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Understanding and Preparing for New Union Representation Procedures

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Richard L. Samson, Esq.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

155 N. Wacker Drive

Suite 4300

Chicago, IL

Richard.samson@ogletreedekins.com

312/558-1229

On December 15, 2014 the National Labor Relations Board issued its new representation case rules after many years of delay and after having received voluminous comments from stakeholders affected by union representation elections. The rules are effective April 14, 2015 and represent the most significant and substantial changes to the handling of union representation petitions in decades. Set forth below is a summary of those changes with reference to the regulations that are being modified. For general reference, also attached is a summary of the legal guidelines (or “Do’s and Don’ts”) concerning union organizational drives.

**Summary of Key Provisions of the NLRB’s Representation Case Procedures
Final Rule**

1. Introductory Summary Purpose

- Objective to protect full freedom of association, self-organization and designation of representatives of our own choosing
- Majority claims to retain essentials of current R-case procedures

- Remove unnecessary barriers to a
 - Fair
 - Expeditious resolution of R-case
- Simplify procedures
- Codify best practices
- Make process more transparent
- More uniform
- Eliminate duplicative and unnecessary litigation
- Reduce unnecessary delay
- Simply procedures for NLRB review
- Modernize communication and document related rules

2. Effective 120 days after publication

- Publication date: 12/15/2014 + 120
- Effective 4/14/15

3. 102.60 Petitions

- Petitions may (not mandatory) be filed electronically, no need to file the original with the Region
- Upon filing, Petitioner must serve a copy of petition “on all other interested parties” (to ensure earliest possible notice of petition to all interested parties)
- With service of petition, petitioner must also serve
 - Expanded Form 4812 which describes the NLRB’s representation case procedure
 - Statement of Position form (to include a request for commerce information – Form 5081 – Questionnaire on Commerce Information)

[If union files petition by fax, must still file a paper copy to ensure legibility]
- Region will continue to re-serve a copy of petitions filed electronically after docketed

4. 102.61

- Contents required in petition modified slightly
- Petitioner must designate the individual who will serve as petitioner's representative (e.g. for service of papers)
- Petitioner must now state:
 - Type of election requested (e.g. manual, mail, or mixed)
 - Date(s)
 - Time(s)
 - Location(s)
- Petitioner must file showing of interest with petition (eliminating current 48 hour requirement) (if filed electronically or by fax, petitioner must also transmit original showing of interest documents to region in order for filing to be proper)(if petitioner files showing of interest electronically or by fax, petitioner has 2 days to file original documents containing handwritten signatures)(reference to allowing electronic signatures as evidence of showing of interest if the General Counsel deems doing so practical – no obligation to file original in that context)

[Majority opens door for GC to find electronic signatures on a showing of interest document acceptable and finds doing so consistent with current regulations]

[Majority directs GC to promptly determine whether, when and how electronic signatures as evidence of showing of interest can be accepted. GC to issue guidance on this issue]

5. Mandatory Posting of Notice of Petition for Election

- 102.63(a)(1)
- Union will file and serve petition (together with description of procedures, Statement of Position form and request for commerce data)
- Region will also serve
 - Petition;
 - Description of Procedures in R-case;
 - Statement of Position form;
 - Notice of Hearing; and

- Revised Form 5492 – “Notice of Petition for Election” (as revised) (not “Initial Notice”)
- Similar to current form 5492 (provides employees with notice the petition has been filed, name of petitioner, type of petition, proposed unit, basic procedures, summary of basic rights of employees and the NLRB’s website address)
- Posting will be mandatory (unlike current Form 5492 which is permissive)
- Must be posted in conspicuous places
 - Employers who “customarily communicate” with employees using electronic forms of communication will be required to distribute this notice electronically, p. 289
- Post Notice of Petition for Election
 - “Employer shall post”
 - Within 2 business days after service of the Notice of Hearing (subject to adjudication of exceptions allowing longer period)
- Failure can be a valid basis for objection
- Maintain posting until petition dismissed, withdrawn, or the Notice of Petition is replaced by the Notice of Election

