

NLRB Update: Why All Employers Should Be Concerned

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Today's Agenda:

1. The Ambush Election Rule
2. Employee Handbooks

NLRB's Ambush Election Rule

- On December 15, 2014, the National Labor Relations Board (“NLRB”) issued a Final Rule amending 29 C.F.R. Parts 101, 102, and 103 with regard to Case Procedures for Representation Elections. The Rule, unless successfully challenged, will go into effect April 14, 2015.
- The United States Chamber of Commerce challenged similar rules when the NLRB attempted to implement them back in 2011. The United States District Court for the District of Columbia struck down those rules, not on the merits, but because it held that the Board did not have a quorum. Because of the thousands of comments opposing the new rules, there is a high likelihood that there will be a legal challenge to these rules as well. The National Association of Manufacturers has noted that it “will be pushing back on this ill-advised and completely unjustifiable regulation.”

NLRB Representation Case-Procedures Fact Sheet

(Prepared by the NLRB)

The National Labor Relations Board's (NLRB) Final Rule governing representation-case procedures is designed to remove unnecessary barriers to the fair and expeditious resolution of representation questions. The Final Rule will streamline Board procedures, increase transparency and uniformity across regions, eliminate or reduce unnecessary litigation, duplication and delay, and update the Board's rules on documents and communications in light of modern communications technology. The amendments provide targeted solutions to discrete, specifically identified problems to enable the Board to better fulfill its duty to protect employees' rights by fairly, accurately and expeditiously resolving questions of representation

- Full Fact Sheet available at www.nlrb.gov

“Free Speech” Under the NLRA

Section 8(c) of the Act provides:

- The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

This language authorizes “employer campaigning,” such as dissemination of information to employees and “captive audience” meetings with employees.

Overview

1

Notice of Hearing within eight (8) days. But apparently no guarantee of a hearing.

2

Notice of Petition for Election posted by employer within two (2) business days after service of the Notice of Hearing.

3

Statement of Position by the Employer by noon the day before the date and time set forth in the Notice of Hearing.

4

Disputes concerning individuals' eligibility to vote in the election postponed until after the election in most all cases.

Overview (continued)

5

The election shall be scheduled for the earliest date practicable.

6

Employer required to post the Board's Notice of Election at least three (3) full working days prior to 12:01 a.m. of the day of election.

7

Within two (2) business days after issuance of the direction for election, the employer shall provide a voter list.

8

Time for filing objections to the conduct of the election or conduct affecting the results of the election and offers of proof must be made within seven (7) days after the tally of ballots.

Overview (continued)

9

Post-election hearing will be set for twenty-one days after the tally of ballots or as soon as practicable thereafter.

10

The Board has discretion whether to grant a request for review of the post-election hearing.

Overview (continued)

11

Provides for increased amount of electronic transmission of documents.

12

Blocking charge must be backed at the time of filing by a written offer of proof.

The Details

I. Notice of Hearing within eight (8) days.

- A. After a petition for election has been filed, if the regional director finds reasonable cause that a question of representation affecting commerce exists, the regional director will set a hearing for a date eight (8) days from the date of service of the Notice of Hearing to the parties involved
 - 1. Hearing may be postponed for up to two (2) business days if a party shows special circumstances.
 - 2. Hearing may be postponed for more than two (2) business days upon showing of extraordinary circumstances.

The Details (continued)

- B. Purpose of hearing is to determine if a question of representation exists; NLRB jurisdiction; scope of the bargaining unit.
 - 1. Scope of bargaining unit is crucial.
 - 2. NLRB jurisdiction is rarely an issue.

- C. Hearing to continue day-to day until completed.
 - 1. Continuance allowed only under extraordinary circumstances.

- D. Compare to old rules that required no set time for a pre-election hearing.

The Details (continued)

- II. Notice of Petition for Election posted by employer within two (2) business days after service of the Notice of Hearing.**
 - A. The Notice will be mandatory and will specify that a petition has been filed, the proposed unit, describe procedures that will follow, and list employees' NLRA rights.
 - B. Current Notice is voluntary and less detailed.
 - C. The new Notice has not yet been published.

The Details (continued)

III. Statement of Position by the Employer by noon the day before the date and time set forth in the Notice of Hearing.

A. Statement of position shall include:

- 1.** whether the employer agrees that the Board has jurisdiction and provide requested information concerning the employer's relation to interstate commerce;
- 2.** whether the employer agrees that the proposed unit is appropriate, and, if the employer does not agree, state its position as to what unit would be appropriate;

The Details (continued)

3. identify individuals that the employer intends to contest at the pre-election hearing and the basis for the contention(s); identify individuals who are contested: Add or exclude
 - a. supervisors
 - b. leads
 - c. temps
 - d. full time/part time
 - e. truck drivers
 - f. seasonal
 - g. administrative
 - h. separate facilities.

