Cooley

December 28, 2011

After months of deliberation and comment, the National Labor Relations Board (the "NLRB" or the "Board") has adopted a final rule amending its election case procedures. The amendments were drawn from a more comprehensive (and controversial) proposal put forward by the NLRB in June. The new rule will take effect on April 30, 2012.

According to the NLRB, the purpose of the amendments is to "remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation." Critics say that the amendments are designed to foster "ambush elections" that will put employers at a disadvantage in the campaign process and will deprive employees of gaining a full understanding of the facts before an election.

The shortening of the election process is a worrisome issue for employers. Under current election procedures, elections take place a median of 38 days after the union's filing of a petition for representation. However, union organizing often takes place behind the scenes for several months leading up to the filing of a petition. Employers often find themselves hard pressed to mount an effective response to months of union campaigning during the existing campaign period. The effect of the NLRB's new rule will be to cut this already short time period nearly in half.

A summary of the amendments incorporated in the new rule appears below. Among the most significant changes is the elimination of the restriction on scheduling an election until at least 25 days after the decision and direction of election in order to allow for Board review. Also significant for employers are the amendments: (1) eliminating the right to file a pre-election request for review of a decision and direction of election, and instead deferring such requests for review until after the election; and (2) providing that Board review of a Regional Director's resolution of certain election disputes is only discretionary. The former will mean less pre-election litigation, thereby contributing to the shortening of the campaign period, and the latter will make it more difficult for employers to obtain Board review of potentially outcome-determinative election rulings by the Regional Director.

Amendments contained in the Final Rule on Election Procedures, December 22, 2011

- Amend § 102.64 to expressly construe Section 9(c) of the Act and to state that the statutory purpose of a pre-election hearing is to determine if a question of representation exists.
- Amend § 102.66(a) and eliminate § 101.20(c) (along with all of Part 101, Subpart C) to ensure that hearing officers presiding over pre-election hearings have the authority to limit the presentation of evidence to that which supports a party's contentions and is relevant to the existence of a question concerning representation.
- Amend § 102.66(d) to afford hearing officers presiding over pre-election hearings discretion over the filing of post-hearing briefs, including over the subjects to be addressed and the time for filing.
- Amend §§ 102.67 and 102.69 to eliminate the parties' right to file a pre-election request for review of a regional director's decision and direction of election, and instead to defer all requests for Board review until after the election, when any such request can be consolidated with a request for review of any post-election rulings.
- Eliminate the recommendation in § 101.21(d) (as stated, along with all of Part 101, Subpart C) that the regional director should ordinarily not schedule an election sooner than 25 days after the decision and direction of election in order to give the Board an opportunity to rule on a pre-election request for review.
- Amend § 102.65 to make explicit and narrow the circumstances under which a request for special permission to appeal to the Board will be granted.
- Amend §§ 102.62(b) and 102.69 to create a uniform procedure for resolving election objections and potentially outcome-

determinative challenges in stipulated and directed election cases and to provide that Board review of regional directors' resolution of such disputes is discretionary.

- Eliminate part 101, subpart C of Board regulations, which is redundant.
- The remainder of the amendments merely conform other sections of the Board's Rules and Regulations to the eight amendments described above.

The amendments incorporated in the new rule are likely to shorten the average election period significantly, from the current median of 38 days to only about 21 days. Although the new rule omits some of the more controversial changes proposed by the Board in June—many of which would cut election times even more drastically—these proposals are not off the table entirely. The NLRB has stated that it will continue to deliberate on them in the future.

In the meantime, legal challenges to the new rule have already begun. On December 20, 2011, before the final rule was even published, the U.S. Chamber of Commerce filed suit in federal court attacking its validity. The lawsuit alleges that the new rule violates Board procedure and denies employers' free speech rights, and seeks a preliminary injunction barring the rule from being enforced while the case is pending. On December 22, 2011, Senator Mike Enzi (R-Wyo.), Ranking Member on the Senate Health, Education, Labor and Pensions Committee, announced his intention to challenge the new election rules under the Congressional Review Act ("CRA"). The CRA allows either the Senate or the House to introduce a joint resolution of disapproval with the full force of law to stop a federal agency from implementing a recent rule or regulation.

In other NLRB news, in our **October 5, 2011 *Alert*** we reported on the NLRB's final rule requiring employers post a notice informing employees of their right to organize under the National Labor Relations Act. **On December 23, 2011, the NLRB agreed to postpone the effective date of the notice-posting rule from January 31, 2012 to April 30, 2012**. The postponement comes at the request of a federal court in Washington, DC, which is hearing a legal challenge regarding the rule. The Board announced that it has determined that postponing the effective date will facilitate the resolution of the legal challenges that have been filed with respect to the rule.

We will continue to monitor these developing areas of labor law, and any further updates will be the subject of a future *Alert*. If you would like to discuss any of these issues or have questions about this *Alert,* please contact one of the attorneys listed above.

Key Contacts

Lois Voelz Palo Alto	lvoelz@cooley.com +1 650 843 5058

Wendy Brenner Palo Alto	brennerwj@cooley.com +1 650 843 5371
Leslie Cancel San Francisco	lcancel@cooley.com +1 415 693 2175
Frederick Baron Palo Alto	fbaron@cooley.com +1 650 843 5020
Michael Sheetz Boston	msheetz@cooley.com +1 617 937 2330