6. 102.62

- Under current procedure, Regional Director’s resolution of pre-election disputes (e.g. bargaining unit composition) subject to discretionary review by NLRB under Request for Review process
- Regional Director’s resolution of post-election disputes (e.g. objections and determinative challenges) currently subject to mandatory review.
- Under amended rules if parties enter into a Stipulated Election Agreement, post-election disputes (determinative challenges and objections) will now be resolved by Regional Director subject only to discretionary NLRB review
 - Ostensibly to unify resolution of pre and post-election disputes and making NLRB review discretionary in both cases
- Final rule expands information to be included in the Excelsior List
 - Makes the Excelsior list due sooner

- Excelsior list now due in 2 business days (not 7) after approval of election agreement or issuance of direction of election (subject to extension by agreement of the parties or by the Regional Director based extraordinary circumstances)
- Employer must furnish list to
 - Regional Director; and
 - To non-employer party (i.e. the union directly)(amended rules eliminate process of employer sending list to region who then sends list to the union)
- Employer must file with the Regional Director a Certificate of Service when the Excelsior list is furnished to the union
- Excelsior list now must include each eligible voter's
 - Full name (current rule)
 - Home address (current rule)
 - Personal (not work) email address (if available)
 - Available home and personal cellular telephone numbers (if available)
 - If employer does not maintain personal email, home/cell phone, it does not need to ask employees for them
 - If employer has personal email and phone/cell for some, not all, employees employer must provide that information for those employees it does possess
 - Not work email or work phone number (NLRB majority left open the ability to add this requirement after further study, by adjudication or rule making)
 - Work locations
 - Shifts
 - Job classifications
- Plus same information (in separate section) for individuals voting by challenge, p. 249.

[The final rules describes the above as a minimum to be produced leaving open the possibility future Boards could require more or different forms of contact information (based on peculiar circumstances) by adjudication or rule making]

[Examples could include social media contact information – Facebook, Instagram, Tumblr]

[Board majority reviews but rejects articulated privacy concerns – e.g. harassment. If these problems arise, we will provide an appropriate remedy.]

[Majority rejects opt out system or the idea of a NLRB hosted portal such that personal contact information is not given to non-employer party]

- NLRB ostensibly addressed privacy concerns by placing restrictions on how this contact information may be used by the non-employer
 - May not use outside representation case proceedings
 - NLRB proceedings arising from it
 - Related matters

- If there is misuse, NLRB will provide an appropriate remedy

[Majority refused to specify remedy leaving a determination of that issue to case-by-case adjudication.]

- List must be produced to the union and filed with the region in an electronic format (unless employer certifies it does not have capacity to do so)
- Employer must also electronically serve the list directly on other parties at same time it files list with NLRB.
 - List to be in searchable format if feasible
 - List must also be provided to all parties and NLRB in same format.
- Majority declines to adopt requirement that union destroy the voter list information at any set period of time
- Date of election: election shall not be scheduled for a date earlier than 10 days after the date by which the voter list must be filed and served
 - Unless requirement waived by party entitled to list

7. 102.63

A. Representation Hearing Date

- Hearing will typically be set to open 8 days after service of the notice of hearing (Regional Director to serve notice as “soon as is practicable”)
 - Unless case presents unusually complex issue
 - If notice of hearing served on same day petition is filed, hearing will open on the 9th day

- Regional Director may postpone beyond 8th day without motion if Regional Director identifies complex issues
- Regional Director may also postpone opening of hearing for 2 days based on showing of “special circumstances”) (10 days after service of notice)
- Regional Director may postpone for longer than 2 days based on “extraordinary circumstances”

B. Statement of Position

- File with Regional Director and serve on all parties such that pleading is received by noon business day before hearing set to open
- Due at noon on the business day before the hearing is set to open if set 8 days from service of hearing notice (Regional Director may require Position Statement to be filed earlier than day before if hearing set to start more than 8 days after service of notice of hearing) (Majority says “parties will have at least 7 (really 6.5) days’ notice to prepare Statement of Position”)
- Purpose of Statement of Position
 - Facilitate entry into election agreement
 - Narrow the scope of any hearing

C. Statement of Position: Content

- If employer takes the position unit proposed by union not an appropriate unit, employer will be required to state in the Position Statement:
 - The basis for that contention (state precise objections to appropriateness of the proposed unit)
- Then state
 - Classification;
 - Locations; or
 - Other employee groupings that must be added or excluded from the proposed unit to make the unit AN appropriate unit

