

If you have any questions about this Advisory, please contact:

JOHN ZANDY
203.498.4330
jzandy@wigginc.com

CAROLINE PARK
203.498.4317
cpark@wigginc.com

LABOR, EMPLOYMENT AND
BENEFITS DEPARTMENT

MARY GAMBARDILLA
Chair

KAREN CLUTE

SHERRY DOMINICK

PETER LEFEBER

LAWRENCE PEIKES

NAJIA KHALID

CHRISTINE WACHTER

JOSHUA WALLS

NLRB Issues New Rules to Speed Up Election Process

In December 2014, the National Labor Relations Board issued new rules that it claims will modernize and streamline union certification elections. In fact, the rules, scheduled to go into effect on April 14, 2015, are mostly about shortening the time between a union's filing of a petition for an election and the election itself, and will make it far more difficult for employers to communicate with its employees about the issues raised by the union in its organizing campaign. According to the NLRB, the median time between petition and election is currently 38 days, and about 70 days in cases where the parties are unable to reach agreement on voter eligibility or other pre-election issues. By comparison, while the new rules do not provide a precise timeline, opponents argue that an election could take place in as few as 14 days following a petition. Keep in mind that it is not that uncommon for an employer to first learn of union organizing at its place of business upon receiving notification from the NLRB that a union has filed a petition to represent its employees, even though the union may have been meeting and communicating with employees for months. Under anyone's interpretation of these new rules, they will encourage union organizing and significantly improve unions' chances of winning elections. So far as the employer community is concerned, that is not a desirable outcome.

Specifically, the rules include the following changes:

- After a petition has been filed, the NLRB regional office will serve a Notice of Petition for Election. Within 2 business days of service, the employer will be required to post the notice and distribute it by email if it uses email to communicate with employees. The Notice provides employees with detailed information about the petition, the Board's election procedures, and their rights. Failure to post and/or distribute the Notice within the required 2 business days will be grounds to set aside an election.
- The regional director generally will set a pre-election hearing for just 8 days after a Notice of Hearing is served. Under existing practices, the timing of a hearing varied by region and could be 13 to 15 days, or even longer, after the Notice.
- The rules limit the scope of the hearing so pre-election hearing issues will be limited to those that are necessary to determine whether an election should be held. Arguments on issues deemed "unnecessary" by the NLRB, such as eligibility and inclusion issues affecting only a small percentage of the voting unit, are postponed until after the election.
- Employers will be required to identify any issues, including voter eligibility, in a "statement of position," due one

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business day before a scheduled pre-election hearing. As part of its statement of position, the employer must provide to the NLRB's regional office and the other parties a list of prospective voters with their job classifications, shifts and work locations. Employers will not be permitted to litigate any issues not addressed in the statement.

- Elections will no longer be stayed for 25 days following the issuance of a decision on a petition. Under existing practices, the automatic stay allowed the Board time to consider any requests for review of the regional director's decision. Instead, the election will be scheduled for the earliest date practicable.
- Voter lists, which must be submitted within two days of the regional director's approval of an election agreement or a decision directing an election, must now include personal phone numbers and email addresses of eligible voters if available to the employer. Employees do not have an opportunity to opt out of the disclosure of their personal contact information.

While these rules are slated to take effect on April 14, 2015, the U.S. Chamber of Commerce and various trade associations have filed suit against the NLRB in the U.S. District Court for the District of Columbia, attacking the new rules as overly broad and impinging on employers' free speech rights as provided for in the National Labor Relations Act. The National Federation of Independent Business Texas and two other small business trade associations have brought a second case challenging the rules in federal district court in Texas. In early March, the NLRB moved for summary judgment in both cases, arguing that the challenges to the rules lack merit. Those motions are still pending. In addition, both the Senate and the House passed resolutions in March to block the rule changes, though President Obama is expected to veto the legislation.

We will continue to provide updates on these changes.

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