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Proposed NLRB Rules Disadvantage Employers

*The Editor interviews **Joshua Waxman**, Partner, Akin Gump Strauss Hauer & Feld LLP.*

Editor: Tell us about your background.

Waxman: I'm a partner in Akin Gump's Labor and Employment Group in Washington, D.C. My practice focuses on complex class action labor and employment litigation and strategic advice.

Editor: On June 22, the NLRB issued a notice of proposed rulemaking (NPRM) with respect to representation-case procedures. Please describe the proposed rules and how they impact employers.

Waxman: Some of these new rules are very simple and noncontroversial; for example, they allow for electronic filing of the election petition by the union. However, others are much more significant and will have a dramatic impact on employers due to the fact that they are likely to drastically reduce the amount of time from when an election petition is filed by a union and when an election is ultimately held. This, in turn, sharply limits the ability of an employer to communicate its position concerning collective bargaining to its employees.

Considered together, the new rules will reduce the amount of time before an election is held to less than 20 days after filing of the petition. Currently, the median time from the filing of a petition to an election is 38 days, and 95 percent of the initial elections are conducted within 56 days of a filing of a petition.

Because the proposed rules cut the number of days from the filing of the petition to the actual time of the election, an employer is going to have little time to communicate its position concerning the union and collective bargaining. In most instances, the union has already been communicating with employees for a considerable period while it is gathering cards and support.

Joshua Waxman

The other impact of the rules is that they will reduce the opportunities for contested issues to be heard by the NLRB. The employer will be subject to very stringent initial pleading requirements. Previously, when an election petition was filed, an employer was required to return only a discretionary questionnaire concerning interstate commerce. Under the proposed rules, this discretionary commerce questionnaire has been converted into what is referred to as a "Statement of Position." Employers need to submit the Statement of Position to the union and the NLRB within seven days after the petition is filed. They must, within those seven days, set forth their position on virtually every issue that could be relevant with respect to the election, the appropriateness of the bargaining unit, the eligibility of voters, any voters that they would propose to be excluded from the union and the existence of any bar to the election.

Receipt of these materials from the NLRB could be the first time employers learn of the possibility of a petition, and, during that short seven-day period, they have to think of all possible issues that could be raised. If they don't raise them in the statement of position, they are precluded from not only offering evidence concerning those issues, but even cross-examining witnesses concerning those issues. For employers not familiar with the election process, this is a really tight time frame.

The *Excelsior* list is the list that employers are now required to provide to the NLRB and to the union of all of the employees that are in the proposed bargaining unit. Currently, they only have to turn over names and addresses. Under the proposed rules, the *Excelsior* list must also include the telephone numbers and email addresses for those individuals. Privacy concerns are raised, since an employer must now give out an employee's home telephone number and/or cell phone number and personal and/or work email address (in each case, the proposed rules are not clear as to which is required). Under the proposed rules, all this information would have to be turned over within only two days after the election date is set, rather than the current seven days. This means there is only a very short period to pull all this information together – which imposes a particularly heavy burden on smaller employers.

Complying with these requirements is particularly important because one of the grounds on which a union can challenge election results is errors in the *Excelsior* list provided by the employer. The tight time frame imposed on the employer to

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furnish such detailed information increases the possibility of the employer making an innocent mistake, but one that would allow the union to invalidate an election on purely technical grounds.

There are a couple of other points that I think are important. One is that, previously, when a petition was filed, the NLRB would set a hearing date, which might be about a week later. Under the proposed rules, once the Statement of Position is received, if the hearing officer concludes that the issues that would be dealt with at the hearing would only relate to less than 20 percent of the individuals in the proposed bargaining unit, then the hearing officer has the discretion not to hold a pre-election hearing and defer those issues until after the election is held.

Not resolving those issues until after the election creates a great potential for producing uncertainty over the entire election process. The voters might be misled over the scope of the unit, or they might make decisions based on a perceived common interest with other employees who are later found not to be appropriately within the unit.