[Majority did not adopt requirement in NPRM that employer state “most similar” unit that it concedes is appropriate or to provide information about the employees in that unit]

[Majority claims this process will assist parties in identifying issues that must be agreed to or resolved by the Regional Director]

- If employer does not take a position on appropriateness of requested unit, petitioner would be allowed to present evidence on that point (without opposition from the employer) (employer cannot offer evidence or cross-examine witnesses regarding that issue)
 - Regional Director must direct election in an appropriate unit.
- In Statement of Position, employer must identify any individuals in classifications in the petitioned for unit whose eligibility to vote the employer intends to contest
 - State basis for such contention
- Employer must describe in the Position Statement
 - All other issues Employer intends to raise at the hearing

D. Statement of Position: Content Re. Election Details

- In Position Statement, employer must also state a preference regarding:
 - Type of election (manual, mail, or mixed);
 - Date(s);
 - Time(s);
 - Location(s).

E. Amended Statement of Position

- Acknowledges Regional Director may allow amendment to Position Statement for “good cause.”

F. Issue Preclusive

- Any issue not identified in Statement of Position... will be waived except
 - Board’s statutory jurisdiction
 - Can also challenge eligibility of individual voter at poll

G. Initial Employee Lists

- Employer must file with Position Statement

- List containing
 - Full names;
 - Work locations;
 - Shifts; and
 - Job classifications.
- Employer must first file a list containing this information for employees in the unit proposed by the union
- If employer contends that unit is inappropriate, employer must also provide this information for the employees the employer contends must also be included or excluded to make unit an appropriate unit

[Majority did not adopt initial proposal that this information be made available in 2 days or that contact information be included in the list provided to the Region]

[Region will not serve Election Notice electronically]

- Failure to provide this information will limit the employer's ability to litigate certain issues

8. 102.64 Conduct of the Hearing

A. Purpose of pre-election hearing

- Citing 9(c)
- To determine if there is a question of representation
- Has a proper petition been filed?
- Is the requested unit appropriate for collective bargaining
 - An appropriate unit
 - Not most appropriate
 - Or largest appropriate unit
- If at hearing, those questions answered in affirmative
 - Regional Director should direct an election

[Generally, not necessary to resolve

- Disputes concerning eligibility
- Or inclusion of individual employees
- To determine if a question of representation exists.]

[Such disputes can be raised by challenges during the election

- And resolved after the election
- If determinative.]

[Final rule does not adopt the 20% rule – Regional Director has full discretion to resolve or not resolve disputes concerning individual eligibility to vote. Hearing officer can exclude such evidence as not being relevant to a question of representation.]

[Final rule does not adopt “genuine dispute of material fact standard. Instead, hearing officer must develop a full and complete record. But final rules give more clear guidance into what is/is not necessary to develop a “full and complete record.”]

B. Hearing to continue from day-to-day until completed (absent extraordinary circumstances)

- To be decided by Regional Director
- Based on extraordinary circumstances that warrant otherwise

9. Section 102.65

- No change to standard for requesting Special Permission to Appeal to Regional Director a decision made by a Hearing Officer
- Can request review of DD&E prior to the election
- No automatic stay
- Motion to intervene – decided by Regional Director

10. Section 102.66 – Introduction of Evidence at a Hearing

- Maintains right to a hearing and right to present evidence of the “significant facts that support the parties contention”
 - Did not adopt “genuine dispute as to material fact standard”

- But hearing officer can reject evidence that is not “relevant to the existence of a question of representation”
 - Typically resolution of issues of individual eligibility and unit inclusion not necessary to determine if there is a question of representation
- Final rule does not adopt the 20% rule (which would have required exclusion of evidence pre-election when dispute impacts employees that constitute less than 20% of the unit)
- Regional Director must determine that proposed unit is appropriate to find that a question of representation exists
- But in most cases, that will not require resolution of individual eligibility and inclusion issues
 - Individual or group covered by inclusion/exclusion terms
 - Employee included in statutory exclusion (supervisor, guard)
- Exception – professional employees (must be resolved prior to the election if potential for a mixed unit exists)
- Same if employer contends different eligibility formula should be used
- Duty of hearing officer
 - Obtain a full and complete record
 - To allow the Regional Director to determine
 - If a question of representation exists
 - Allow parties to present evidence of
 - Significant facts relevant to the existence of a question of representation
- If a question of representation exists
 - Regional Director must direct an election to answer the question
 - Certify the results
- Conversely, hearing officer acting on direction of Regional Director can (permits)
 - Prevent the introduction of evidence
 - Not needed

