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Message from the Chair

by Paul L. Kleinbaum

It's hard to believe 2015 has arrived. Best wishes to you and your families for a happy and healthy year!

As you probably know, there has been a change in the leadership of National Labor Relations Board (NLRB) Region 22. I attended the swearing in of the new regional director, David Leach, on Oct. 2. Then, on Oct. 22, the section sponsored a celebration honoring Mike Lightner, following his retirement as regional director in July, for his 41 years of service to the NLRB and to the labor-management bar in New Jersey. Retired Chief Justice James R. Zazzali, Wayne Positan, Gail Oxfeld Kanef, and Rich Fox spoke very poignantly of Mike's work with Region 22, the Labor and Employment Law Section, and the Sidney Reitman Employment Law American Inn of Court. We look forward to working with David Leach, and I know that Mike will continue his involvement with the section and the Region 22 Practice and Procedure Committee.

There is a legislative development in which the section has taken a lead role. By the very nature of the field of labor and employment law, there are not too many issues about which the labor-management and plaintiff-defense bars can agree. However, one such issue presented itself in 2014. The executive committee of the section unanimously approved a motion to seek legislation, similar to existing federal law, which would prohibit the double taxation of attorney fee awards. Section executive committee member Bruce McMoran and an associate, Justin Burns, drafted the legislation, which was approved by the New Jersey State Bar Association Board of Trustees. Bruce and Justin are now working with the Office of Legislative Services to fine tune the language for introduction. I am hopeful we will be able to report the introduction of a bill in the not-too-distant future.

The section continues to offer interesting and informative programs that address up-to-date issues on both labor and employment law topics, including issues pending before the courts and regulatory agencies.

Can You Handle a 'Quickie' Election?

by John C. Romeo and James J. La Rocca

Currently, less than seven percent of private-sector workers are union,[1] yet the National Labor Relations Board (NLRB) has managed to draw quite a bit of media attention the last two years as it enters traditionally non-union settings. By now, we are all familiar with the NLRB's criticisms of employment policies that discourage employees from doing such things as smearing a company's reputation,[2] and protecting employees for merely 'liking' a colleague's rant about an employer's tax-withholding error.[3] And, don't forget the NLRB regional director's decision concluding that certain football players at Northwestern University are better described as employees rather than students, opening the door to unionization among college athletes.[4]

While all of this has been newsworthy as the NLRB ventures into previously unchartered territories, one of the most notable actions by the NLRB in the last two years is its reintroduction of amendments to the current union election rules,[5] which look to drastically reduce the time that passes between the filing of an election petition and the election itself. The practical consequence of these 'quickie' election rules is that employers will have significantly less time than they currently do to provide employees with information about unions before elections take place, thereby, the authors believe, not only impeding fair and free elections, but also increasing unions' already favorable chances of winning elections.[6]

The authors believe New Jersey practitioners should be wary of the NLRB's attempts to help unions enter its workforces, and the quickie election rules in particular. Unions already have a well-established infrastructure in New Jersey and its surrounding states, as New Jersey, New York, and Pennsylvania account for approximately one-quarter of all union workers in the United States.[7]

This article briefly outlines the history of the quickie election rules and some of its more significant changes, with which traditional labor lawyers should be well versed, especially in-house counsel and their outside attorneys in New Jersey. The rules are scheduled to take effect April 14, 2015.

The Quickie Election Rules' Prolonged History

An article about quickie elections first appeared in this publication several years ago, shortly after the NLRB issued then-'final' quickie election rules in Dec. 2011.[8] A lot has happened since then, and much more is to come.

Shortly after the NLRB first issued final quickie election rules, numerous business groups, including the United States Chamber of Commerce, filed suit against the board challenging the process by which it issued the rules, as well as the substance of the rules.[9] In May 2012, a federal district court declared the rules invalid because only two of a minimally required three board members were present when the NLRB passed the rules.[10] The NLRB appealed the district court's decision, only to later withdraw the appeal in the wake of numerous decisions by federal appellate courts concluding that the board did not have the power to take any action since Aug. 27, 2011. This was the result of President Barack Obama's purported 'recess' appointments of board members, which violated the Constitution.[11] Notably, while the NLRB's appeal regarding the quickie election rules was pending, all five NLRB seats were filled pursuant to constitutional mandates.

In Feb. 2014, with a full, validly comprised board, the NLRB again proposed the quickie election rules, which were identical to the rules the NLRB first proposed in Dec. 2011.[12] In April 2014, the board accepted public comments and held a public hearing on the proposal.[13] And, on Dec. 15, 2014, the NLRB published final rules, which are scheduled to take effect April 14, 2015.[14]

The final rules are far from the end of this story. Because they largely mirror their predecessor, the business community almost certainly will institute legal action again, this time focusing its challenge on the rules' substance for, among other things, violating employers' First Amendment and statutory rights to communicate with their employees about unionization. Additionally, Congress could oppose the rules by, for example, introducing legislation (subject to the president's veto power).

The New Rules

Businesses that do not have labor strategies addressing unionization in place are extremely vulnerable to unionization under the new rules. The following table[15] summarizes some of the more significant changes.