Most significantly, the proposed rules could result in issues regarding supervisory employees not being resolved before the election. Supervisors have no legal right to participate in union activities, and if an employee who solicits a union authorization card is later deemed to be a supervisor, an election could be overturned. Similarly, conduct by an individual who is deemed to be a supervisor could be the basis for a union's objection and an unfair labor practice charge that would bind the employer in the post-election context. Therefore, not deciding the supervisor question before the election could have some serious ramifications. Yet the proposed rules could result in having elections first and resolving basic eligibility questions later, as opposed to resolving them in a pre-election hearing under the current rules.

Because there will likely be a greater period of time after the election before issues will be resolved, employers will be prohibited from making unilateral changes to their operations during a longer time period under the so-called "acts-at-its-peril" doctrine. If the election is upheld and a union is found to have represented the employees, then the employer's unilateral changes during this period will be deemed to be unlawful. This delay will just increase the period of uncertainty when employers are limited in their ability to run their businesses.

The final change that will have an impact on employers is that the NLRB's review of final decisions by regional directors becomes purely discretionary under the proposed rules. Currently, there is the ability for the parties to work together to enter into an election agreement that would then allow for eventual NLRB review. Frequently, employers and unions enter into such agreements in order to avoid hearings and contested issues knowing that they could still have NLRB review down the road, if necessary. Eliminating that as an option and making it only discretionary may ultimately discourage such agreements by the parties.

Editor: As you know, the DC Circuit recently vacated the SEC's Proxy Access Rule. Assuming the adoption of the rules as proposed, would you expect an appeal to the DC Circuit?

Waxman: It is likely that the parties will seek judicial review of the proposed rules to challenge their legality either in the DC Circuit or perhaps in a district court. Seeking a resolution of disapproval or limit on appropriations from Congress is another possible, but probably politically impossible, alternative.

It bears noting that the last time there was a judicial challenge to an NLRB rule was in 1991 when the U.S. Supreme Court unanimously upheld the NLRB's authority to issue a rule concerning hospital units in *American Hospital Association v. NLRB*. The Supreme Court's decision was not issued until almost four years after the rulemaking process began, so you can get a sense of how long these things can drag out.

In the Proxy Access case that you reference, the SEC had a few requirements to follow that were not applicable to the NLRB rules due to the fact that the SEC has a statutory obligation to determine as best it can the economic implications of its rules. The DC Circuit found that the SEC had not considered sufficient empirical evidence to support the Proxy Access Rule, in part because of its failure to adequately assess those implications.

Both the NLRB and the SEC are independent agencies, and there are some arguments that were successful in the Proxy Access decision that might have resonance here as well. The Board has rulemaking authority under Section 6 of the NLRA, but that authority is limited to rules that do not conflict with other provisions of the NLRA and that also comply with the Administrative Procedure Act's requirement that rules not be arbitrary or capricious.

Some of the principles established in the Proxy Access case may be relevant. For example, the NLRB's rules are based on the premise that there was a need to reduce the time period within which an election is held. That premise is not supported by the statistical data concerning the agency's performance. The NLRB is meeting its target goals for elections, and its rules offered no empirical evidence or any statistical analysis to support the it's conclusion that there was a need to have these elections quicker. The main issue with the time period for elections is not necessarily the time to hold them initially, but, rather, the time that it takes to resolve all post-hearing issues, and these rules do nothing to consider or fix that aspect of the problem. Indeed, the proposed rules do not contain any provisions to address blocking charges. Rather, the NLRB only sought comments on how it might deal with blocking charges in the future. Yet blocking charges, which are unfair labor practice charges that result in the dismissal or delay of an election petition, have a much greater impact on delaying elections.

There is also an argument that the rules are contrary to the statutory language of the NLRA in one specific respect, which is that the proposed rules defer a hearing in circumstances where the hearing officer determines that the hearing would only implicate 20 percent or less of the bargaining unit. But Section 9(c) of the Act says that, when the Board investigates an election petition, if it has reasonable cause to believe that a question of representation may exist, it shall provide for an appropriate hearing. Thus, there is a fairly good statutory argument that the provision of the rules that eliminates a hearing when it only affects 20 percent of the bargaining unit is directly contrary to the statutory language of the NLRA, and, therefore, the rules should be vacated.