



For your information

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New NLRB Representation Election Rule Struck Down

On May 14, 2012, a federal district court overturned the NLRB's new rule governing union elections. The court invalidated the rule, which took effect on April 30, 2012, finding that the NLRB lacked the statutorily required quorum for rulemaking.

Background

On June 21, 2011, the National Labor Relations Board (NLRB or Board), over Member Hayes' dissent, proposed significant reforms of the election procedures it follows to determine if employees wish to be represented by a union for purposes of collective bargaining. The proposed changes were largely designed to speed up the election process. (See our August 24, 2011 [For Your Information](#).) Before the Board finalized the proposal, Chairperson Liebman's term ended, leaving just three members on the five-member Board.

On November 30, 2011, the NLRB voted 2-1 in favor of amending its union representation election rules. (See our December 9, 2011 [For Your Information](#).) On December 16, 2011, two of the Board's three sitting members approved a final rule amending the NLRB election process. The third sitting member, Member Hayes, did not cast a vote. The new election rule took effect on April 30, 2012.

Chamber of Commerce, et al. v. NLRB

On December 20, 2011, the U.S. Chamber of Commerce and the Coalition for a Democratic Workplace filed suit against the NLRB in federal district court, challenging the new election rule on a number of grounds. Among other things, the [complaint](#) alleged that the Board lacked the authority to promulgate the rule because federal law requires a quorum of three Board members and only two members participated in the decision to adopt the final rule.

On May 14, 2012, U.S. District Judge James Boasberg struck down the NLRB's rule, [holding](#) that the lack of a three-member quorum rendered the rule invalid. The court rejected the NLRB's argument that Member Hayes could be counted toward the statutorily required quorum because he held office when the rule was approved and had participated in earlier discussions relating to the rule. Citing Woody Allen's line that "eighty percent of life is just showing up," Judge Boasberg held that showing up is the only thing that matters when it comes to satisfying a quorum requirement. Because Member Hayes did not participate in the rulemaking vote, no quorum was established.

In setting the NLRB's rule aside, Judge Boasberg was careful to note that he was not passing judgment on the merits of the rule and the NLRB's changes to its election procedures. Noting that nothing would prevent a properly constituted quorum from voting on the rule again, the court added that "representation elections will have to continue under the old procedures" in the meantime.

INSIGHT

This ruling comes on the heels of conflicting court decisions and a stay of the NLRB's employee rights notice-posting rule, which also was slated to take effect on April 30. (See our April 25, 2012 [For Your Information](#).)

NLRB Reverts to Prior Election Procedures

In response to the court's ruling, the NLRB [announced](#) that it temporarily suspended implementing changes in its election procedures. Further, on May 15, 2012, Acting General Counsel Lafe Solomon rescinded his earlier [guidance](#) to NLRB regional offices on implementing the new representation case procedures, and advised regional directors to revert to their prior practices in processing election petitions.

COMPLIANCE ALERT: According to the NLRB, about 150 election petitions were filed under the new procedures prior to May 15, many of which resulted in election agreements. The NLRB says that it will contact all parties involved in the 150 cases and give them "the opportunity to continue processing the case from its current posture rather than re-initiating the case under the prior procedure."

Conclusion

The representation election rules, which went into effect on April 30, no longer apply. The NLRB, which now has a full five-member Board, is currently reviewing the court's decision and its response. While the Board considers whether to vote on the rule again or appeal the decision, the election rules and pre-election procedures that were in place prior to April 30, 2012 will govern representation elections.

Buck Can Help

- Keep you updated on further developments
- Train and educate managers and supervisors on National Labor Relations Act issues

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.
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