NLRB Expedited Election Rules and Other Major Labor Developments Webinar

April 30, 2015
CHA Webinar

Welcome and Program Overview
Liz Mekjavich
California Hospital Association
Continuing Education Offered for this Program

Continuing education will be offered for:

- Compliance
- Health Care Executives
- Legal
- Risk Management

Continuing Education Requirements

- Full attendance, completion of online survey, and attestation of attendance are required to receive CEs for this webinar. CEs are complimentary and available to the registrant only. Survey will be sent to registrant after the webinar. Please complete the survey within one week.
F. Curt Kirschner Jr. is a partner at Jones Day and is based in the San Francisco offices. Mr. Kirschner focuses his practice on resolution of complex labor and employment disputes, with a concentration on addressing employers’ rights and obligations relating to disputes in the health care field. He has extensive experience in the defense of “corporate campaigns” brought against employers by labor unions, including the pursuit of litigation against unlawful union activities arising from corporate campaigns. Mr. Kirshner has negotiated scores of collective bargaining agreements, handled numerous proceedings before the National Labor Relations Board and similar state agencies.

Gail Blanchard-Saiger is vice president of Labor and Employment for the California Hospital Association. In this role, she provides leadership for state and federal legislative and regulatory issues related to hospital human resources and labor relations. Ms. Blanchard-Saiger has over 15 years experience as a labor and employment law attorney representing hospitals and health care systems. She is a member of the American Society for Healthcare Human Resources Administration and serves on its Advocacy Committee.
Expedited Election Rule

F. Curt Kirschner, Jr., Jones Day

History of the New Rule

• The Board first proposed amendments to its rules and regulations governing union elections in June 2011.
• The Board announced a Final Rule in December 2011, which was invalidated by a federal district court on the grounds that the vote on the Final Rule did not have a quorum.
• In February 2014, the Board proposed amendments that were substantively identical to its June 2011 proposal.
• Following additional comments and hearing, a split Board voted to implement those amendments, with relatively minor modifications, in December 2014.
• Became effective on April 14, 2015.
Challenges to the New Rule

  - Lawsuit argues that Rule violates the National Labor Relations Act’s (NLRA) requirement to hold “appropriate” elections, and instead requires “quickie” elections.
  - Also argues that new Rule tramples employers’ free speech and Due Process rights.
  - Motions for summary judgment are now pending, with hearing date set for May 15.
- Similar case pending in Texas, with summary judgment hearing on April 24.
- “As applied” cases now being filed:
  - *Baker v. NLRB*, 1:15-cv-00571 (D.D.C. Apr 17, 2015): Court denied motion for temporary restraining order because employer failed to show threat of “irreparable harm” if new Rule is enforced. Now consolidated with Chamber case.
- Congressional challenges:
  - Congress passed measures disapproving of changes, but President

Key Changes to Election Procedures

- New NLRB Election Rule will “streamline” election process and expands obligation to disclose information about employees:
  - Shortens time frame for elections (no schedule adopted in Rule, but may be as soon as 10 days after petition is filed)
  - Prevents employers from litigating certain issues before an election
  - Curtails ability to challenge pre-election rulings by NLRB Regional Directors
  - Permits petitioning unions to obtain personal email, cell phone, and home phone numbers of voting unit employees
  - Substantially increases authority of Board Regional Directors and decreases Board Member oversight of the election process
Changes to the Petition Filing

• Under the new Rule, unions must provide a “showing of interest” (i.e., signatures of 30 percent of employees) when filing a petition with the NLRB.
  – Prior practice gave unions 48 hours after filing petition to produce this “showing of interest.”
• Electronic filing of the petition will be permitted.
• Union must also fax a copy of the filed petition to the employer.
• Employer required to post, including electronically, initial Notice of Election to employees within two working days of receipt of Board’s new notice of Petition for Election form (not currently required to be posted).

