NLRB ISSUES FINAL RULE ON UNION ELECTION PROCEDURES

On December 22, 2011, the National Labor Relations Board (the “Board” or “NLRB”) issued a final rule (“Final Rule”) amending the procedures for union elections. Although not as sweeping as the “ambush” election rule proposed on June 22, 2011, the Final Rule would likely lead to the same result – increasing union membership.

Background on Current Election Procedures

The National Labor Relations Act (NLRA) gives employees the right to join a union, to bargain collectively with their employer, or to refrain from these activities. When a union feels it is ready to have a union organizing election, it files a petition with the Board for a secret ballot election. Before filing a representation petition, the union must prove that enough employees in the potential bargaining unit support the union. To do so, the union must obtain signed authorization cards from 30% or more of the employees in the potential bargaining unit. By filing a petition, a union initiates what is called a “representation case.” Section 9(c) of the NLRA states that, when a petition is filed, the Board must investigate that petition and hold a pre-election hearing to decide if a question concerning representation exists.

At any time before or during the representation hearing, the parties may agree to issues that must be resolved in order to schedule an election. In such “stipulated” or “consent” elections, the employer and union agree to resolve pre-election disputes and avoid having a hearing. In “consent” agreements, unlike “stipulation” agreements, the parties also waive their right to Board review of the regional director’s post-election decisions. Over 90% of the elections held by the NLRB are pursuant to these agreements. An election place and date are then determined by mutual agreement of the parties or by order of the NLRB regional director. Under the Board’s current time targets, an election conducted pursuant to such an agreement should be conducted within 42 days of the filing of the petition.

If the parties do not reach an agreement on pre-election issues, there must be a pre-election hearing. The NLRB generally schedules the hearing within seven to 14 days after the petition is filed. The NLRB hearing officer takes evidence relevant to issues in dispute and the parties often file briefs. Among the issues that a hearing may address is whether the voting group requested by the union is the appropriate bargaining unit for purposes of collective bargaining. The NLRB regional director then decides to either dismiss the union’s election petition or direct that an election be held. The parties can ask the Board to review the regional director’s decision. The regional director generally schedules the election no sooner than 25 days after the hearing to give the Board time to rule on the request for review. The current rules require parties to file a request for Board review of the regional director’s decision and direction of an election before the election is held in order to preserve their right to raise disputed issues in post-election proceedings.
After the NLRB regional director orders an election, the employer must provide a list of the names and home addresses of all eligible employees in the voting unit of employees within seven days. This *Excelsior* list is furnished by the NLRB to the union in order to allow it to contact employees. The date of the election is normally at least ten days after the date the *Excelsior* list is given to the NLRB. In Fiscal Year 2010, the median period from the filing of the petition to the date of the election was 38 days.

In order to win the election, a union must receive a majority of the valid votes cast which is 50% plus 1 person. If a union does not receive a majority of the votes cast, no election may be held in that same unit for one year following the date of the election. If the union wins the election, it is certified as the exclusive representative for bargaining of all of the employees in the appropriate bargaining unit.

During an election, the parties may challenge ballots cast by voters. The parties also may file objections with the NLRB regional director after the election challenging the fairness of the election. In stipulated elections or elections directed by the regional director, the parties have the right to seek Board review of the regional director’s rulings on challenges and objections. Such Board review of post-election decisions is mandatory.

**Background on NLRB Rulemaking**

The NLRB’s proposed rule (“Proposed Rule”) issued on June 22, 2011 sought numerous changes to current election procedures that would substantially expedite the election process and thereby deny workers the ability to fully exercise their right to make an informed and well-reasoned decision whether to join or not to join a labor union. In his strongly worded dissent to the proposal, Member Hayes stated that:

> 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.

The process outlined in this Proposed Rule appears basically to be an administrative end-run around the legislative process that defeated the Employee Free Choice Act (EFCA). These proposals would seriously impact employers’ ability to respond to a union campaign and exercise their free speech rights to communicate with employees about unionization. Expediting the election process to as short as an estimated 10 days with fewer pre-election procedures would likely result in increased unionization.

