

NLRB Rule-Making Poised to Make Additional Changes to Union Election Procedures

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On July 28, 2020, the National Labor Relations Board (“NLRB” or the “Board”) announced another round of rule changes that would impact representation election procedures in two significant ways. We previously discussed prior election rule changes (linked [here](#)) and legal challenges to their implementation (linked [here](#)).

First, the changes would abolish the requirement that employers include employees’ personal email addresses, as well as home and cell phone numbers, on election eligibility lists in advance of a representation election. Additionally, the rule would codify the entitlement of military servicemembers to obtain and cast absentee ballots in representation elections.

Employers’ obligation to furnish employees’ contact information to the regional director for disbursement to all parties (most importantly, the prospective bargaining representative) is longstanding. The rule is derived from the Board’s decision in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966), in which the Board found that failing to provide an election eligibility list including the names and home addresses of all employees eligible to vote (an “*Excelsior* list”) would constitute grounds for setting aside the representation election. The requirements of *Excelsior* lists were expanded by the Board under President Obama in 2014 to include employees’ email addresses, as well as home and cell phone numbers. The 2014 Board justified the expansion on the ubiquity of email and phone usage in the half-century since *Excelsior*, and on the need for employees to obtain full information from both parties regarding the costs and benefits of union representation.

The Board reasoned that the 2014 Board did not sufficiently protect an employee’s privacy right in personal email and telephone information, which outweighs any additional benefit incurred from providing that information. The Board continued that prospective union representatives’ ability to proliferate information without email and phone contact information was never in jeopardy, and was overstated by the 2014 Board in its expansion of *Excelsior* lists.

Additionally, citing the spirit of “national policy that favors taking measures to ensure that servicemembers’ employment and electoral rights are preserved,” the proposed rule would guarantee military servicemembers’ right to participate in representation elections via absentee ballot. The proposed rule provides that “in order to be timely, a request for an absentee ballot must . . . be received within 5 business days of the direction of election or approval of an election agreement [and] must also be ‘accompanied by the mailing address at which the person can be reached while on leave.’” To support expediency, the proposed rule also notes that “the cutoff point for counting absentee mail ballots should be tied to the date on which they are mailed to the employees, and that 30 calendar days” should provide enough time for the ballot to be returned.

Finally, while noting that it would not impose the burden of informing the Board that absentee ballots will be required on either party, the proposed rule notes that where “a party is aware that an eligible employee is on military leave but does not so inform the Board, whether due to neglect, indifference, or gamesmanship,” that party should be estopped from objecting to the results of the representation election based on the failure to provide that employee an absentee ballot.

If you have questions, we encourage you to reach out to your Benesch contact or one of the attorneys below to discuss.

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