LEGAL UPDATES

PUBLISHED: MAY 1, 2012

NLRB's Controversial Election Rules Take Effect

Services

Labor & Employment

Traditional Labor Relations

UPDATE — May 16, 2012

Federal Judge Voids New NLRB Union Election Rules

On May 14, 2012, a U.S. District Court issued a decision that effectively voids the National Labor Relations Board's (NLRB) new election rules that went into affect on April 30, 2012. Judge James Boasberg of the District Court for the District of Columbia granted a motion for summary judgment filed by the U.S. Chamber of Commerce in which the chamber argued that the rules were enacted without the three-member quorum required by law.

The court based its decision strictly on the quorum issue, making no decision with respect to the substantive validity of the NLRB's new election rules themselves, specifically stating that had the NLRB had a proper quorum, it is possible that the rules would have been found "perfectly lawful."

The NLRB may appeal the court's decision or it may also consider voting to adopt the rule with a quorum. The court noted that possibility, but it also noted that uncertainty remains regarding the NLRB's quorum issue, as litigation is pending that challenges President Barack Obama's January 4 recess appointment of three new NLRB members.

What This Means to You

The court's decision effectively delays the NLRB's enforcement and implementation of the new "streamlining" or "ambush" election rules until the NLRB can appropriately adopt the rule with a proper quorum or the court's decision is overturned on appeal. For now, employers will not have to deal with the possibility of a rushed election process.

ALERT — May 1, 2012

The acting general counsel of the National Labor Relations Board (NLRB) has issued a Guidance Memorandum (GC 12-04) that outlines how regional offices will implement the controversial election rules that took effect April 30, 2012.

The new election rules, which were finalized in December 2011 with the stated intent of "streamlining the union election process," have been the subject of much criticism from employers and business groups. To most employers, "streamlining" is a disguised effort by the NLRB to make it easier for unions to win elections. GC 12-04 specifies that the new election rules will apply to all representation cases filed on or after April 30.

The effect of the new election rules and the memorandum regarding the implementation of the rules will be to accelerate representation elections in which the employer would have otherwise challenged or contested the scope of the petitioned-for bargaining unit. The rules and the memorandum do not change the timing of union elections involving a Stipulated Election Agreement, where the parties agree on the scope of the proposed bargaining unit.

GC 12-04 states that the sole purpose of a pre-election hearing will, hereafter, be to determine whether a question concerning representation exists. As a result, NLRB hearing officers will be authorized to limit the issues and evidence presented at pre-election hearings to evidence relevant to the existence of a question concerning representation. This streamlining serves to both limit the scope of the hearing and to speed up the election and hearing process.

Most important, the memorandum and the new election rules allow for significant shortening of the union election process where the scope of the potential bargaining unit is questioned. Under the new election rules, hearing officers will have discretion to determine whether post-hearing briefs will be allowed, including the time frame for filing briefs. Additionally, most requests for NLRB review of the pre-election hearing determination will now be deferred until after the election – with the exception of special permission to appeal.

The memorandum also discusses the burden of proof following the NLRB's recent *Specialty Healthcare* decision. Under *Specialty Healthcare*, where the petitioned-for unit is presumptively appropriate, the burden of proof is on the party opposing the petitioned-for bargaining unit to show that the unit is not appropriate. Most often, this will put the burden of proof on an employer who is contesting the scope of the bargaining unit sought by a union. The net result of the new rules and the *Specialty Healthcare* decision is that employers will be much less likely to succeed in challenging the scope of the appropriate bargaining unit.

GC 12-04 eliminates the previous “recommendation” that regional directors not schedule an election sooner than 25 days after the decision on a pre-election hearing. Under the new rules, a party (usually the petitioning union) can waive its right to receive the voter eligibility list 10 days before the election – and the NLRB has put together a waiver form for this express purpose. In a case involving a pre-election determination, an election could be held as soon as seven days after the decision on the appropriate unit if the union waives its 10-day consideration period.

In short, the memorandum and the new election rules demonstrate that the NLRB is seeking to shorten the time period between the filing of a petition and the actual union election.

What This Means to You

Employers who are subject to the jurisdiction of the NLRB should anticipate that the new election rules will spur an increase in union organizing efforts. As a result, ongoing positive employee relations efforts will take on a level of increasing importance. Therefore, employers should work with counsel to put in place appropriate defensive measures now, rather than wait to react to a union’s petition for representation.

Contact Info

Should you have questions, please contact your Husch Blackwell attorney.

Husch Blackwell LLP regularly publishes updates on industry trends and new developments in the law for our clients and friends. Please contact us if you would like to receive updates and newsletters or request a printed copy.