These proposed changes included, among other things:

- Requiring the pre-election hearing to be held seven days from filing the petition (instead of the current practice of 14 days).
- Requiring employers to complete a “Statement of Position Form” that identifies the issues they may want to raise at the pre-election hearing, such as the appropriateness of the proposed bargaining unit. Employers would have to state
their positions no later than the start of the hearing, before any other evidence is accepted. Failure to raise an issue in the Statement of Position Form would bar the party from later litigating the issue, severely restricting an employer’s ability to challenge the appropriateness of the proposed bargaining unit.

- Litigation of voter eligibility issues involving less than 20% of the bargaining unit would be deferred until after the election.
- Requiring employers to produce a preliminary voter list, including names, work location, shift, and classification, by the opening of the pre-election hearing.
- Requiring employers to provide a final voter list two days after the scheduling of an election, including voters’ telephone numbers and email addresses when available.

Over 65,000 public comments were filed on the Proposed Rule. The Board stated that many of the comments focused primarily on a few of the proposed amendments, most notably the scheduling of the pre-election hearing, the statement of position requirement, and the content and timing of the voter eligibility lists. In light of this commentary, the Board concluded that “further Board deliberation concerning those proposals (and some others) is necessary at this time.”

Facing the possible loss of a quorum at the Board at the end of 2011, on November 30, 2011, the Board approved, by a 2-1 vote, a final rule adopting a subset of the election rule amendments contained in the Proposed Rule. The two-member majority was made up of Democrats Chairman Mark Pearce and Member Craig Becker, both of whom come from union backgrounds. The Board’s lone Republican, Member Brian Hayes, voted against the resolution, criticizing the proposed amendments and the process by which they had been vetted as fundamentally flawed. Under the Supreme Court’s June 2010 decision in New Process Steel v. NLRB, the Board must have three members to carry out its statutory functions under the NLRA. If it falls to only two members, the Board would be powerless to act on the election rule amendments and would have no authority to carry out any of its adjudicatory functions. In the absence of Senate confirmation of the three Board vacancies in the wake of the expiration of Becker’s term, or the President making recess appointments to fill the vacancies, the Board would have been left with only two members at the beginning of 2012.

What makes this development unprecedented, and radical in the eyes of many, is that it defied a decades-old practice of the Board, regardless of the political party in the majority. That practice is not to take action that changes existing law without the affirmative votes of at least three Board members. The only justification offered by the majority for deviating from that process is that the historical practice has not been applied to rulemaking. The reason this is the case, however, is that in the past, when the Board has fallen to three members, no two-member majority appears to have considered rulemaking, let alone moved forward with it. The Board has rarely considered substantive rulemaking on a scale of this nature even with a full five-member Board. It last did so in the late 1980s, when it took over two years of hearings, testimony, and comments before the Board issued a final rule on appropriate units in the health care industry. In explaining the resolution, Chairman Pearce offered little justification for two Board members, one of whom, Member Becker, was a controversial recess appointee never confirmed by the Senate, to reshape national labor policy with dramatic election rule changes affecting every employer, employee and labor organization subject to the Board’s jurisdiction. He was, however, candid on why he felt a sense of urgency to move forward with his resolution, saying that he was proposing a scaled-back version of the amendments “because of
the possibility that the Board will lose a quorum at the end of the current congressional session.” This was a reference to the expiration of Member Becker’s recess appointment at the end of the first session of the 112th Congress on January 3, 2012.

The Final Rule

The Final Rule makes eight changes to the election procedures. Although the Final Rule does not include some of the more significant and controversial changes initially proposed, the net effect of the eight changes will nonetheless serve the same purpose of facilitating unionization. The Board casts these changes merely as steps to “reduce unnecessary litigation in representation cases.” However, these changes will impede employers’ ability to respond to organizing campaigns and workers’ ability to make informed decisions about unionization.

