On December 12, 2014, the National Labor Relations Board (NLRB) implemented the long-anticipated “ambush election” rules, which govern the procedures for union representation elections. The new rules go into effect on April 14, 2015 and arguably constitute the most sweeping regulatory change ever implemented by the Board.

Simply stated, the rules tilt the playing field dramatically in favor of unions by creating an environment in which many union elections will occur in just 10 to 21 days after the union requests a vote. In addition, the rules essentially eliminate most employer rights during the representation case process. The new rules now make it easier for unions to successfully organize all employers, in all industries. Union election win rates will likely increase as employers are blindsided by petitions and denied the time necessary to effectively communicate with employees about unions and unionization.

Given this new reality, taking immediate action to develop a response to the shortened election time frame is the only viable option to maximize the ability to remain union-free. Below is an overview of the most significant changes made by the new rules, followed by suggested strategies and tactics for employers.

**Expedited Union Elections**

The most significant impact of the new rules is that most union representation elections will be held in a range from 10 to 21 days after a petition has been filed. Expedited elections deprive employees of the opportunity to obtain critical information prior to voting. Union campaigns, which have historically occurred over a six or seven-week period, must now be forced into extremely shortened time frames.

**Voter Eligibility Issues Deferred to After the Election**

Under the new rules, most disputes over voter eligibility and bargaining unit inclusion/exclusion will be resolved after the election. Unless the issue involves relatively large portions of the proposed unit (the Board referenced 25% as an example) those voter eligibility disputes will be resolved after the election takes place. Leaving important issues unresolved, such as supervisory status and whether certain employees are part of the voting unit, undermines the ability of employees to make an informed decision and hinders all employers’ ability to present an effective campaign.
Expedited Hearings and Onerous Requirements for NLRB Position Statements

In addition to drastically reducing the number of pre-election hearings, any such hearing will now be set to start just eight calendar days after the date the petition is filed. During that period, employers are required to research and file (generally one business day before the hearing is set to start) a detailed legal position statement addressing critical threshold issues including, (1) any exclusions from the bargaining unit; (2) the overall appropriateness of the unit; (3) the proposed date, time, and place of the election; and (4) any other issues the employer seeks to raise at the hearing. Placing employers under extraordinary pressure to collect and analyze complicated data and to prepare a position statement diverts attention from the campaign and injects unwarranted uncertainty into the process.

Providing Multiple Lists of Employees’ Contact Information to the Union

Employers seeking a pre-election hearing must now provide unions with two separate lists of employees: (1) a list of all employees in the challenged, petitioned-for bargaining unit; and (2) a list of all employees in the unit the employer contends is appropriate. Two business days after the unit issue is decided, a list must be electronically provided including each employee’s name, home address, telephone number, email address, work location, shift, and job classification.

Suggested Strategies and Tactics to Counter Ambush Elections

The NLRB’s new rules place a premium on advanced employer preparation. Employers cannot reasonably wait until a petition is filed to determine the appropriate course of action, train supervisors, and develop campaign messages. The following are strategies and critical action items employers must immediately address:

1. Determine which employees meet the NLRB test for supervisor status and train those individuals on how to detect and react to a union campaign.

2. Develop appropriate campaign material in advance of a petition being filed.

3. Identify and train a management response team to work with counsel in developing effective communications with employees.

4. Prepare a draft campaign calendar that fits within the 10-21 day time period for elections.

5. Educate employees on the company’s position on unions and unionization.

6. Conduct vulnerability assessments at select or at-risk locations.

7. Analyze bargaining unit issues at select or at-risk locations.

8. Prepare an outline for the required NLRB position statement and collect supporting exhibits.

9. Review handbooks and personnel policies to ensure NLRB compliance and avoid a rerun election.

Ogletree Deakins’ traditional labor lawyers are intimately familiar with the new NLRB election rules and the impact they have on employers desiring to remain union-free. Please consult your Ogletree Deakins contact or a member of our Traditional Labor Relations Practice Group with any questions you may have on the new NLRB election rules and suggested strategies for your organization.
To learn more about the new ambush election rules, join our speakers, C. Thomas Davis (Nashville), Brian E. Hayes (Washington, D.C.), and Mark M. Stubley (Greenville) for a one-hour webinar, New “Ambush Election” Rule: Unionizing a Workforce Just Got Much Easier, on Thursday, December 18, 2014 at 2 p.m. To register for this timely program, click here.

In addition, National Labor Relations Board Member Philip A. Miscimarra is our special guest speaker at Ogletree Deakins’ upcoming 2015 Workplace Strategies Client Seminar on May 14-15, 2015 (with pre-conference “immersion” sessions on May 13 and post-conference “interactive” sessions on May 16) at the Grand Hyatt in San Antonio. To register for this seminar, which is designed for sophisticated human resources professionals and in-house counsel and which will feature more than 75 topics and 180 speakers, click here.

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