# NLRB Quickie Election Rule Now In Effect

Insights
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On April 28, 2012, a federal judge with the U.S. District Court for the District of Columbia cleared the way for the National Labor Relations Board's expedited-election rule. It is effective today, Monday, April 30th.

The judge's order is not a substantive ruling on the new regulations, which remain the subject of litigation. Rather, the order comes as a ruling on the request of the U.S. Chamber of Commerce to temporarily enjoin the new rules until after a final ruling. The judge denied that request, refused to issue a temporary injunction, and the rules now go into effect.

That said, the court expects to issue a formal ruling on the merits by May 15, before any election under the new rule would likely take place. In the meantime, we encourage employers to take advantage of this rapidly closing window of opportunity by moving forward with plans to: 1) reevaluate your current employee relations programs; 2) identify, confirm and properly train all frontline supervisors; and 3) implement other proactive steps designed to help make unions unnecessary.

**The New Rule's Most Significant Provisions**
Although the new rule is purportedly designed to "reduce unnecessary litigation," its primary objective is to substantially reduce the period of time between the filing of a representation petition and a union election. Until now, these petitions would trigger a hearing designed to resolve any voting eligibility issues long before the ballots were cast. Even in the absence of such a hearing, the parties could rest assured that no election would be scheduled until the passage of six or more weeks, during which time employers were free to properly train their supervisors and educate employees.

But effective April 30th that process will be substantially streamlined by deferring most eligibility determinations until after the votes had already been cast by those employees whom the union seeks to represent. The rule makes clear that the NLRB will confine hearings to a relatively small number of proceedings in which the disputed employee classifications comprise more than 10% of the petitioned-for bargaining unit. These circumstances will be rare, and the status of a small number of supervisors alone will typically be insufficient.

**The Effect On The Timing Of Elections**
NLRB Regional Directors will have the discretion to schedule hearings within seven days of the

petition. Even if such hearings are granted, the new rule confers new-found discretion upon the assigned Hearing Officers to cut them short, reject evidence, and to issue rulings from the bench without the benefit of briefs, conceivably resulting in a decision that same day. At that point, the NLRB would be free to schedule an election within two weeks or less. Under those circumstances, the election would end up taking place within three weeks of the petition date, representing a 50% reduction in the overall employee education period.

**What Does This Mean For Your Workplace?**

A 50% reduction in lead time between petition and election means that all things being equal, employees will be casting ballots that much closer to the confusion and negative emotion that presumably fueled the union card-signing activity to begin with. Consequently, all employers will have to be far more proactive in advance of any representation petition, and more nimble, efficient and direct with any communications issued thereafter.

The streamlined procedures also mean that managers and employees alike will go into the election without any certainty over the ultimate scope of the voting unit. This is particularly troubling with regard to supervisory status. The absence of a formal determination on this issue could compel employers to make assumptions on a critical issue with major ramifications if they "guess wrong." Consequently, it will be more important than ever to identify any "close calls," and to consider strategies to ensure against any subsequent misclassification by the NLRB.

Lastly, it is fair to assume that labor unions will attempt to exploit the inherent advantages associated with these changes by stepping up the extent of their organizing activity. When combined with other troubling decisions allowing unions to carve out sympathetic "micro-units" of smaller employee groupings, these new rules will likely result in a proliferation of representation petitions, and impose new challenges on multiple fronts.

**How To Get Ready**

The new rule is already in effect, which means that the window of opportunity to get in front of these changes is rapidly closing. Our advice is to take immediate steps to fine-tune your employee relations programs so as to make third-party representation unnecessary. Some employers will take that a step further by looking for opportunities to engage their workforce on the issue of third-party representation long before any petition is filed, by crafting a lawful message that is tailored to the unique aspects of their corporate culture, and then evaluating the most effective vehicles for delivering that message.

More than ever, you should work toward minimizing the impact of the expedited timetables by "standing on go" with a proactive program that can be implemented long before the first petition is filed, and tailored to ensure effective communication should that happen.

Keep in mind that unions had already been enjoying 70% win rates under the old rules. Under the new rules, employees will typically be casting their ballots much closer in time to the negative emotion that generated the initial organizing activity. Consequently, less response time between

emotion that generated the initial organizing activity. Consequently, less response time between petition and elections will likely favor unions and put increased pressure on employers. The new rules will also leave less time for employers to properly identify, confirm and train their supervisors post-petition, which means that much of this will need to happen ahead of time. In the meantime, these changes are likely to fuel increased organizing activity as unions scramble to exploit these advantages

Given the limited availability of pre-election determinations on supervisory status, act now to identify and confirm the status of any "close calls," and to properly train all your statutory supervisors on how best to lawfully and effectively communicate with employees. Begin to take advantage of the closing window of opportunity to improve employee relations programs while preserving the integrity of your company's "brand," by effectively communicating, resolving employee issues, reducing perceptions of unfairness, and managing in a way that shows you care.

Finally, act now to develop a strategic contingency plan for any petitions that are filed, so as to maximize prospects for lawfully and effectively educating employees under drastically reduced timetables.

For more information contact your regular Fisher Phillips attorney.

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