

**Recent NLRB Action Encourages Unionization**  
**Are you prepared to respond?**

*Posting Requirements*

The National Labor Relations Board ("Board") has recently issued a Final Rule that will require employers to notify employees of their rights under the National Labor Relations Act ("NLRA") beginning **November 14, 2011**. **On this date, employers will be required to post the NLRA employee rights notice where other workplace notices required under other federal laws are typically posted.** In addition, employers who normally post notices to employees regarding personnel rules or policies on an internet or intranet site must post the NLRA notice there as well. This new posting requirement applies to all private sector employers subject to the NLRA, which excludes agricultural, railroad, and airline employers.

Specifically, the notice will state that employees have the right to act together to improve wages and working conditions, to form, join, and assist a union, to bargain collectively with their employer, and to refrain from any of these activities. It also provides examples of unlawful employer and union conduct and instructs employees how to contact the Board with questions or complaints. **The Board will provide copies of the required notice on request at no cost to employers beginning on or before November 1, 2011.** The notices can be obtained either by contacting the Board at its headquarters or its regional, sub-regional, or resident offices or by downloading the notice from the Board website, [www.nlr.gov](http://www.nlr.gov). As of this publication, the form notice was not yet available.

Failure to abide by this new Board posting rule may be treated as an unfair labor practice under the National Labor Relations Act. The Board has stated that it expects that, in most cases, employers who fail to post the notice are unaware of the rule and will comply when requested by a Board agent. As such, the unfair labor practice case will typically be closed without further action; however, the Board also may extend the six-month statute of limitations for filing a charge involving other unfair labor practice allegations against the employer. Finally, if an employer knowingly and willfully fails to post the notice, the failure may be considered evidence of unlawful motive in an unfair labor practice case involving other alleged violations of the NLRA.

For further information on this new posting requirement, visit the Board website at [www.nlr.gov](http://www.nlr.gov).

*Proposed Election Rules*

On June 21, 2011, the Board proposed reforms of the procedures it follows before and after conducting a secret ballot election to determine if employees wish to be represented for purposes of collective bargaining. The Board invited comments on the proposal through a public hearing in July and through a 60-day period for written comments. The proposed amendments are intended to reduce unnecessary litigation, streamline pre- and post-election procedures, and facilitate the use of electronic communications and document filing. Specifically, the Board wants to tighten the process by ensuring that employers, employees, and unions receive needed information sooner and by delaying litigation over many voter-eligibility issues until after workers vote on whether to unionize.

According to the Board, 1,610 unionization elections were held in fiscal year 2009, with unions winning 63.8 percent of them. The median amount of time from the filing of a petition for an election to the actual balloting was 38 days in 2008. The average time was 57 days. The proposed rules would substantially shorten the time period between the filing of a petition for a union-representation election and the actual election. Although the Board has made no exact calculation of how long the shortened process will take, it is

estimated that the new process will reduce this period to a mere 10-20 days. This is significant to employers in that they will not have as long to educate and make their case to employees following the filing of the representation petition. In short, election campaigns will be significantly abbreviated.

In addition, the proposed rules affect the initial process of deciding who gets to vote in the secret ballot election. Most elections begin with a petition from the union showing interest among employees. The proposed rules not only allow this petition to be filed electronically but also allow electronic distribution of Board materials concerning elections as soon as the petition is filed.

Next, the proposed rules require the Regional Director to set a pre-election hearing to begin seven days after a hearing notice is served. This significant change in the proposed rules shortens the time period for a hearing on who is eligible to vote, requires the parties to set out their positions before any evidence is presented, and requires employers to provide names and other personal contact information (including email addresses) of every employee who would be included in the voting if the union prevailed in the hearing. Through this change, the Board seeks to avoid election delays by deferring a common form of litigation in which companies argue over which employees are allowed to vote until after the election. In contrast to the current rules, a party dissatisfied with the results of the hearing can no longer seek immediate review from the Board before employee names are given out and an election is conducted; instead, parties are only permitted to seek review of all Regional Director rulings through a single, post-election request.

Based on the record created at the hearing, the Regional Director will determine whether a question of representation exists and, if appropriate, will direct an election, specifying its type, date, time, and place. The employer then must post a final notice to employees of the election for at least two days before the election. The employer must also provide a final list of eligible voters to the union, including phone numbers and email addresses. If a voter's eligibility is disputed, he or she is permitted to vote under challenge. Finally, on the date stated in the direction of election, a secret-ballot election will be held, the ballots counted, and a tally prepared. Within seven days of the tally of ballots, a party may file objections to the election or conduct affecting the election results along with its evidence of such conduct. If necessary, the Regional Director will resolve the objections in a hearing commencing fourteen days after the tally.

Although no final rules have yet been issued on these proposals, it is important that employers are aware and mindful of these potential significant changes to the union election process. If such changes are implemented, it will be important for employers to be proactive in establishing a plan of response in the event the secret ballot election process is initiated within their companies. Given the proposed short time frame between an election petition and the actual election (10-20 days), waiting to see if you ever receive a petition may be too late to effectively convey the company's position against the union and convince your employees to vote "no."

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