Filing the Statement of Position

• An employer will be required to file a Statement of Position (SOP) by noon of the day before the scheduled hearing.
• The SOP will be required to contain a statement of the employer’s position regarding the proposed unit, any issues the employer desires to litigate at the hearing, and a listing of the names of employees in the proposed unit and their classification, shift and work location.
  – The Board dropped the requirement that employers identify the “most similar” appropriate unit to the union’s proposed unit.
• The SOP shall also contain the employer’s position on any jurisdiction issues, supervisor issues, and managerial and confidential employee issues.
• Employer also must include in the SOP proposed date(s), time(s)
Avoiding Waiver in the Statement of Position

- To avoid potential waiver, the SOP also should include employer position on the following issues:
  - Election bar, contract bar and recognition bar
  - Eligibility period for voting unit employees
  - List of employees employers desire to exclude from the proposed unit
  - List of employees to be added to the petitioned-for unit
  - Labor organization status
  - Employer business closing or expansion information
  - Seasonal employee issues
  - Professional employees to be excluded
  - Any issue regarding guards
  - Any other issue raised by the petition

Sample Statement of Position

- Sample SOPs are now available on the Board’s website. The form is more of a “fill in the blank” exercise than a full legal brief. Hospitals must raise issues and give some basis for their position to avoid waiver, but need not cite legal authority or argue those points.
Timing of the Pre-Election Hearing

• A hearing (if any) will be held eight days after notice of the petition is served.
  – The Regional Director may postpone the hearing up to two business days upon a showing of “special circumstances,” and for more than two business days upon request of a party showing of “extraordinary circumstances.”
• Once started, a hearing will continue for consecutive days until concluded – as a general rule, continuances will not be granted.

Scope of the Pre-Election Hearing

• The Hearing Officer and Regional Director will make rulings on evidentiary matters and decide which issues can be considered at the hearing.
  – In response to comments by AHA and others, the Board dropped its proposed bar on litigation of eligibility issues affecting less than 20% of the unit. The Final Rule leaves such a bar to the Hearing Officer’s discretion.
• The Hearing Officer will limit litigation to issues that were raised in the Statements of Position, and such issues are limited to whether there is a “question concerning representation.” Questions concerning supervisory, managerial, and confidential employee status generally will not be permitted to be raised at the hearing.
Post-Hearing Briefs and Unresolved Issues

- Post-hearing briefs, which were previously filed as a matter of right, have been strictly curtailed.
  - Briefs will be permitted only by special permission of the Hearing Officer, who will also control the timing and content of the briefs.
- Failure of the Board to resolve pre-election supervisory, managerial, and other unit placement issues presents serious legal and practical issues for the employer; e.g., what if an individual believed by the employer to be a supervisor is found post-election to be a non-supervisory employee? The conduct of such individual during the election on behalf of the employer may be grounds for a re-run election.

Requests for Board Review

- The new Rule eliminates the automatic right of parties to request Board review.
  - In the past, stipulated election agreements have been the way that a high percentage of representation cases have been processed by the Board.
- Requests for review of Regional Director decisions may be filed at any time during the hearing or within 14 days after a final disposition of the case – requests will only be granted for compelling reasons.
- Under the new Rule parties will have an extremely limited opportunity to obtain Board review of pre-election determinations by Board Regional Directors.
Filing the Voter Unit Information – *Excelsior* List Issues

- Under the new Rule, an employer will only have two working days after issuance of the direction of election to file the following information with the Board and with the Union:
  - Name of all voting unit employees and their home address
  - Classification, shift and work location of such employees
  - Personal email address of voting unit employees (if available)
  - Personal telephone numbers of voting unit employees (if available)
- The new Rule is a substantial change from past practice, where employers had seven calendar days after the direction of election to file voting unit information. Such information also did not have to include personal phone numbers or email addresses of employees, or their classification, shift, or work location.

