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CLIENT ALERT: NLRB Again Issues "Ambush Election" Rule

What it's about: The NLRB has again issued its rule dramatically speeding up the union election process. As a result, employers will have much less time to prepare for elections, and much less time to communicate with their employees regarding the pros and cons of unionizing. The Final Rule was published in the Federal Register on December 15, 2014.

In the past, employers had some time to communicate with employees after an election petition was filed. Under the new rule, there will be precious little time. An employer that wants to operate without a union will need to be well prepared in advance, before any union organizing activity is even underway, if it wants to respond effectively once a campaign starts.

The details: Unions seeking to have the NLRB conduct an election to determine if employees desire representation may file petitions at the Board. The NLRB's regional offices investigate these petitions to determine if an election should be conducted, and will direct an election if they find that one is appropriate under the Board's standards. Many legal issues arise in these settings, some of them quite complex. These issues have been the subject of thousands of NLRB and court decisions over the past 80 years. The result has been a body of law defining how the process should work.

Historically, if the parties did not agree on a legal issue affecting the election, the regional office would hold a pre-election hearing to determine whether an election should be conducted, and who would be eligible to vote. These hearings have always afforded employers an equal opportunity to present evidence on the legal issues. After considering the evidence presented at the hearing, together with any legal briefs either side wanted to quickly file, the NLRB's regional office would issue a written decision resolving the issues, and set a date for the election. Either side would then have the right to file an expedited appeal of the regional office's decision at the Board in Washington. The Board would immediately address the disputed issue, resolving it before the election date, and then the regional office would conduct the election as scheduled. While these steps were going on, the employer was free to communicate with its employees about the pros and cons of unionizing.

The Board has now issued a new set of rules radically revising this longstanding process. Fundamentally, the election will be conducted first, without the employer having an opportunity to submit evidence and arguments regarding the legal issues, and then any unresolved issues that the regional office deems worthy will be addressed after the fact. One significant effect of this change is that employers will have far less opportunity to communicate with their employees about unionizing.

Examples:

Employer's Statement of Position:

Old Rule**:** Not required

New Rule: Due the day before the hearing (so one week after petition filed), setting forth every legal issue in the case. If an issue is not identified in this document, it can never be raised by the employer later in the case.

Hearings Truncated:

Old Rule: A hearing would be held at which the parties could present evidence on what bargaining unit was appropriate, who should be eligible to vote, who was a supervisor, a professional, a managerial employee, etc., and therefore ineligible by law to be in the unit or vote. Following the hearing, the employer could submit a brief with arguments and legal citations supporting its position. If the regional office issues a decision directing an election in a unit the employer believes is inappropriate, the employer has a right to request review of that decision from the Board in Washington.

New Rule: A hearing may be held on whether the unit is legally appropriate. Employers have no right to file briefs. Issues regarding who is eligible or ineligible to be in the unit due to being a supervisor, professional, managerial, etc., will not be addressed; those issues will be considered, if at all, only after an election. If the regional office issues a decision the employer believes is incorrect, the employer has *no right of appeal* to the Board.

Notice of Election Much Sooner:

Old Rule: The regional office would issue a notice of election, typically no sooner than two to three weeks after the petition was filed.

New Rule: The regional office will issue a notice of election immediately after the hearing, potentially 8 days after the petition was first known to the employer.

Employer-Provided List of Voters Comes Sooner, is More Involved:

Old Rule: Once the regional office issues a notice of election, the employer files a list of voters names and addresses within seven days. This requirement typically arises three to four weeks after the petition was filed.

New Rule: ***Two days*** after the regional office issues the notice of election – potentially 8 or 9 days after the petition was filed – the employer must provide the union the following information for every voter:

- Name
- Home address
- *Personal email addresses*, if employer knows them
- *Personal telephone numbers*, if employer knows them
- Every employee's work location, shift, and job classification

Election Held In One-Fourth the Time:

Old Rule: Election conducted six to seven weeks or more after petition filed.

New Rule: Election conducted as early as *10 days* after the petition is filed.

The Board's new rule is scheduled to take effect April 14, 2015. It is expected to be challenged in court, however, and legislation will likely be introduced in Congress in an attempt to moderate some of its most extreme effects. The Board previously issued the same rule in 2011, but it was struck down in court on procedural grounds. This time, it appears that the substance of the rule will be challenged.

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