.

Buck's consultants would be pleased to discuss the potential impact of the proposed changes on your labor, employment and communications policies and practices.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.