Union 'Quickie Election' Rule Survives Legal Challenge

Insights
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A federal appeals court ruled that the NLRB's "quickie election" rule is permissible and does not violate the law, meaning that employers will continue to have to live under the new and challenging regime that stacks the deck in unions' favor. Although several business groups filed a lawsuit arguing that the rule should be stricken for a variety of reasons, the 5th Circuit Court of Appeals rejected the challenge and kept the rule intact. Employers would be best served to adjust to the new normal, as there do not appear to be any viable challenges to the rule on the horizon (*Associated Builders and Contractors of Texas Inc. v. National Labor Relations Board*).

Quickie Election Primer: Three Main Changes

The rule, promulgated by the National Labor Relations Board (NLRB) and effective as of April 2015, impacts union elections in three main ways. First, it significantly shortens the time period between the date the election petition is filed and the date the election takes place, shrinking that time period to less than 30 days (hence the "quickie election" moniker). The shorter period provides a significant advantage to unions because employers do not have sufficient time to educate employees to ensure they make an informed decision.

Second, it significantly limits the scope of the any pre-election challenges that may need to be litigated, which, under the old system, often postponed the election date. The additional breathing room created by such a necessary delay was often instrumental in developing strategy and getting the employer's message out to the workforce. Under the quickie election rule, most challenges (such as individual voter eligibility issues) are deferred until after the election takes place.

Third, the rule requires employers to disclose a significant amount of personal employee information to the unions, allowing them access to almost all available contact information (including cell phone numbers and email addresses). What you might have collected for legitimate, business-related purposes may end up being used against you as a communications tool to disseminate anti-employer messages.

Court: Rule Stands Legal Tests

In January 2015, right before the rule went into effect, a consortium of business groups joined together to file a lawsuit against the NLRB in Texas to challenge the legality of the quickie election rule. The case was dismissed, and in August 2015, the business groups lodged an appeal with the 5th Circuit Court of Appeals.

On June 10, 2016, the Court of Appeals rejected the legal challenge and upheld the rule. It first said that shortening the time frame of the election campaign did not unduly interfere with employers' protected speech rights. Although the challengers contended that the shrunken time span inhibits meaningful workplace debate, the court did not agree and ruled that they failed to explain why or how that was so.

The court then said the delayed eligibility challenges were permissible under the National Labor Relations Act (NLRA). The court noted that, under the new rule, unit eligibility and other similar challenges are not "ordinarily" to be heard before an election, but that the rule also permits the hearings officer to address such issues at an early stage if warranted. Even if the challenges are delayed until after the election, the court noted that the Board has wide discretion under the NLRA when making decisions on these issues.

Finally, the court said that the forced disclosure of personal contact information did not violate any known privacy laws. Although the challengers pointed out that disclosing cell phone numbers, email addresses, and other such information increases the risk of identity theft or other types of potential privacy infringements, the court said that these concerns did not trigger any legal violation.

Although it is possible that the 5th Circuit could choose to entertain another argument on appeal on an *en banc* basis (full panel review), and also possible that the Supreme Court could wade in to rule on the merits of the rule, neither of these possibilities seems likely at the given time. Last year, the federal court in the District of Columbia also ruled in the Board's favor on this issue, leaving employers who want to challenge the rule with a very limited avenue for seeking relief.

What Should Employers Do Now?

While it is true that the number of union petitions filed has not dramatically increased in the past year or so, this is most likely due to the fact that unions are still figuring out the best way to take advantage of the new system. Our view is that 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 benefit. 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.

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.

Final Consideration: Collecting Personal Information From Your Workforce

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.

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.

For more information, visit our website at www.fisherphillips.com or contact your regular Fisher Phillips attorney.

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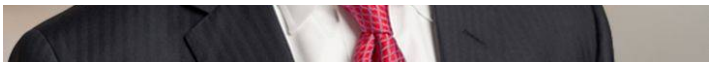

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