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PERSPECTIVE

Employers must prepare to be ambushed by unions

By **Marta Fernandez** and **Patricia DeSantis**

The National Labor Relations Board's final rule governing representation-case procedures became effective in April 2014, radically altering the process by which workforces unionize and overturning nearly 70 years of precedent. The NLRB says the changes keep "the essentials of existing representation case procedures" while removing "unnecessary barriers to the fair and expeditious resolution of representation cases."

But the new rule, known as the "quickie" or "ambush" election rule, stacks the deck in unions' favor by shortening the time between petition, election and post-election challenges, and by limiting avenues for review of adverse outcomes. The rule's oversimplification of representation-case procedures will expedite organizing campaigns, potentially allowing elections to be held in as few as 13 days from the date the union files a petition. Previously, an employer would often have a month to 42 days to campaign with its workforce. In cases of an unprepared or unsuspecting employer, a union may leverage the truncated timeline to bulldoze its way into the previously union-free workplace.

A union campaigns for employee support for months, even years, before filing a petition to certify a bargaining unit. The support for a union necessary to file a petition does not develop overnight; instead it is the fruit of poisonous seeds planted over time. By the time a union files a petition evidencing they have the minimum support of 30 percent of the employees in the proposed bargaining unit, it will have propagated its message far beyond that; indeed, the union may already have the majority support necessary to win the election.

Leaving employers with as little as 13 days to react robs them of critical catch up time. Worse, under the final rule, during this critical window employers also must comply with burdensome procedural requirements.

Some of the most onerous requirements include:

- An employer must post the notice of petition for election within two days of the filing of the petition and, in some cases, must also distribute it electronically. The notice advises employees about the filing of a petition and employee rights under the National Labor Relations Act. This was not required previously. Failure to comply with this new rule may be objectionable conduct and may be grounds to set aside an election.

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- A pre-election hearing will be noticed to take place as early as eight days following filing of a petition. An employer who chooses to challenge pre-election issues such as the scope of the bargaining unit, the type, date, time and location of the election, or the NLRB's jurisdiction over the employer, must make these challenges in a position statement filed the day prior to the pre-election hearing. Any issue not raised in the position statement will be deemed waived. The position statement must also include the names, shifts, locations and job classifications of employees in the bargaining unit and any employees in dispute. A "decision and direction of election" will be issued following the hearing.

- Within two days of either the decision and direction or "stipulated election agreement," a list of eligible voters (the "Excelsior list") must be electronically filed with the NLRB and served on a union. Previously, an employer had seven days to prepare and file the Excelsior list. Now, information required in the Excelsior list has expanded beyond names and home addresses to include additional

personal information such as phone numbers and email addresses. Failure to prepare an accurate Excelsior list may be objectionable conduct and may be grounds to set aside an election.

The net effect of the changes is to increase union access to employees prior to election day while simultaneously distracting employer communication efforts through increased procedural pressure.

But the employer's battle does not end on election day. Any unsuccessful party may challenge the conduct of the election and seek to set aside the results by filing objections and making an offer of proof. A hearing on objections follows to decide their validity. Before the new rule, a party would have seven days from the day of the election to file objections and an additional seven days to make an offer of proof. Any hearing on objections would be held months later. Now, both objections and offers of proof must be made within seven days of the election and any post-election hearing is set to begin within 21 days of the election. This results in less time for an employer to develop robust defenses, gather evidence and prepare witnesses.

Given the above, employer preparedness for an organizing campaign has become more critical than ever before. Employers should take steps now to guard against future threats of unionization. Here's a few suggestions:

- Stress positive relations between management and employees. Pay attention to areas of employee complaints and unrest, particularly wages or benefits which fall below industry standard or aren't competitive with comparable unionized workforces.

- Assess whether supervisors and leads will be considered supervisors under the NLRA and excluded from organizing efforts. Given the condensed timeline from petition to election, companies will have no time to waste in determining who may communicate the employer's message

and who will be susceptible to union organizing.

- Actively and lawfully enforce neutral workplace policies, such as no-solicitation, no-distribution and access policies. Failure to enforce neutral policies prior to a petition may impact an employer's ability to enforce those policies against a union after a petition is filed.

- Train your managers and supervisors to recognize the early warning signs of union organizing and to respond lawfully to union campaigns. Management should know what they can and cannot say under the NLRA.

- Develop a petition plan to be rolled out immediately in the event a petition is filed. During an election you will need to train management, security and human resource personnel immediately regarding rules for dealing with employees, union organizers, the NLRB and the public during an active union campaign.

- Keep all information collected from employees in an easily accessible format so that it may be assembled and edited in a short period of time as company resources may become scarce when preparing to meet these deadlines.

- Upon filing of a petition and through the conclusion of the election day, collect evidence of objectionable conduct in real time so that it can be provided in an offer of proof, if needed.

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