Filing the Voter Unit Information – *Excelsior* List Issues

- This aspect of the new Rule places considerable pressure on employers, especially in the healthcare setting where bargaining units are generally larger than other industries.
- Failure to meet the requirements of the voting unit lists can result in an overturned election.
- This aspect of the new Rule also raises substantial employee privacy issues – work email and work telephone numbers may be required in future.
- The Board majority failed to include any remedy for union misuse of employee personal information.
- Board also failed to include opt-in/opt-out procedure for employees regarding personal information.
Accelerated Election Timing

- Elections will no longer be subject to an automatic 25-day stay.
- Instead, elections potentially could be held just three days after a direction of election has been issued (based on Rule that notice of election must be posted at workplace for at least three days before election).
  - This could result in election being held as soon as 11 days after a petition is filed.
- In practice, unions will have considerable control over the timing of elections.
  - They are ensured a minimum of 10 calendar days to review and utilize voting list information in their campaigns, but can waive this period to force a quicker election.

Post-Election Objections

- Any post-election objections must be filed within seven days after the vote tally, and an offer of proof must be made at that time.
  - Prior practice allowed parties seven days after filing objections to make an offer of proof.
- Objections may also be dismissed without a hearing if the Regional Director determines that proffered evidence is insufficient to set aside the election.
  - Between the shortened time for making offer of proof and the specter of summary dismissal, employers will face greater obstacles when challenging election results.
Board Guidance on the New Rule

- Recent General Counsel Guidance Memo (GC 15-06) offers in-depth explanation of the changes to representation case procedures.
  - FAQ on new procedures
  - PowerPoint on new procedures
  - Sample forms, including sample Position Statements
  - Suggested formats for voter lists

Initial Returns on New Rule

- New Rule became effective on April 14
- Very modest uptick in petitions filed
  - March 31 – April 6: 48 petitions filed
  - April 7 – April 13: 51 petitions filed
  - April 14 – April 20 [new Rule]: 52 petitions filed
- Parties continue to anticipate results of pending litigation
Purple Communications, Inc., 361 NLRB No. 126 (Dec. 11, 2014): The NLRB Creates a New Presumptive Right

The **Purple Communications** Decision

- In a 3-2 decision, the NLRB held that employees have a “presumptive right” to use their employer’s business email systems for Section 7 purposes.
- Overruled Register-Guard, which had allowed non-discriminatory restrictions on use of work email systems.
- Majority held Register-Guard wrongly decided because it:
  - “undervalued employees’ core Section 7 right to communicate ... while giving too much weight to employers’ property rights,” and
  - “inexplicably failed to perceive the importance of email as a means by which employees engage in protected communications.”
- The two dissenters filed lengthy and compelling
The Purple Communications Test

- Presumes employees who already have access to employer email systems for work purposes have a right to use those systems for Section 7 purposes during non-work time.
- Employer can restrict that right only by “demonstrating special circumstances necessary to maintain production or discipline.”
  - “Special circumstance” requires demonstration of a connection between the employer’s asserted interest and the restriction.
- Total bans on non-work email will be justifiable only in “rare cases.”
- Employers can justify less than total bans only if they are uniform and consistently enforced and necessary to maintain production and discipline.

The Limits of Purple Communications

- It only applies to employees who already have access to their employer’s email system and does not require employers to provide such access.
  - Unions and outside Union organizers still do not have the right to use the employer’s email system.
- Decision addresses only email systems, not any other electronic communications. But Board implies that same analysis would apply to text and instant messaging.
- It does not preclude employers from monitoring email system usage, but does not explain how to avoid unlawful surveillance.
- It does not give employees a right to use email systems for Section 7 activities on work time, though the distinction is illusory in this context.
Potential Exceptions for Health Care

- Case did not arise in health care, and arguments exist to limit application in hospital setting.
- The Supreme Court and the NLRB have repeatedly held that hospitals have a presumptive right to ban all solicitation in immediate patient care areas.
- In addition, alternative means of employee communication is relevant factor in health care setting. See *Beth Israel v. NLRB*, 437 U.S. 483, 505 (1978).
- Hospitals should consider arguing that “special circumstances” justify bans on non-work email, at least in immediate patient care areas, due to potential for distraction from, and disruption of, patient care.

