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LEGAL ALERT

It's Back – NLRB Revives Quickie Election Rule That May Soon Be Here to Stay

The National Labor Relations Board has just announced that the agency would be reissuing its proposed "quickie election" amendments to rules governing representation case procedures. The news came in the form of a press release, describing plans to publish a formal Notice of Proposed Rulemaking, incorporating changes that "are identical to the representation procedure changes first proposed in June of 2011."

Fisher & Phillips initially advised employers of the proposed rule nearly three years ago (www.laborlawyers.com/shownews.aspx?Unions-In-Decline-Labor-Board-To-The-Rescue-&Ref=list&Type=1122&Show=14216). At that time, we referred to procedures that would expand on the amount and timing of employee information to be disclosed following an election agreement, and on any anticipated employee eligibility issues. We also explained that the "streamlined" procedures could effectively cut the campaign period between representation petition and election from six weeks to less than three, and that the new rule could preclude resolution of supervisory status until after all the ballots are already in the box.

In early December of that year, we issued another Alert informing businesses that the Board had approved a resolution to move forward with a vote on the new rule over the dissent of then member Hayes, who warned that the "devil is in the details" (www.laborlawyers.com/nlrb-moving-forward-with-new-election-rules). In an apparent rush to vote on the rule prior to the expiration of member Becker's recess appointment (and resulting loss of quorum), the Board voted on and subsequently published a final rule in late December of 2011, amending current representation procedures in a number of significant ways, effective April 30, 2012. As we explained at that time:

> A shortened election cycle places employers at serious disadvantage when it comes to educating employees on the detriments of union representation and training their supervisors to lawfully respond to union activity. It also leaves employees with less time to consider all the facts for purposes of making an informed choice on whether they want to be represented by a union. Worse yet, the new rule will essentially compel employees to cast their ballots before any lingering voter eligibility issues are resolved, effectively precluding them from understanding the full scope and ramifications of their decision.

(www.laborlawyers.com/nlrb-publishes-final-rule-changing-representation-election-procedures).

While some may not remember, the quickie-election rule was actually the law of the land for the first two weeks of May, 2012. We made clear at that time, that: "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." (www.laborlawyers.com/nlrb-quickie-election-rule-now-in-effect).

On May 14 of that year, however, the U.S. District Court for the District of Columbia struck down the rule on the basis that only two of the three Board members serving at that time actually participated in the vote to approve the final rule, thereby depriving it of the required procedural quorum. (www.laborlawyers.com/court-strikes-down-nlrb-quickie-election-rule).

The Board has since allowed the appeals in that case to run their course while restoring the viability of its own quorum. This past year, the NLRB returned to "full strength" in the form of five confirmed members for the first time in over a decade. A reconstituted NLRB is expected to publish the proposed rule tomorrow, and the comments period is expected to close on April 7th (with reply comments due a week later).

Although the Board is characterizing the new rule as "identical" to the one first proposed over two years ago, it is worth noting that this time around, the Board is now suggesting that employee e-mail addresses will

also have to be disclosed. Consequently, while the full extent of the rule remains to be seen, the devil will remain in the details.

Equally important, the procedural impediments that doomed the rule the last time around will presumably be long gone by the time the final rule is put up for vote. As things stand now, the two Republican members may choose to vote against the rule or abstain, but in either case the three remaining Democratic members would constitute a lawful quorum should they vote for its passage as anticipated.

In the meantime, employers are encouraged to consider the practical implications of a quickie election rule on their own workplace, and to take proactive measures to develop a lawfully tailored response plan as soon as reasonably possible. Fisher & Phillips attorneys stand ready to assist in that regard. If you have any questions about the implications of the proposed rule or would otherwise like to discuss how best to prepare your organization, contact your Fisher & Phillips attorney at your earliest convenience.