

NLRB “QUICKIE ELECTION” RULE PROVIDING A BIG BOOST TO UNIONS

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At the start of 2015, employers across the country were bracing for the National Labor Relations Board’s new “quickie election” rule. We warned that the new procedures would have a significant impact on union-organizing tactics and representation elections because they were designed to not only speed up union elections, but also provide other advantages to a union targeting a facility.

Unions Gain Advantages

At the start of 2016, we can say: we were right. An analysis by Fisher Phillips of the first six months of union elections following the April 2015 inception of the new rules makes it clear that unions are significantly benefiting from the changes. These benefits are not just limited to an expedited process in which employees have much less time to review and evaluate the facts needed to make an informed decision. As more elections are processed under this expedited procedure, it is very possible that unions are catching unwitting and unprepared employers in the new, complicated procedures.

Case in point: The numbers reveal that the faster an election, the better chance unions have to win. In the 57 fastest elections under the new rules (all 16 days or less), unions won 77 percent of the time. Again, no one should be surprised that unions will win more votes if employees have less time to evaluate the relevant facts. Unfortunately, this problem will only get worse as unions learn how to take advantage of these new rules.

Elections Speeding Up, Employers Losing More

The most recent data shows elections are happening faster

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than ever. To be exact, they are occurring 12.7 days faster than a year ago (26.8 days vs. 39.5 days during the same period a year ago). Anecdotal experience tells us that the trend will continue, as we have seen several elections scheduled in under 20 days. In fact, since the new rules went into effect, there already have been 27 elections that have occurred within two weeks of the petition filing. During the same period a year ago, there were only three.

Unions also are winning a higher percentage of elections overall. The analysis shows that organized labor won 67 percent of elections in the first six months under the new rule, compared to 65 percent during the same period in 2014 – prior to the rules changes.

It's also worth noting that the number of elections rose 2.7 percent in the first six months under the new rule (651 thus far in 2015) compared to the same period a year ago (634), while the number of petitions rose by 2.2 percent from the first six months under the new rule (1,380 in 2015) compared to the same period a year ago (1,350).

Calm Before The Storm

That there has not been an overwhelming flood of NLRB petitions — as some had predicted before the new rule kicked in — should not be interpreted as a sign the expedited elections rules will not significantly change both the process and results. Employers who have recognized the importance of proper labor preparedness and taken steps to address these issues understand the relevant complications of the new rules.

To the same degree, unions are still in an educational phase. Each campaign, under the new rules, provides them an increased amount of insight and experience on how to use the rules to their advantage. Based on our experience working on elections under the new rules, it seems very likely that this educational phase for unions and companies is simply the calm before the storm.

Three Points To Consider

In fact, there are many new issues that employers need to consider besides the shorter election period. First, the new rules require an employer to be prepared to address all potential bargaining unit issues within seven days of receiving notice of a petition. This process requires extensive work and should be contemplated well in advance of a petition.

Second, our experience with some NLRB Regional offices makes it clear that you need to be very careful and diligent in confirming that key unit issues are properly preserved each time an election stipulation is used under the new rules.

Third, an NLRB Regional Director recently agreed to overturn a vote, which the union lost, because the employer did not do enough to satisfy the requirement to provide all “available” personal email addresses and cell phone numbers. This was a very technical application of the new rules, which now require employers to provide a voter eligibility list containing home addresses, available personal email addresses, available home phone numbers, and personal cell numbers for all eligible voters.

This personal information is in addition to full names, work locations, shifts, and job classifications. Any employer who has had to provide a voter eligibility list under the old rules will recognize how much more difficult the process is now. As the recent decision by the NLRB Regional Director confirms, the new rules and requirements make it much more problematic for employers who fail to evaluate even this relatively routine requirement under the new rules.

Consider Altering Your Data Collection Practices

Moving forward, you should consider whether the collection of personal email addresses serves any compelling business reasons. If not, you should consider suspending the collection of that data. Employers who do not maintain such data are not required to provide it to the NLRB at the very beginning of the representation campaign. If you determine that it makes business sense to maintain such data, it should be regularly updated and readily available.

Once you decide how to address this issue, it will be critical to make all levels of management understand what information can be collected and used. For example, if frontline supervisors collect and use text messages to communicate work information and these numbers are not provided as part of the voter eligibility list, it's clear the NLRB will consider that failure to disclose as grounds to overturn a vote.

Final Considerations

Our recent experiences have shown that the new expedited election rules, including the requirements to turn over key

personal contact information (emails and cell phone numbers), are also making it necessary for employers to understand how they will deal with a wide array of social media issues during organizing campaigns. In addition to having an NLRB-compliant social media policy, employers will need to have a plan for dealing with social media and its impact on employees.

There were other substantive changes under the new rules that have altered the traditional election process. For example, the NLRB has limited the availability of pre-election hearings, which are meant to address issues related to whether an election should even take place. Disputes over voter eligibility and inclusion in the voting unit are now typically deferred until after the election, at which point they will only be resolved if they would have an impact on the election. The end result is elections that were traditionally conducted approximately six weeks after the representation petition will now be concluded in less than three.

Conclusion

The Fisher Phillips analysis of elections demonstrates why it is more important than ever for you to properly identify and train your statutory supervisors on recognizing the early warning signs of union activity. The reduced time between a petition and election affords companies less time to educate employees, so being proactive early in an organizing campaign will be crucial.

Supervisors also need to know what they can and cannot do during a campaign under the complex labor laws that govern the process. Training now can prove invaluable later. Finally, it is critical for you to analyze any potential bargaining issues now to be prepared to comply with the new rules before the inevitable storm hits.

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