

Navigating the NLRB's New Quickie Election Procedures New rules make the process faster and more streamlined

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This past spring, the National Labor Relations Board (NLRB) issued modified procedures for unions and employers to follow when a representation petition is filed. Effective April 14, these aptly-called "quickie election rules" decrease the time frame during which union organization elections occur. These rules also increase the requirements for employers faced with organizing campaigns. The stated goals of the new procedures are to streamline the election process, increase uniformity among regional offices, reduce unnecessary litigation, and update the election rules in light of modern technology.

Pre-Election Procedures

To initiate an election, typically a union files or e-files an election petition with an NLRB regional office. The union must also file a statement of position form and a description of representation case procedures form with the NLRB. All three documents must be served on the employer, and the union must file with the regional office a certificate of service reflecting same. The union must also provide contact information for its representative, along with its position on the type, date, time and location of election sought. Within two days of the filing, the union needs to file with the NLRB, but not with the employer, its "showing of interest," which is evidence that it received authorization cards from at least 30 percent of the employees in the proposed bargaining unit.

The NLRB will then issue to the employer a notice of petition for election, along with a statement of position form and a notice of hearing. The notice of hearing indicates that, except in a case presenting unusually complex issues, a pre-election hearing is scheduled to occur generally eight days from the date the notice is issued, and will continue day-to-day until completed, unless the regional director finds extraordinary circumstances.

The employer is required to post the notice of petition for election in its workplace within two business days of receiving the notice of hearing. If the employer customarily communicates with its employees through email, it must also send the notice of petition for election to its employees electronically. Failure to post the notice so all pages are simultaneously visible and/or to distribute the notice within the required two business days may be grounds to set aside an election.

The employer also needs to file with the NLRB and serve on the union a completed statement of position form. In this form, the employer must identify all issues it wishes to raise about the proposed unit before the election, or the employer may be precluded from raising such issues at the pre-election hearing. The employer must also state whether it contends that the proposed bargaining unit is inappropriate and the classifications, locations or other employee groupings that the employer asserts must be added to or excluded from the proposed unit to make it appropriate. The NLRB has a supplemental form on its website for the employer to provide an alphabetized list of employees in the proposed unit, including their names, work locations, shifts and job classifications. If the employer contends that any individuals on that list should be excluded, it must indicate so. Importantly, if the hearing is set for eight days from service of the notice of hearing, then the employer's statement of position must be filed by noon the day before the pre-election hearing. The board has repeatedly indicated that this is a strict deadline absent special or extraordinary circumstances.

Notably, if the employer and the union are in agreement as to all pre-election issues, the parties may enter into an election agreement. The agreement typically specifies the appropriate unit and the place, date and hours of voting. As a result of the parties entering into an election agreement, they can avoid the time and expense of participating in a pre-election hearing.

If the parties are set to participate in a pre-election hearing, a party may request the regional director postpone the hearing for up to two business days for special circumstances or for longer if extraordinary circumstances exist. At the hearing, the union first has the opportunity to respond to any issues raised by the employer in its statement of position. The parties then argue the issues raised by the employer in its statement of position and are generally limited to those previously-identified issues. The new rules clarify that the purpose of the pre-election hearing is to determine if a question of representation exists, but disputes concerning individuals' eligibility to vote or their inclusion in an appropriate unit ordinarily are not argued or resolved at the pre-election hearing. Following the conclusion of the hearing, the hearing officer prepares a report and, later, the NLRB's regional director issues a pre-election decision about the issues raised. The parties may file a request for board review of a regional director's decision any time following the decision until 14 days after a final disposition of the proceeding by the regional director, but such a request will not stay any action by the regional director.

The regional director will also issue a direction of election and notice of election. The notice of election includes a description of the employees eligible to vote and information about the election, including the date, time and location where it will be held. The employer is required to post this notice of election in a conspicuous place in the workplace at least three full working days prior to 12:01 a.m. of the day of the election. If the employer customarily communicates with employees via email, it must also send this notice to its employees via email.

Absent an agreement to the contrary or extraordinary circumstances, two business days after the regional director issues a direction of election or after the regional director approves the parties' election agreement, the employer is required to provide to the union and the NLRB a voter list, previously sometimes referred to as an Excelsior list. The voter list must contain the identity and contact information—including the names, work locations, shifts, job classifications, home addresses, home telephone numbers, personal email addresses and personal cellphone numbers, if available—of all employees eligible to vote in the election. The NLRB's website contains an appropriately-formatted form for employers to use.

Election Procedures

The new rules do not provide any significant updates to the election procedure itself, except to clarify that the election should be held at the earliest date practicable but not earlier than 10 days after the date by which the voter list must be filed. An agent of the NLRB conducts the election, and eligible voters may vote at the designated location. The parties are permitted to each station one previously-identified, nonsupervisory employee as an observer at the polling place. Each eligible employee has the opportunity to cast his/her vote either for the union or for the employer. The board agent then counts the ballots, tallies the votes for each party, and immediately makes available to the parties the tally of ballots.

Post-Election Procedures

Following the election, the parties have seven days from the date the board agent tallies the ballots to raise post-election objections to election conduct. These objections must be filed with the regional director and served upon the other party with proof of service. They must be accompanied by an offer of proof, which is filed with the NLRB but not the other party. The regional director then has the opportunity to decide whether to hold a post-election hearing, based on whether he/she believes the objection "raises substantial and material issues" and "could be grounds for setting aside the election if introduced at the hearing." If the regional director decides to hold a post-election hearing, it must take place within 21 days of the election ballot tally or as soon as practicable thereafter, unless the parties agree to an earlier date.

After the post-election hearing, the hearing officer prepares a report to the Regional Director. The parties have 14 days from the date of the hearing officer's report to file any exceptions to the report. The opposing

party then has seven days from the last date the filing party could have filed exceptions to issue an answering brief. The regional director will render a decision concerning the hearing officer's report. He/she will also issue a certification of the election results.

Within 14 days of the regional director's certification of the election results, either party may file a request for review of the post-election decisions. The NLRB then has the discretion to decide whether to grant the request based upon a significant, prejudicial error or other compelling reasons.

Effects of the New Rules

Even though the new quickie election rules have only been in effect since April 14, they have resulted in an increase in the number of petitions being filed. According to a report prepared by Bloomberg BNA, the number of petitions filed from April 14 through May 14 increased by 32 percent when compared to the previous month, and by 17 percent over the same time period in 2014.

Furthermore, under the new rules, the median time between the filing of the petition for election and the election itself has been reduced significantly. Since April, the median time period between petition and election has been 23 days, whereas under the old rules the median time period was 38 days.

This snapshot shows that the new rules are shortening the time frame during which union organization elections occur. Attorneys advising employers about union organizing efforts should be aware of these generally expedited time frames and understand the important procedural modifications that resulted from the NLRB's new quickie election rules. •

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