The Return of Quickie Union Elections: Top 10 Things Employers Need to Know About Labor Board's Broad New Rule

Insights
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Employers were dealt yet another blow yesterday when the National Labor Relations Board re-introduced "quickie" elections and accelerated the time period between union petitions and elections. This is just one of the changes found in the NLRB's new representation rule that will revamp the union election process and make life that much harder for employers responding to a union organizing campaign. The new "direct" rule, which will take effect on December 26 without any additional comment period, is yet another recent example of steps the current Board is taking to tilt the playing field firmly in the direction of unions – and it won't be the last one you can expect in the next few weeks. What are the top 10 things you need to know about with this impending change?

1. Employers Have Been on a Rollercoaster Ride Over The Past Decade

The quickie election rule has gone through several changes in the last decade as the political winds have shifted in Washington, D.C. and the halls of the NLRB. In 2014, the Obama-era Labor Board initially introduced union-friendly union election rules that introduced so-called "quickie" election procedures and put employers in a difficult spot. Balance was restored to the process in 2019 thanks to the Trump-era Labor Board issuing common-sense rules that rolled back some of the more onerous requirements of the quickie election process. But the writing was on the wall once the NLRB shifted to a Democratic majority, and yesterday's rule effectively wipes the 2019 changes away and restores the landscape back to the Obama-era standards.

2. NLRB Says Change is Needed

In support of the new rule, the Board majority cites statutory language, Supreme Court authority, and general policy aims in order to justify a return to quickie elections. It claims the 2019 rule changes introduced delays in the process that needed to be eliminated. "It is a basic principle of the National Labor Relations Act that representation cases should be resolved quickly and fairly," said Chairman Lauren McFerran in a statement accompanying the rule release. "By removing unnecessary delays from the election process, the new rule supports these important goals, and allows workers to more effectively exercise their fundamental rights."

3. Elections To Be Held "Earliest Date Practicable" – 8 Calendar Days Is Goal

This eliminates the existing 20-day period between the direction of an election and the election itself, which was one of the key hallmarks of the Trump-era rule. Among other things, this period has advanced the needs of due process by extending sufficient time to all stakeholders (including employers and organized labor) for purposes of contemplating the filing of a Request for Review of the Region's determination regarding scope of the voting-eligible bargaining unit *before* the ballots are cast. As a result, we could soon see a return to the days when parties were left with no meaningful period in which to raise legal challenges concerning fundamental eligibility issues such as supervisory status – injecting an additional element of uncertainty into the representation process.

4. Pre-Election Hearings Will Be Limited to Issues Concerning Whether the Election Should Take Place

On a related note, the new rule removes much of the discretion enjoyed by Regional offices to resolve important employee eligibility issues and appropriate voting units before the election takes place. That means that issues such as whether to enfranchise additional departments or employee groupings based on similar working conditions or other common interests will only be resolved (if at all) after the election takes place. Fundamentally, this makes it easier for unions to organize smaller "micro-units" by delaying any prospects for certainty surrounding the eligibility of excluded voters until after the polls have closed. While the NLRB intends for the new rule to introduce efficiency into the process, such a change will likely lead to many unwieldy situations that will be difficult to manage, including the prospect of voters casting ballots without any clarity as to the status and eligibility of their fellow co-workers.

5. Any Questions About Whether Employees Should Be Included in the Bargaining Unit Will Be Postponed Until After Election

Generally, the new rule only allows for a pre-election hearing on those issues necessary to determine whether an election itself should be conducted. Accordingly, Regional directors will soon defer litigation of any eligibility and inclusion issues (regardless of impact) to the post-election stage unless they must otherwise be resolved in order to determine if an election should be held at all.

6. Briefing Schedule Altered

The employer's Statement of Position responding to issues raised by the representation petition (and preliminary voter list) will generally be due approximately three days sooner under the new rule, and Regional directors will only have limited discretion to extend that deadline. Meanwhile, unions may respond orally to the Statement of Position at the start of the pre-election hearing instead of filing a written response. At the backend of the process, the parties will be provided an opportunity for oral argument before the close of the hearing and written briefs will only be allowed only if the Regional Director or hearing officer determines they are necessary. Written briefs have traditionally played a key role in informing determinations on appropriateness of the unit or supervisory status

with controlling precedent. The existing rule entitles parties to file briefs at least five business days following the close of hearings.

7. Quickie Elections Reintroduced Through Quickie Procedural Process

By classifying all of these changes as "procedural" in nature, the Labor Board has bypassed the standard notice-and-comment process accompanying formal administrative rulemaking, thereby dropping this rule on all stakeholders without a meaningful opportunity to weigh in. This mirrors the process utilized by the Trump Board when it initially rolled back many of these provisions back in 2019. A federal court subsequently struck down several of those changes on the basis that they were substantive in nature and therefore should have gone through a formal rulemaking process. While we expect the new rule to be challenged on similar grounds, it remains to be seen whether any such challenges will ultimately derail it before December 26. Consequently, the time to start preparing for the changes is now.

8. Elections Already Skewed in Unions' Favor

A return to the days of quickie elections will only serve to further the interests of organized labor, which is already enjoying an unprecedented resurgence driven in part by other regulatory changes in recent years. According to Bloomberg's NLRB Election Statistics Report, unions are winning elections at an 80% clip so far this year, the first time ever that this number has been reached at midyear. And it's not just smaller units winning the right to unionize: 18 out of 19 elections involving groups of 500 or more workers have fallen in favor of unions over the first half of 2023. Overall, unions won 662 elections during that same period – covering over 58,000 workers. That represents the highest first-half win total for labor in nearly 20 years. These numbers seem likely to grow even higher in the coming years thanks to yesterday's new rule.

9. This is What You Should Do

Employers now have a four-month window in which to prepare for implementation of the new representation rule. You should consider utilizing that time to work closely with internal employee relations resources and outside counsel to evaluate your existing labor relations infrastructure, and to explore additional participatory initiatives for enhanced employee engagement. This also represents an opportunity to identify any statutory supervisors under existing Board doctrine and to strategically evaluate other potential bargaining unit issues well in advance of the onset of a potential representation petition. Lastly, you should think proactively and outside the box when it comes to available vehicles for closing any perceived communication gaps – both upward and downward. Every organization must analyze its own workforce, industry, resources, and other factors before tailoring a sustainable plan around the unique aspects of your workplace culture.

10. You Haven't Heard the Last From the NLRB

We expect to see more from the Labor Board along these lines in the very near future, further tilting the playing field back in favor of unions. That's because Democratic Board member Gwynne Wilcox's term will expire on August 27, and the Senate is unlikely to bring her renomination to a vote before the coming recess. Once that happens, she will no longer be able to participate in the rulemaking or decision-issuing process until her reappointment, relegating the NLRB to a composition of two Democratic members and one Republican in the interim. We can therefore expect to see a spate of additional activity (in the form of both decisions and rules) before she departs – some of which may not be formally published or released until after her last official day.

It seems the only constant when it comes to labor relations doctrine these days is change, and change has certainly arrived with this latest swing of the pendulum back toward the interests of organized labor. The best way to stay up to speed on the additional changes we expect in the coming days and weeks? Ensure you are subscribed to Fisher Phillips' Insight system to gather the most up-to-date information.

Conclusion

If you have questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any member of our Labor Relations Practice Group.

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