

NLRB Notice Posting Requirement and New Representation Election Rules

May 16, 2012

Notice Posting Requirement

On August 25, 2011, the National Labor Relations Board (NLRB) issued a rule requiring essentially all private employers to post a notice informing employees of their rights under the National Labor Relations Act (the Act).

Two recent Court actions have developed regarding the notice posting. On April 13, 2012, the U.S. District Court for the District of South Carolina held that the NLRB did not have the statutory authority to require the notice posting. That decision reached a different conclusion than an earlier District of Columbia District Court opinion and set up a split in the case authority. Additionally, on April 17, 2012, the U.S. Court of Appeals for the District of Columbia ordered an expedited review and prevented the NLRB from implementing the rule until the court issues an opinion.

When the federal appellate court in DC granted the injunction, the April 30, 2012, posting deadline was suspended. The court ordered that the appeal would be expedited, scheduling oral argument for September 2012. Therefore, the notice posting requirement is now suspended until the DC Court of Appeals issues its decision on the appeal after the oral argument in September. Further, the South Carolina case is being appealed by the NLRB, which will involve additional litigation, likely pushing any implementation date even further into the future.

Election Rule Changes

On December 22, 2011, the NLRB issued final rules designed to reduce delays and litigation relating to representation elections. The rules became effective April 30, 2012. The changes include seven primary amendments to the election rules. They include:

1. Amending board regulations to state that the purpose of pre-election hearings described in Section 9(c) of the National Labor Relations Act is to determine whether a question concerning union representation exists that should be resolved in a secret ballot election.
2. Giving NLRB hearing officers' authority to limit the presentation of evidence in such a hearing to genuine issues of fact material to the existence of a question concerning representation.
3. Providing for post-hearing briefs with the permission of a hearing officer, rather than as a matter of right.
4. Amending Section 102.67 and Section 102.69 of the board's rules to eliminate a party's right to seek board review of regional directors' pre-election rulings while allowing parties to seek post-election review of such rulings.
5. Eliminating language in NLRB's current statement of procedure that recommends a regional director not schedule balloting within 25 days of directing an election.
6. Amending Section 102.65 of the board's rules to provide that requests for special permission to appeal a regional director's pre-election ruling will be granted only in extraordinary circumstances.
7. Amending board rules to make NLRB review of post-election disputes discretionary.

However, on May 14, 2012, the U.S. District Court for the District of Columbia ruled that the NLRB did not have a required quorum when the final rule was voted on, thereby invalidating the election rules. The NLRB has suspended implementation of the new rules, and is currently considering its next step. It is anticipated that the NLRB may re-vote on implementing the rule in the future, although there is litigation pending on the validity of the recent recess

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appointments to the NLRB, which further complicates future action regarding the rule changes. Stay tuned for further developments as they occur.

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