Blog Post

The Holidays Arrive Early for Employers: The National Labor Relations Board Issues New Union Election Rules

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By Amy Moor Gaylord

Employers can finally breathe a sigh of relief. Late last week, the National Labor Relations Board (Board) announced finalized union election rules, which will ease some of the quickie election procedures implemented by the Board in 2014. Perhaps most significantly, the new rule extends the time to the pre-election hearing from 8 calendar days to 14 business days, allowing employers, who are often blind-sided by union election petitions, a more reasonable amount of time to retain counsel and prepare for the hearing. The rule also returns to the pre-election process several important issues, such as determining which employees are supervisors, and prohibits elections from being scheduled less than 20 days after the election is approved or directed.

In 2014, the Board implemented what quickly became known as its "ambush election rules." These rules significantly changed the existing election procedures by shortening the pre-election process, effectively making it easier for unions to win representation elections. Of the 25 amendments made to the existing election procedures, some of the more dramatic changes in 2014 included:

- Mandating that the pre-election hearing be held 8 calendar days after the filing of the petition, with extensions granted only under "extraordinary circumstances."
- Requiring employers, for the first time, to file a "positon statement" outlining their arguments for hearing by noon on the business day before the hearing. Unions quickly learned to manipulate the filing of the petition to deprive employers of time to prepare their arguments and position statement (for example, filing the petition late on a Friday afternoon so that the hearing would be held on a Monday while the positon statement had to be filed by noon the Friday before).
- Prohibiting employers from raising any issues at the hearing that were not included in the position statement, or that did not affect a significant number of employees in the bargaining unit.

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- Deferring until after the election took place the litigation of important bargaining unit issues, including which employees were supervisors ineligible to vote.
- Drastically reducing the time between when the petition was filed and when an election would be held. Prior to the ambush election rules, the average time to an election was about 38 days. Under the ambush election rules, the average time hovered around 21-23 days, meaning employers had little time to talk to their employees about the realities of unionizing.

These short deadlines often left employers scrambling to find counsel and prepare for the hearing. Under this pressure, many employers simply waived their right to raise important issues, such as which employees should be in the bargaining unit, and entered into stipulated election agreements without a pre-election hearing.

The new rule, while not undoing all of the 2014 changes, does allow employers a little breathing room. Most significantly:

More time to prepare for the pre-election hearing: As noted above, the rule extends the time to the pre-election hearing from 8 calendar days to 14 business days after the petition is filed. Not only does this longer time period allow employers a more reasonable amount of time to prepare for the hearing, it allows the parties and the Board more time to try to resolve issues prior to the hearing rather than needlessly litigating issues that might have been resolved through negotiation and compromise.

Requires unions to respond to the employer's position statement: Previously, the entire burden leading up to a pre-election hearing rested on the employer. Employers were required to jump through a number of procedural hoops including posting notices, producing lists of employees, and filing a substantive position statement outlining all of the issues they intended to litigate at the pre-election hearing. Under the new rule, the union is now required to file a response to the employer's position statement. As mentioned above, unions frequently timed the filing of petitions to deprive the employer of time to prepare for the hearing. Popular filing dates included the Wednesday before Thanksgiving and the Friday before Christmas when key managers and witnesses were unavailable to prepare for hearing. Requiring the union to respond to the employer's positon statement not only transfers some of the pre-election burden to unions, it may make unions reconsider the timing of their petitions knowing they will have to substantively respond to the employer's position statement or risk having their petition dismissed or the employer's position on bargaining unit issues accepted.

Allows employers to litigate important election issues before the election: As before the 2014 rules took effect, disputes between the employer and the union over which employees

should be included in the bargaining unit and which employees are supervisors who are ineligible to vote will once again be litigated and decided before the election. Knowing who is actually eligible to vote in the election is vital to an employer's ability to effectively communicate with its employees about unionization. First, it allows employers to tailor their communication to those employees who will actually be voting. Second, employers routinely rely on supervisors to communicate with employees about the employer's views on unionization during the time leading up to the election. An employer who mistakenly treats an employee as a supervisor who is later found to be eligible to vote risks having unfair labor practice charges filed against it and possibly having the results of the election thrown out if the employer wins. Employers will once again know up front which employees are supervisors and be able to rely upon those employees as part of its employee communications strategy.

More time to talk to employees before the election takes place:
The new rule directs Board officials to set elections no fewer than 20 days after approval (in the case of a stipulated election agreement) or direction (after a pre-election hearing if no election agreement is reached) of the election. This change will come close to returning the pre-election timeline to the pre-ambush election rules average. Additionally, the Board's regional officials will now have more leeway to extend deadlines in the election process, including the timing for notice of pre-election hearings and briefings.

The final rule will be effective in April 2020, about 120 days from the date of publication in the Federal Register, which is anticipated to be December 18, 2019. Until then, employers will still have to comply with the existing ambush election rules. We anticipate that unions will try to amplify organizing efforts in order to file petitions before the rules change, to take advantage of the more union-friendly 2014 rules. Even under the current rules, however, employers can still be successful in union elections if they are prepared and proactively maintain positive relations with their employees.

Petition Filed	Pre-2014 Rule	2014 Rule	New Rule
Petition Statement Filed	Not required	Noon on the business day before the hearing	8 business days following the service of the Notice of Hearing
Union response to position statement	Not required	Not required	3 business days before hearing date
Pre-election hearing	Generally about two weeks after petition filed	8 calendar days after petition filed	14 business days after petition filed

Election date	Within 42 days of the petition filing (on average 38 days), or about 25 days after the direction of election	As soon as practicable (average 21-23 days but as little as 3 days in at least one case)	Not sooner than 20 business days following an election agreement or direction of election

Contact your Akerman attorney if you need guidance in preparing for potential union organizing or improving your relationship with your employees.