- To determine if a question of representation exists
- Specifically, individual eligibility and inclusion issues (which do not have to be resolved pre-election) (whose resolution post-election, if necessary, will prevent unnecessary litigation)
- NLRB does not have to decide all voter eligibility issues pre-election
- NLRB is not required to allow pre-election litigation of issues that will not be decided pre-election
- Hearing officer, at direction of Regional Director, has discretion to decide which issues to resolve pre-election and which issues to defer to after the election
 - Without 20% limit
 - Which means hearing officer can decide to take evidence or resolve pre-election issues that impacts less than 20% (or not)
 - Majority also says in fn. 373 Regional Directors should typically not litigate pre-election issues involving less than 20%
 - But also refuse to take evidence on issues that impact 20% or more
 - General rule, however, is not to allow 25% of unit to vote by challenge
- NLRB says, however, that individual eligibility disputes ordinarily need not be litigated at the pre-election hearing or resolution in a direction of election
- Impact, more voters will vote subject to challenge
- Majority rejected argument that doing so will negatively impact voter turnout or disturb the secret ballot process
- Notice of election will inform those employees eligible to vote by challenge of that fact
 - Will invite them to contact board agent with question about that process

11. The Hearing Process

- Now petitioner must prepare, file and serve a Statement of Position due noon on business day before date hearing is set to start
- Other parties must respond to each issue raised in the Statement of Position
 - Presumably at the start of the hearing

- Hearing officer shall not receive evidence or any issues as to which the parties have not taken adverse positions
- Issue preclusion – parties are precluded from raising issues that they did not
 - Raise in their Statement of Position
 - Or in response to a Statement of Position
- Can raise new issues only on showing of “good cause”
- Exception – statutory jurisdiction
[Final rule does not adopt the reference to “joinder”]
- Offers of proof – after both parties have stated position on issues, hearing officer may solicit offers of proof (subject to HO’s discretion)
 - Final did not adopt mandatory process contained in NPRM (which would have required an offer of proof in each case)
[Offer of proof – oral or written statement identifying
 - Each witness
 - Summary of each witness’ testimony]
 [If offer of proof rejected and Regional Director finds evidence insufficient to sustain proponent’s position, evidence shall not be accepted]
- Final rules note that all hearing officers’ decisions are made at Regional Director’s direction (to avoid objection to)
- Options
 - Election agreement = No Hearing
 - No election agreement Hearing (pre-election)
 - Hearing must be appropriate

12. Voter challenge

- Even if party does not raise issue in Position Statement
 - May still challenge that voter at the polls

- Preclusive impact only at pre-election hearing
- Exception, cannot challenge voter resolved by Regional Director decision

13. Subpoena

- Final rule did not adopt proposal to clarify that 5 days for motion to quash is a maximum not a minimum
 - Still NLRB's position
 - But to be resolved by practice

14. Close of Hearing

- Prior to close of hearing
- Hearing officer will inform parties about
 - Obligations if Regional Director directs an election
- Hearing officer will also solicit parties' position on
 - Type
 - Date
 - Times
 - Location(s)
 - Of election
- Subject to Regional Director's discretion to make a final decision
- Will allow Regional Director to include those details in the direction of election

15. Post-Hearing Briefs

- Not a matter of right
- Granted by Regional Director based on Regional Director's discretion
 - May permit
 - Or not

[Not a hearing officer decision]

- If brief not allowed, parties will be allowed to make an oral argument
- Have right to request review of Regional Director's decision not to allow a post-hearing brief

[Final rules downplay significance of limiting right to post-hearing brief by noting that parties can file a pre-hearing brief or brief before the close of the hearing]

- If briefs allowed, Regional Director will decide what subjects will be briefed and when the briefs should be filed

