

Weston Hurd NLRB Update - April 2015

Brace Yourself: "Quickie" Election Rules Go Into Effect Tomorrow

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On April 6, 2015, the NLRB's General Counsel Richard Griffin issued a detailed guidance memorandum outlining the procedures for the handling of representation cases under the Board's new "quickie" election rules. These rules go into effect on April 14, 2015. We have addressed these rules in prior newsletters:



[NLRB Quickie Election Rules - March 2012](#)

[Employer New Year Resolution #1 - Prepare for Union Campaigns - December 2014](#)

However, the Guidance Memorandum provides additional detail about how the Regional Directors of the NLRB field offices (who are responsible for conducting representation elections) will implement and enforce the rules.

The Board's new rules drastically reduce the time between a union's filing of a petition for an election and the date of the election. Under the rules, Regional Directors are required to schedule an election for the "earliest date practicable" and that date can be as little as 11 days after a petition is filed even if the employer pushes all the deadlines in the employer's control. Such a short timeline effectively robs an employer of any meaningful opportunity to communicate with employees about the drawbacks of unionization.

Here is a brief summary of how the abbreviated pre-election procedures will work:

- A union can now electronically file a petition with the relevant NLRB field office and must also serve the petition on the employer. If the employer does not have the ability to receive the petition by email (or the union does not know the employer's email address), the union can telephone the employer and then deliver the petition to the employer on the next day (by personal service, overnight delivery, or fax). The new form for filing a petition for a representation election can be found here: [Form NLRB-502 RC Petition](#).

- The NLRB field office is also supposed to serve the employer with the petition **on the same day** that the office receives it from the union. The field office will attempt to serve the petition by email but, if it is unsuccessful, is required to do so by regular mail. Along with the petition, the regional office must provide the employer with the following:
 - 1) Notice of Petition for Election;
 - 2) Notice of Representation Hearing;
 - 3) Description of Election Procedures; and
 - 4) Statement of Position form which the employer must complete and file before the hearing. The new Statement of Position form can be found here: [Form NLRB-505 Statement of Position Form](#) .

This "same day" service starts the clock ticking on the strict deadlines of the new rules.

- An employer has **two days** to post the Notice of Petition for Election at conspicuous places at its worksite after receiving it. If the employer communicates with employees through email, it must also email the notice to employees. If the employer fails to meet this deadline, the NLRB can set aside the results of the subsequent election (if the employer wins) and order a new election.
- The pre-election hearing must be scheduled within **eight days** of the regional office serving the Notice of Hearing, unless the case presents "unusually complex issues."
- An employer must present any and all issues about the union's proposed bargaining unit (i.e., what groups of employees should be included or excluded from the unit and which individuals are eligible to vote) by noon on the business day before the opening of the pre-election hearing (i.e., by noon of the **seventh day** after the petition is filed). The employer's Statement of Position (as the Board calls it) must also include the following:
 - 1) An alphabetized list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit;
 - 2) An alphabetized list of the full names, work locations, shifts, and job classifications of all individuals which the employer contends must be added to the proposed unit to make it an appropriate unit;
 - 3) A list of any individuals in the proposed unit that the employer contends are not eligible to vote;

An employer cannot raise any issue at the pre-election hearing about the appropriateness of the unit that is not included in its Statement of Position. If the employer fails to timely provide the list of employees in the proposed unit, it cannot contest any issue regarding the appropriateness of the unit or who is eligible to vote.

- In contrast to the procedure under the old rules, the Regional Directors, under the new rules, can wait until the election is over to determine a wide range of issues concerning individual employees' eligibility to vote, including whether certain employees are actually supervisors or whether a "small group" of employees should be excluded from the unit. Thus, even though an employer is required to identify all of these issues within seven days, the NLRB is under no obligation to resolve them until after the election. Given that front-line supervisors are often an employer's greatest asset in union organizing campaigns, a

Regional Director's decision to keep the status of these employees in limbo until after an election can severely hamper an employer's ability to effectively communicate with employees during the campaign.

Within **two business days** after the Regional Director issues an order directing an election, the employer must provide the union and the regional office with a list of all employees included in the unit, along with the employees' personal email addresses and personal cell phone numbers (if known). The employees have no right to prohibit the release of their emails or cell phone numbers. If the employer fails to meet this deadline, the NLRB can set aside the results of the subsequent election (if the employer wins) and rerun it.

The union has the right to use the employee list for 10 days before an election is held. However, the union can waive this right and if the union has been campaigning in secret for months or even years, it may well do so. If the union waives this 10 day period, the "earliest date practicable" for the election could be the third day after the pre-election hearing.

As we have advised in previous newsletters, these new rules make it imperative for employers to mount an ongoing anti-union organizing campaign. As an initial matter, management and supervisors must understand that they cannot ignore emails from unions and/or the NLRB (particularly if the employer has multiple locations). Employers must also ensure that management is adequately trained to communicate with employees about unions and should consider preparing draft union campaign materials to be ready to immediately respond to a union campaign if a petition is filed. Employers should also undertake a review of their existing job classifications (with particular emphasis on front-line supervisors) and assess the classifications that would make an appropriate bargaining unit.

Employers must also keep the lines of communication open with employees. Many times, employees talk to a union organizer because they feel that their employer is not listening to them. Of course, not all workplace complaints can be remedied and not all employees can be satisfied. But employees must feel that their workplace complaints will get a fair hearing by management and that, where appropriate, management will correct an unfair policy or stop a supervisor from playing favorites.

Most importantly, employers are well-advised to take steps now to address these issues. Employers that put off thinking about a union campaign until after a petition is filed, will find themselves playing defense and will have precious little time to meaningfully communicate with their employees about the disadvantages of unionization.

If you have any questions, comments or concerns about this NLRB Update, please contact your Weston Hurd lawyer.



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