The eight changes are as follows:

1. The Final Rule amends the election rules to expressly state that the statutory purpose of a pre-election hearing is to determine if a “question of representation” exists, in other words, whether a petition has been filed in a unit that is appropriate for collective bargaining.

2. The Final Rule gives hearing officers presiding over pre-election hearings the authority to limit evidence introduced at the hearing to evidence that is relevant to a genuine issue of material fact on whether a question of representation exists. Current rules have been interpreted to give employers the right to present evidence at a pre-election hearing on voter eligibility (e.g., whether an employee is an ineligible supervisor). Instead, disputes concerning whether an employee is eligible to vote in the election would be resolved, if necessary, after an election. The Final Rule allows hearing officers to reject evidence of the supervisory status of employees in the proposed bargaining unit in the pre-election hearing. Under the Final Rule, the only issue that hearing officers must examine and that regional directors must decide before directing an election is whether the union has filed a petition in an appropriate bargaining unit. Because disputes concerning voter eligibility can be deferred until after the election, employees would cast their votes not knowing who was properly included in the bargaining unit.

3. The Final Rule gives hearing officers presiding over pre-election hearings the discretion to decide if and when a party may file a post-hearing brief. The hearing officer can decide to allow post-hearing briefs only when they “would be of assistance to the decision-maker” and can control the subjects addressed in and the time for filing the briefs. The Board concluded that the filing of post-hearing briefs often delays the regional director’s decision and the direction of an election. In order to “eliminate unnecessary expense and delay,” employers may be prohibiting from filing a post-hearing brief supporting their position.

4. The Final Rule eliminates the right of parties, prior to an election, to seek Board review of a regional director’s decision and direction of an election. Under current procedures, parties have the right to seek Board review prior to the election. Under the Final Rule, a
party must defer a request for Board review until after the election, when the request can be consolidated with any post-election requests for review.

5. With the elimination of the parties’ right to request Board review prior to an election, the Final Rule removes the current requirement that that regional directors normally should not schedule an election until at least 25 days after directing an election to provide the Board time to rule on a request for review. By removing the mandatory 25 day waiting period before an election is scheduled, the Final Rule both expedites elections and eliminates an employer’s right to appeal the regional director’s decision before the election is held.

6. The Final Rule states that the Board will not grant special permission for the parties to appeal the regional director’s pre-election ruling except in “extraordinary circumstances where it appears that the issue will otherwise evade review.” The current regulations do not define a standard for when the Board will grant a request for special permission to appeal. In the Final Rule, the Board concludes that narrowing the circumstances when the Board will grant special permission to appeal will “eliminate unnecessary litigation and delay.” While the change would expedite elections, it is likely to result in more uncertainty for employers, not less.

7. The Final Rule makes Board review of a regional director’s resolution of post-election disputes discretionary after both stipulated and directed elections. Under current procedures, such Board review of post-election decisions is mandatory. As noted above, the Final Rule eliminates the right to seek pre-election Board review. Under the Final Rule, the Board can deny review of post-election disputes when “a party’s request raises no compelling grounds for review”. The Board concludes that making post-election Board review discretionary instead of mandatory “will eliminate the most significant source of administrative delay in achieving finality of election results”. While this change, may reduce administrative delay, providing only for discretionary Board review of appeals from a regional director’s resolution of election-related issues gives regional directors largely unreviewable power in representation cases.

8. The Final Rule eliminates the set of regulations describing procedures in representation cases contained in Part 101, Subpart C of its Statement of Procedures claiming they are redundant of the regulations in Part 102, Supart C.

**Impact of the Final Rule**

The Majority of the Board concludes that the final rule will reduce litigation and delay. The Final Rule will likely accomplish these goals. However, the reduction of litigation and quicker elections that would come about as a result of the Final Rule would by and large favor unions and would likely adversely affect the interests of employers. By shortening the election period, employers will have less time to communicate with employees about unionization. In turn, the Final Rule restricts the right of employees to make informed decisions about whether to join a union.