Most notably, the new rules drastically reduce the time between the filing of a petition and the election, which would make it extremely difficult (if not impossible) for companies to effectively communicate with employees to ensure they cast informed votes. Under the NLRB's current election rules, there typically is a six- to eight-week period between the filing of an election petition and the election. Although not ideal, many employers often address unionization with their employees only after receiving the petition. The communication is vital because unions usually begin communicating with employees weeks or months before a business receives a petition, which leaves employees with an incomplete and one-sided understanding of unionization until they hear from the company. The new rules reduce time between the filing of the petition and the election, likely to 15 to 20 days. It seems axiomatic that employers will have little chance of winning elections under the proposed rules, given the latest statistics indicate unions win most elections under the current rules.

Another key difference is that the new rules will limit a business's ability to assert legal arguments in opposition to an election, particularly if it has not considered the arguments it may raise before receiving an election petition. Under the new rules, a company will need to submit a position statement containing all legal arguments upon which it intends to rely within days of receiving a petition. There are a host of legal arguments available to an employer that it easily could miss with this short turnaround time unless it has analyzed the issues ahead of time.

CURRENT PROCEDURES	NEW PROCEDURES
Neither the parties nor the NLRB can transmit important election documents, including petitions, electronically.	The parties and the NLRB can transmit election petitions and related documents electronically.
It is difficult to predict when the NLRB will hold pre- and post-election hearings.	The NLRB regional director sets a pre-election hearing eight days after the filing of an election petition (subject to limited exceptions). An employer is required to file a position statement by noon the day before the pre-election hearing that must set forth its position on legal issues, which, if not raised, could be waived. This statement must include prospective voters' names, job classifications, shifts, and work locations.
Parties can litigate voter-eligibility issues before the election.	Hearing officers and regional directors can limit or prevent litigation over voter-eligibility issues before the election.
Parties provide a list of voters and their home addresses seven days after the NLRB directs an election.	The voter list must include not just home addresses, but email addresses and phone numbers, if available, and it must be produced two business days after the NLRB directs an election.
The NLRB decides most post-election disputes as of right.	The NLRB has discretion to decide whether it will review post-election disputes.

Conclusion

Provided the quickie election rules survive legal challenge, they could spur a wave of unionization in New Jersey and its surrounding states. In the meantime, companies should consider developing labor relations strategies designed to minimize their risk of unionization to neutralize the threat of these quickie election rules, which are scheduled to take effect in April. Importantly, these strategies also can help drive companies' bottom lines by helping them attract and retain the most talented employees and increase morale and productivity, which—unions aside—just makes good business sense. ■

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Endnotes

1. U.S. Dep't of Labor, Bureau of Labor Statistics, News Release: Unions Members—2013, Jan. 24, 2014, *available at* http://www.bls.gov/news.release/pdf/union2.pdf.
2. *See Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (Sept. 28, 2012) (finding employer's courtesy rule prohibiting conduct that injures its reputation to be unlawful).
3. *See Three D, LLC*, 361 NLRB. No. 31 (Aug. 22, 2014) (holding that clicking the 'like' button on Facebook can constitute protected conduct).
4. *Northwestern Univ. & Coll. Athletes Players Ass'n*, No. 13-RC-121359 (N.L.R.B. Region 13 March 26, 2014) (Decision & Direction of Election), 2014 NLRB LEXIS 221, *available at*, http://www.nlrb.gov/case/13-RC-121359, *review granted*, 2014 NLRB LEXIS 298 (April 24, 2014).
5. 79 Fed. Reg. 240 (Dec. 15, 2014); National Labor Relations Board, Office of Public Affairs, NLRB Issues Final Rule to Modernize Representation-Case Procedures, Dec. 12, 2014, *available at* http://www.nlrb.gov/news-outreach/news-story/nlrb-issues-final-rule-modernize-representation-case-procedures.
6. In 2013, unions won 60 percent of union elections. National Labor Relations Board, Election Report for Cases Closed (2013), *available at* http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1680/FY2013%20Election%20Report.pdf.
7. News Release: Unions Members—2013, *supra* note 1.
8. Stacey A. Cutler and Kathleen L. Kirvan, Quickie Election Rule: Not So Quick!, *N.J. Lab. & Emp. L.Q.*, May 2012, at 35.
9. *Chamber of Commerce of the U.S. v. NLRB*, 879 F. Supp. 2d 18 (D.D.C. 2012).
10. *Id.*
11. *See, e.g.*, *NLRB v. Enter. Leasing Co. Se., LLC*, 722 F.3d 609 (4th Cir. 2013); *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203 (3d Cir. 2013); *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).
12. 79 Fed. Reg. 10747 (Feb. 26, 2014); National Labor Relations Board, Office of Public Affairs, NLRB Proposes Amendments to Improve Representation Case Procedures, Feb. 5, 2014, *available at* http://www.nlrb.gov/news-outreach/news-story/national-labor-relations-board-proposes-amendments-improve-representation.
13. *NLRB Proposes Amendments to Improve Representation Case Procedures*, *supra*, note 12.
14. 79 Fed. Reg., *supra*, note 5.
15. *See* John C. Romeo and James J. La Rocca, Is Your Company Ready for the Labor Board's 'Quickie' Election Rules?, *N.J. Corp. Counsel Ass'n Newsl.*, April 2, 2014, *available at* http://news.acca.com/accnj/issues/2014-04-02/2.html.

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