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NLRB's Final "Ambush" Election Rule Will Spur New Organizing Campaigns

On December 12, 2014, the National Labor Relations Board ("NLRB") adopted a Final Rule that will significantly alter existing union election proceedings. Employer groups and trade associations lobbied hard against the Final Rule both in written comments and in live testimony during public hearings in April 2014, arguing that the Final Rule will only serve to intrude on an employer's and employee's free speech rights.

Despite the thousands of public comments filed and dozens of organizations who provided testimony supporting the current procedures, the NLRB majority sided with unions and continued its clear labor-friendly agenda. The end result is that the Final Rule will expedite the union election process, which will only serve to spur new organizing campaigns leaving employers little to no time to respond to a union's petition for representation. The Final Rule makes is more important than ever for employers to have a proactive plan and strategy in place well before any union petition is filed, so that employees are well aware of management's position to unionization in advance.

Below are the most important aspects of the Final Rule and their potential consequences for employers:

- Employers will be required to post a NLRB-generated Notice of Petition for Election, containing detailed information about the filing of a petition and an employee's rights within two (2) business days of the NLRB's service of the petition. In the past, it was voluntary to provide such notice. This change will potentially provide employees with information about the petition and election procedures before the company has had the opportunity to prepare its own informative materials, providing the unions with an advantage early in the election process.

- A pre-election hearing will take place within eight (8) days of the filing of an election petition. Employers will be required to respond in writing and address all issues that may be raised during the election in a Statement of Position, generally due the day before the pre-election hearing. The combination of these two procedural changes significantly disadvantages an employer because it gives the employer a very limited amount of time to analyze, consider, and then determine which issues the petition for election may raise. This problem is further amplified by the fact that any issues not raised in the Statement of Position will largely be considered waived, and an employer's arguments will be limited to those set forth in the Statement of Position. Thus, despite a shortened period of time in which to prepare its response to a union's election petition, the employer is expected to provide greater and more accurate information at the pre-election hearing, which may result in the inclusion of extraneous issues that have no real relevancy to the representation proceeding just to ensure no arguments are lost.

- As part of its Statement of Position, the employer must also supply a list of prospective voters, their job classifications, shifts and work locations by the day before the pre-election hearing. Again, due to the shortened time frame between the petition and the pre-election hearing, an employer has a restricted

amount of time to determine which employees should be considered prospective voters and which are properly excluded from the covered unit. As the Final Rule also limits litigation at the pre-election hearing to issues necessary to determine whether an election should be conducted, the designation of a proper unit is even more important. A regional director may defer litigation of eligibility and inclusion issues affecting a small percentage of employees until after the election. This means that employees could vote in an election, even if they are later determined to be ineligible to vote for one reason or another. Because determining who should be part of a represented unit has become more complicated in light of the *Specialty Healthcare* decision, the Final Rule makes it even more important for employers to carefully consider who should be a part of the proposed bargaining unit at the pre-election stage, or even before an election petition is filed.

- Employers must now provide employee personal email addresses and phone numbers on their voter list, also referred to as an "Excelsior List." This information must be provided along with the rest of the information required on a voter list within two days of the Board ordering an election, cutting it down from the seven days employers used to have to acquire this information.

- The election will no longer be postponed for 25 days after the regional director issues a decision and direction of election, unless otherwise ordered by the NLRB. The Final Rule does not provide a specific time period during which an election must be held, but states that an election should take place at the earliest date practicable. This will likely further decrease the amount of time an employer has to prepare for an election and develop/make any arguments against unionization. Employees could potentially be rushed into voting without the opportunity to receive all the necessary facts and make an informed choice.

- Employers and unions may seek review of all representation case rulings through a single post-election request to the regional director. Post-election hearings will generally open 14 days following the filing of objections. After the Regional Director makes his post-election rulings, however, the Board will have discretion to deny review of those rulings.

The Final Rule came swiftly on the heels of another union-friendly reform by the NLRB in its *Purple Communications, Inc.* decision, which creates a presumption that an employee can use its employer's email system for organizing purposes during non-work time. Similar to the *Purple Communications* holding, the decision to promulgate this new rule split along party lines, with Chairman Mark Pearce, Member Kent Hirozawa, and Member Nancy Schiffer supporting the Final Rule. Although the NLRB has already published the new representation rule, it will not take effect until April 14, 2015. This gives employers some (but not much) time to analyze their policies and practices and understand the impact of the new requirements and to prepare for this new election dynamic.

As a consequence to the Final Rule, employers will likely face a rise in union organizing activity, as well as an increase in the number of elections because of the faster timeframe. Although some business groups have already stated they will file court challenges to the Final Rule, as it stands, the Final Rule will become enforceable in a matter of months and employers must prepare for the changes and challenges it will bring. Thus we recommend that employers take the following steps to prepare:

- Develop and implement legally compliant and proactive labor strategies prior to the receipt of any election petition.

- Create a high-level management team (including Legal, Accounting, HR, and Department Heads) to be responsible for receipt and handling of union election campaigns. As the Final Rule requires that very specific information be provided to employees and the union in a short amount of time, this team must be ready to respond with the appropriate information immediately.

- Anticipate possible bargaining units before a petition is filed so that you can establish a strong argument for the proposed unit and begin the initial process of collecting the required data regarding job classifications, shifts and work locations.
- Develop a strong communication plan and train managers and supervisors so that you can get the company's message to employees immediately without violating the NLRA.
- Immediately consult with legal counsel if a union petition is received to ensure full compliance with the Final Rule.

For assistance with developing lawful policies and procedures regarding union elections and labor strategies or any other labor and employment issues, contact Kara Maciel, Chair, Labor & Employment, Conn Maciel Carey PLLC.

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