16. 102.67

- A. Regional Director can no longer transfer R-case to NLRB for decision
- B. Notice of Election – if Regional Director defers deciding issues of eligibility/unit inclusion until after the election, the Notice of Election shall explain
 - Individuals in question
 - Not included or excluded
 - Will vote subject to challenge
 - Explain procedures for resolving (or not) that challenge

17. Direction of Election – Reason to Follow

- Final rule did not adopt concept in NPRM that would allow Regional Director to issue direction of election with reasoning to follow so long as that issued before election
- Now must issue Decision and Direction of Election together
- Decision and Direction of Election will also “ordinarily” specify the election details
 - Type
 - Date(s)
 - Time(s)
 - Location(s)

18. Date of Election

- If Regional Director directs an election (so arguably not applicable to election agreements)

- Regional Director “shall schedule the election for the earliest date practicable consistent with these rules.”
- Regional Director should still consider operational considerations and preferences of parties in making this decision
 - e.g. don’t set election for date when evidence indicates attendance will be low
[Need to evaluate attendance issues ahead of hearing]
- But election date is to be determined in the Regional Director’s discretion
- Final rule eliminates the 25 to 30 day waiting period after the DD&E before the election date can be set
 - so election can be scheduled “as soon as practicable” after DD&E issues
 - DD&E + 2 +10 = DD&E + 12
 - Petition + 8 + 13 = **21**

19. Transmission of Direction of Election to Parties

- DD&E and Election Notice will be transmitted ELECTRONICALLY to all parties (if email address provided to region)
 - i. If not, then by fax
 - ii. And if no fax number available, by overnight mail
- Posting of Notice of Election – Employer must post Notice of Election “in conspicuous places” including where notices to employees are customarily posted
- Employer must also distribute Notice of Election to employees electronically if “employer customarily communicates with its employees electronically.” This includes by email, post on internet site, etc. (if employer uses those electronic systems). Final rule also says if employer customarily uses personal email to communicate with employees, should also send Notice of Election to that personal email address, p. 397.
- Employer must post Notice of Election 3 working days prior to the election (which is current practice) (final rule did not adopt NPRM which had proposed reducing this posting requirement to 2 days)
- The RD will not transmit the Notice of Election directly to the employees in the bargaining unit (as the NPRM has proposed)

- Failure to post and distribute the Notice of Election is grounds for setting aside an election based on valid objections
- Union will also be able to send Notice of Election to employees using the personal email address they will receive in the voter eligibility list

20. Voter List

21. Request for Review

- Can file a Request for Review of any decision made by a Regional Director that involves an action delegated to him/her under the statute
 - Can file at any time
 - Up to 14 days after the final disposition of the proceeding by the RD
- Can file the Request for Review immediately after DD&E issues
 - Or can wait until after the election (there is no waiver)
- Creates more latitude to file Request for Review
- Election is not stayed absent an order from the NLRB
- Ballots cast and counted while Request for Review is pending unless the NLRB orders the election stayed

22. Section 102.68 – Record in Pre-Election Hearing

23. Section 102.69

- OBJECTIONS – Party must file Objections (which must still contain a short statement of the reason for the objections) and file SIMULTANEOUSLY a written OFFER OF PROOF with evidence supporting the objections
 - Must SERVE objections but not the Offer of Proof on the other party
- Objections must be filed 7 days after the Tally of Ballots issues (no change)
- Final rule eliminates second 7-day period during which to file the supporting evidence
- Party can move the RD for additional time to file the Offer of Proof based on a showing of “good cause”

24. Procedure for Handling Objections and Determinative Challenges, p. 419

- Final rule codifies RD's discretion to resolve Objections and Determinative Challenges without a hearing if RD finds they raise no substantial and material factual issues
- If a hearing is warranted, held before a hearing officer
 - i. Both issues will be litigated
- After hearing, Hearing Officer will issue a Report and Recommendation
- Exceptions to Report and Recommendation must be filed within 14 days after issuance of the Report and Recommendation
 - i. The RD decides the exceptions
- If no exceptions are filed, RD will decide the matter upon the expiration of the 14 day period
- NLRB review of the RD's resolution of post-election disputes is
 - i. Discretionary
 - ii. Not a matter of right
- In case when union wins, NLRB will NOT resolve nondeterminative challenged ballots post-election
 - i. Can attempt to resolve by bargaining
 - ii. File a UC if bargaining does not work

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