



Proposed NLRB Union Election Rules Significantly Reduce Employers' Response Time to Union Organizing

MSK Alert by [Steve Schneider](#)
March 2014

Recently, a majority of the National Labor Relations Board (NLRB or Board), now at full strength with five members, announced its new proposal for restructuring the existing union election process. The proposed rules' stated purpose is to remove barriers to the resolution of union representation issues, increase transparency and uniformity across its regional offices, eliminate unnecessary litigation, and modernize the Board's representation election procedures. If these "new" rules sound familiar, it is because this is the NLRB's second attempt to accelerate the union election process. The Board proposed nearly identical rules in 2011, but the courts struck them down in 2012 because the Board lacked a quorum when it voted to adopt them.

The proposed rules, often referred to as the "quickie election" rules, will significantly change the process that employers are required to follow when a union representation election petition is filed with the Board. While the NLRB insists that the new rules will streamline the union election process, employers should be wary of their practical effects if they are approved later this year.

The Current Representation Election Procedure

Currently employees, unions and employers may file petitions with the NLRB to determine if employees wish to be represented by a union. After the filing, the petitioner has 48 hours to submit evidence regarding the number of employees who support the petition. The petition is then served on the parties, with the employer receiving a request that it post a notice of employees' rights and fill out a number of forms. At this time, the employer is also asked to provide a list of the names and job classifications of employees in the unit described in the petition. Finally, the employer is required to provide its position on the appropriateness of the bargaining unit described in the petition.

Shortly after the petition is filed, the parties are served with notice of a preelection hearing. Before or during the hearing, the parties are encouraged to reach an agreement regarding, among other things, the jurisdiction of the Board to conduct an election, the composition of the bargaining unit, and the date, time, and place of the election. After the hearing, the Regional Director issues a decision dismissing the petition or directing an election, after which the parties have 14 days to request the Board's review. The Regional Director will then schedule an election, generally 25 to 30 days after the date of the decision. The current process usually provides employers with approximately 35 to 40 days to communicate with their employees about the election process and provide facts about collective bargaining and strikes.

Within seven days after the Regional Director issues his or her decision, the employer is required to file a list of employees who are eligible to vote, including their home addresses. This list is then made available to all other parties so they can communicate with eligible employees about the election. Once the dates, times, and locations of the election are set, the Regional



@mskllp

www.msk.com

LOS ANGELES | NEW YORK | WASHINGTON, D.C.

Page | 1
7891405.2



Director prepares a notice of election that the employer is required to post in the workplace for at least three days before the election. After the election, parties may file objections, including a summary of the evidence supporting their objections. If material factual issues remain, the Regional Director will notice a postelection hearing. After the hearing, the hearing officer will issue a report, and the Regional Director will issue a decision, which can be appealed to the NLRB itself.

The Proposed Rules

The proposed rules would make the following significant changes to the election process:

- Permit parties to file petitions for election electronically with the NLRB's regional office;
- Require the petitioner to file any evidence (e.g., showing of interest) with the petition rather than 48 hours after its filing;
- Require employers to include, in addition to the names and addresses of employees in the proposed bargaining unit, their telephone numbers, email addresses, work locations, and shifts and classifications of all employees eligible to vote in the election;
- Require employers to serve the eligibility list on all other parties electronically at the same time it is filed with the regional office, and shorten the time the employer must do so from seven days to two days;
- Require that the preelection hearing begin seven days after filing of the petition (absent special circumstances);
- Require employers to provide a "Statement of Position," including a list of all individuals employed by the employer in the petitioned-for unit, no later than the hearing date (within seven days after petition-filing, assuming notice of hearing was served on that date). The Statement of Position must set forth the employer's position on any issues relating to the petition that the employer intends to raise at hearing (e.g., appropriateness of the bargaining unit). Failure of the employer to raise an issue in its timely filed Statement of Position constitutes a waiver of the employer's right to contest that issue;
- Eliminate employers' rights to request that the NLRB review decisions of the Regional Director regarding the representation petition before the election, and limit the Board's postelection review; and
- Limit the issues that may be litigated before the election (including who is eligible to vote) and the evidence that can be introduced during the representation hearing. In particular, if the employer is disputing 20% or less of the total number of employees in the proposed bargaining unit, there probably will be no hearing conducted, and the notice of election will be issued on the date of the noticed hearing, leaving ballot challenges as the potential way to oppose inappropriately included employees.

The proposed rules, if adopted, will mean significant changes and challenges for employers. Currently, the average election occurs within approximately 38 days after the filing of a petition. If the rules are adopted, the new petition-to-election period could be as short as 19 or 20 days, which, when combined with the short threshold period to prepare and file the employer's Statement of Position, leaves much less time for employer communications to employees.



The Board will be accepting comments on its proposal until April 7, 2014, but employers should be prepared to train their supervisors about unionization efforts this spring before these new rules take effect.

ASK MSK

Q: Are all employers subject to the new proposed “quickie election” rules?

A: The new proposed NLRB “quickie election” rules will impact all employers who are subject to the National Labor Relations Act (NLRA). The NLRA applies to virtually all private-sector employers. The NLRA, and thus the new rules, do not apply to federal, state, or local governments; employers who employ only agricultural workers; and employers subject to the Railway Labor Act.

Q: What are the practical implications of the new “quickie election” rules for employers?

A: The most noteworthy implication of the new rules is that employers will have significantly less time to respond to union representation petitions. The new expedited process will also mean that employers often will not be able to challenge the election process until after the election occurs. The rules will give employers less time to communicate with employees during the process and will simultaneously give unions increased access to employees by requiring employers to turn over employees’ phone numbers and email addresses.

Q: Assuming the new rules are adopted, is there anything employers can do now to prepare?

A: Yes. Employers should train their supervisors about unionization efforts and what supervisors legally can and cannot say to employees about unions. Employers also should develop a strategy for addressing union election petitions immediately. Although the NLRB will be accepting comments on its proposal until April 7, 2014, if an employer prefers to stay union free, now is the time for employers to train supervisors and get prepared for “quickie elections” when the new rules go into effect.