Continued Scrutiny of Employer Policies
Focus on Employment Policies

- The NLRB continues to invalidate facially neutral employer policies based upon alleged “chilling” of protected Section 7 activity.
- Scrutiny of employer policies not limited to unionized workplaces and not confined to cases where employers have violated the Act in connection with the enforcement of workplace policies.
- Regional Directors are increasing use of investigative subpoenas during unfair labor practice investigations to obtain employee policy manuals.

NLRB Standards for Employment Policies and Work Rules


Policies or work rules that reasonably tend to “chill” employees’ exercise of their statutory rights violate Section 8(a)(1) of the NLRA:

1. If the policy or work rule was implemented in response to union organizing activity.
2. If the policy or work rule has been applied to restrict employees’ exercise of statutory rights.
3. If employees would reasonably construe the policy or rule to prohibit protected activities.
General Counsel’s Guidance on Employer Policies

• On March 18, 2015, the General Counsel issued a memorandum on employer handbook policies. (GC 15-04, Report of the General Counsel Concerning Employer Rules).

• The report outlines the Board’s legal standards for various types of policies, with examples of policy language and explanations of why it would be lawful or unlawful. These explanations cover policies on:
  - Confidentiality
  - Conduct toward the company and supervisors
  - Conflicts of interest
  - Conduct toward fellow employees
  - Interactions with third parties
  - Copyrights, and trademarks
  - Restrictions on photography and recording
  - Restrictions on employee ability to leave work

Policies Limiting Communications Will Be Scrutinized

• The General Counsel’s guidance shows that Hospitals should take particular care when trying to limit the content of employee communications, including social media posts. All of the following policy excerpts were considered facially unlawful:
  - “Do not send unwanted, offensive, or inappropriate e-mails.”
  - “Do not make insulting, embarrassing, hurtful or abusive comments about other company employees online, and avoid the use of offensive, derogatory, or prejudicial comments.”
  - “Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by e-mail.”
Board Protection of Employee Misconduct and Incivility

Misconduct = Protected Activity

• The Board has continued to treat employee outbursts and misconduct related to Section 7 activities as protected.
• In the most recent example of this trend, the Board found that an employee had been unlawfully discharged for posting the following (censored) message about his supervisor to Facebook:
  – “Bob is such a NASTY MOTHER F*****R don’t know how to talk to people!!!!! F**k his mother and his entire f***ing family!!!! What a LOSER!!! Vote YES for the UNION!!!!!!”
• Looking at the totality of circumstances, the Board found the profanity and family insults insufficient to strip the post of its protected status. *Pier Sixty, LLC*, 362 NLRB No. 59 (2015).
Thank you

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State Labor Relations

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State Labor Relations

California Nurses Association

- Organizing activity has increased
  - Election at Mission Hospital (SJHS)
  - Election at Huntington Hospital
- Strike notices
  - Kaiser
  - Providence Health & Services
- Legislation
  - AB 346 – Charity Care – bill sponsor
  - Aligned with CHA on AB 145

State Labor Relations

SEIU-UHW

- Organizing activity
  - Election at USC Verdugo Hills
  - Election at Mission Hospital (SJHS)
  - Other organizing efforts underway
- CHA/UHW Agreement
  - Joint Labor Management Committee is meeting and working towards the May 5, 2014 Agreement goal to increase Medi-Cal funding in order to eliminate the provider fee
Thank you

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Questions

Online questions:
Type your question in the Q & A box, hit enter

Phone questions:
To enter the queue press *1
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The Cal/OSHA Safe Patient Handling Regulation
2014 Edition — Available to Members Only

- Explains the requirements of the Safe Patient Handling regulation, the elements of a back and musculoskeletal injury prevention plan, how to implement a plan in your facility, and what to expect regarding enforcement.
- Available for purchase with the Cal/OSHA’s New Safe Patient Handling Regulation Webinar recorded live on August 5, 2014

Thank You and Evaluation

Thank you for participating in today’s program. An online evaluation will be sent to you shortly.

For education questions, contact Liz Mekjavich at (916) 552-7500 or lmekjavich@calhospital.org.