CLIENT ALERTS & INSIGHTS

NLRB Guidance on Accelerated Union Election Schedule Effective at the End of December

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On December 8, 2023, the National Labor Relations Board's ("NLRB") General Counsel published a Memorandum outlining the differences between the new union-friendly election rule that becomes effective on December 26, 2023 and the Trump-era NLRB election rule promulgated in 2019. The new election rule was announced earlier this year when the NLRB issued a Final Rule "substantially" returning union election procedures to those implemented under the Obama-era NLRB in 2014.

As we previously reported, the new rule rescinds Trump-era union election rules altogether by limiting pre-election hearings to whether an election should occur, delaying questions about employee inclusion in the bargaining unit to after the election, and eliminating the 20-day period between the order to hold an election and the date of the election itself. The Memorandum provides guidance on the new timeline for union elections and reiterates the NLRB's stance that the new rule "removes unnecessary barriers to the fair and expeditious resolution of representation cases."

The new rule "meaningfully" reduces the time from petition filing to election, thereby substantially limiting employers' ability to prepare a response and effectively campaign. Employers should be cognizant of the following key changes to union election procedures that will take effect later this month:

- Pre-election hearings will be scheduled to begin eight (8) calendar days after petition filing, which is approximately ten (10) days sooner than under the Trump-era NLRB rule. A non-petitioning party's Statement of Position is due seven (7) calendar days after petition filing, which is three (3) calendar days sooner than under the Trump-era NLRB rule. Petitioners are permitted to respond orally to the non-petitioning party's Statement of Position at the start of the pre-election hearing and are no longer required to file and serve a written Responsive Statement of Position three (3) business days prior to the pre-election hearing.
- Parties may only request a two (2) business day postponement of pre-election hearings and/or the deadline for the non-petitioning party's Statement of Position upon a showing of "special circumstances." Any additional days of postponement would require the party to demonstrate "extraordinary circumstances." Under the Trump-era NLRB rule, Regional Directors had discretion to approve postponements upon request of a party showing "good cause" and there were no limitations on the number of days for postponement.

- Employers are required to distribute and post the Notice of Petition for Election in a conspicuous location within two (2) business days after service of the Notice of Hearing. Employers who customarily communicate with employees electronically can distribute the Notice of Petition for Election electronically. Under the Trump-era NLRB rule, employers had five (5) business days to distribute and post the Notice of Petition for Election. The Notice of Petition for Election must remain posted until the petition is withdrawn or dismissed or, if an election is scheduled, until a Notice of Election is posted.
- Only issues necessary to determine whether an election should be conducted will be litigated in a pre-election hearing. Issues regarding eligibility to vote and inclusion in a bargaining unit will generally be deferred to the post-election stage if they do not need to be resolved in order to determine whether an election should be held. These issues were ordinarily litigated at the pre-election hearing under the Trump-era NLRB rule. According to the NLRB, this amendment "more efficiently avoids litigating and resolving issues that are often mooted by election results or amicably resolved following an election and permits more expeditious resolution of representation cases."
- Parties will be provided with an opportunity for oral argument before the close of the hearing but will need special permission from the Regional Director (pre-election hearings) or Hearing Officer (post-election hearings) to file post-hearing briefs. The timeframe for submitting post-hearing briefs and the subject matter permitted therein are decided by the Regional Director or Hearing Officer. Under the Trump-era NLRB rule, parties were entitled to file post-hearing briefs up to five (5) business days after the hearing. This amendment will purportedly eliminate "redundant and repetitive briefing, and consequent delay, in the more commonplace straightforward cases."
- Regional Directors will specify election details (e., type, date, time, location, eligibility, etc.) in the decision and direction of election, and the Notice of Election will be simultaneously transmitted with the decision and direction of election. Elections will be scheduled on "the earliest date practicable" after issuance of a decision and direction of election, eliminating the 20-business-day waiting period under the Trump-era NLRB rule.

Implementation of this rule is just the next example of the current NLRB and General Counsel Jennifer Abruzzo shifting election procedure to favor organized labor. Despite high-profile labor issues at Starbucks and the UAW strike, private sector union membership remains at a low 6%. This imminent rule change, with other changes like Abruzzo's attack on statutorily protected employer free speech through the NLRB's challenges to captive audience meetings, are just a few of the blatant examples of the NLRB's efforts to assist organized labor, turning long-standing labor policy on its head.

In light of these significant changes, it is critical that employers proactively prepare for union campaigns. Employers should ensure that management and supervisors are informed of the upcoming changes and prepared to effectively respond to union organizing. Employers should also remain engaged with their employees and receptive to any complaints or concerns in order to decrease the likelihood of union organizing.

To learn how these developments can affect your business, contact a member of Benesch's Labor & Employment Practice Group.

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