Restricting pre-election hearings to the question of whether a petition has been filed in an appropriate unit and empowering hearing officers to decide whether the evidence offered is
relevant to that question, when considered in light of the Board’s recent decision in Specialty Healthcare, 357 NLRB No. 83 (2011), will stack the odds against an employer’s demonstrating that a petitioned-for unit is inappropriate. Under Specialty Healthcare, so long as a union’s petitioned-for unit consists of a clearly identifiable group of employees, the Board may presume the unit is appropriate. If an employer argues that the unit should include additional employees, the employer must demonstrate that employees in a larger unit share an “overwhelming” community of interest with those in the petitioned-for unit. This will make it easier for unions to organize smaller “micro bargaining units”.

Deferring to post-election proceedings disputes over the eligibility of certain employees to vote carries with it a risk that employees may be misled as to the scope of the voting unit, in particular whether the unit includes those who potentially may be supervisors. As a result, an unintended consequence of the amendments may have the effect of disenfranchising certain employees. Where employees vote subject to challenge but their votes are not determinative and the challenges are therefore never resolved, the litigation that the amendments seek to avoid will sometimes only be delayed. That would happen if the union were to win the election and the parties were unable to agree on whether the challenged voters should be part of the bargaining unit. In that event, the parties would often find themselves back at the Board litigating whether the employees belong in the unit in a unit clarification proceeding.

Giving hearing officers the power to decide whether to accept post-hearing briefs and providing only for discretionary Board review of appeals from a regional director’s resolution of election-related issues gives regional directors largely unreviewable power in representation cases. That may expose employers to varying interpretations of the law from region to region (and perhaps even case-to-case). The most troubling aspect of the amendments is the synergistic effect they will have with the Board’s decision in Specialty Healthcare – possibly fostering union gerrymandering of voting units and the proliferation and approval of micro- and disjointed units, derived not from traditional community-of-interest factors but perhaps from the extent employees support union representation.

Thus, while the amendments have been portrayed as limited in number and intended to accomplish a salutary purpose, and may not result in the “quickie” elections that many predicted (and the Board’s full June proposal would have created), they will nonetheless likely have the result at the heart of the amendments – increasing union membership. The ability of a union to gain a foothold through a small unit that is difficult to challenge under the new rules is something employers need to appreciate. Proactive planning is now much more important for employers who are at risk of unionization. As a result, for employers in union oriented geographies, or in union-heavy industries, or who are subject to corporate campaigns, planning is both more crucial and more specific. Employers are encouraged to talk with experienced labor relations counsel about bargaining unit planning and other union avoidance concerns.

What’s Next?

The Final Rule is scheduled to become effective on April 30, 2012. The U.S. Chamber of Commerce along with the Coalition for a Democratic Workplace filed a lawsuit to contest the rule on the grounds that it violates the National Labor Relations Act, the Administrative Procedure Act, the Regulatory Flexibility Act, and free speech and due process constitutional
rights. While the legal challenges continue, employers nonetheless need to prepare for the impact of these changes to union election procedures.

Employers also need to be prepared for more pro-labor changes from the new Board. On January 4, 2012, President Obama announced three recess appointments to the Board. Sharon Block (D), Richard Griffin (D), and Terence Flynn (R) have been given recess appointments to fill the three vacancies on the Board. Anticipating that in 2012 the five-member Board would be left with just two sitting members – Chairman Mark Gaston Pearce (D) and Brian Hayes (R) – Obama made the recess appointments to allow the Board to exercise its authority that lapsed upon the expiration of Craig Becker’s recess appointment. Although the Senate had been holding pro forma sessions – in which it convenes every few days but carries out no substantive work - the President contends, however, that he has the authority to make recess appointments when the Senate is “effectively” in recess. The move to seat new NLRB members in this fashion will likely be contested. With the five-member Board in place, it may well revisit the other changes to election procedures originally proposed that would tilt the scales of organizing campaigns even further in favor of unions.