The Details (continued)

4. raise any election bar, e.g, election held within one year, or an existing bargaining unit;
5. state the length of the payroll period for employees in the proposed unit and most recent payroll ending period;
6. employer's position concerning type, date, time and location of the election and eligibility period;
7. any other issues the employer plans to raise at the hearing;

The Details (continued)

8. Name, title, contact information of the individual who will serve as the employer representative and accept service of all papers;
9. list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit, and, if the same information for the individuals if the employer contends that the unit is not appropriate;
10. the above list must be in alphabetical order and in electronic format.

The Details (continued)

- B.** FAILURE TO RAISE ISSUES IN THE STATEMENT OF POSITION WAIVES THOSE ARGUMENTS, EXCEPT CHALLENGES TO THE BOARD'S JURISDICTION.
- C.** Employer may amend its Statement of Position if it can show good cause.
- D.** No Statement of Position required under old rules.
- E.** No preliminary voter list required under old rules.

The Details (continued)

IV. Disputes concerning individuals' eligibility to vote in the election postponed until after the election in most all cases.

If the number of disputed voters makes a difference in the outcome, the eligibility of the disputed voters will be litigated.

- A. Hearing officer will inform the parties that the regional director will issue a decision as soon as practicable as to whether an election will be directed and the parties' obligations under the rules.

The Details (continued)

- V. The election shall be scheduled for the earliest date practicable.**
 - A. As a practical matter, counting the time frames herein, it would seem that the earliest an election could be held would be 10 days, but most likely between 10 and 20 days.
 - B. In contrast, it is estimated that on average, under the old rules, an election would take place approximately 40 days from the direction of election.

- VI. Employer required to post the Board's Notice of Election at least three (3) full working days prior to 12:01 a.m. of the day of election.**
 - A. If the direction of election provides for individuals to vote subject to challenge the Notice shall advise employees that they are neither included in, nor excluded from, the bargaining unit and that their eligibility will be resolved, if necessary, following the election.
 - B. Notice must remain posted until the end of the election.

The Details (continued)

VII. Within two (2) business days after issuance of the direction for election, the employer shall provide a voter list.

- A.** List must be alphabetized overall or by department and be in electronic format and include:
 - 1.** Full names, work locations, shifts, job classifications, and contact information, including:
 - a.** home addresses, available personal email addresses, and available home and personal cell phone numbers.
 - 2.** Separate list that includes the same information for those individuals who will be permitted to vote subject to challenge.

- B.** Seven days to provide list under the old rules.

The Details (continued)

VIII. Time for filing objections to the conduct of the election or conduct affecting the results of the election and offers of proof must be made within seven (7) days after the tally of ballots.

- A.** Regional Director may extend time for filing the written offer of proof upon request of a party showing good cause.
- B.** Under the old rule, offers of proof could be filed within 14 days after an election.

The Details (continued)

- IX. Post-election hearing will be set for twenty-one days after the tally of ballots or as soon as practicable thereafter.**
 - A. Used to resolve objections to the conduct of the election or conduct affecting the results of the election.
 - B. Old rules did not specify a time frame for the post-election hearing to be held.

- X. The Board has discretion whether to grant a request for review of the post-election hearing.**
 - A. Under the old rules, the Board's review of pre-election disputes was discretionary, but the Board's review of post-election disputes was mandatory.

The Details (continued)

XI. Provides for increased amount of electronic transmission of documents.

XII. Blocking charge must be backed at the time of filing by a written offer of proof.

- A. The party's offer of proof must describe evidence that, if proven, would interfere with employee free choice in an election.
- B. The offer of proof shall provide the names of the witnesses who would testify in support of the charge and a summary of their testimony.
- C. The written offer of proof shall not be served on any other party.

The Details (continued)

XIII. ACTIONS TO TAKE:

- A. Vulnerability audits
 - 1. Documents to prove supervisory positions
 - 2. Interchange for additional units or employees
 - 3. Common supervision
 - 4. Common policies
 - 5. Why unions are counter-productive in electronic format, ready to use on short notice
 - 6. Company position on unions in handbook

The Details (continued)

B. Litigation

1. Chamber of Commerce
2. National Association of Manufacturers
3. National Right to Work Committee

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- The U.S. Senate and House of Representatives have passed resolutions to block the National Labor Relations Board from implementing its contentious new union election rule, but those will likely run into a veto when it hits President Barack Obama's desk, with the White House having publicly stated that it is against the measure. The NLRB rule makes only small changes to the union election system that the administration believes will “help level the playing field” for workers, according to the White House.

EMPLOYEE HANDBOOKS

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- On March 18, 2015, the NLRB's General Counsel issued a "Report of the General Counsel Concerning Employer Rules"
 - "During my term as General Counsel, I have endeavored to keep the labor management bar fully aware of the activities of my Office. As part of this goal, I continue the practice of issuing periodic reports of cases raising significant legal or policy issues. This report presents recent case developments arising in the context of employee handbook rules. Although I believe that most employers do not draft their employee handbooks with the object of prohibiting or restricting conduct protected by the National Labor Relations Act, the law does not allow even well intentioned rules that would inhibit employees from engaging in activities protected by the Act. Moreover, the Office of the General Counsel continues to receive meritorious charges alleging unlawful handbook rules. I am publishing this report to offer guidance on my views of this evolving area of labor law, with the hope that it will help employers to review their handbooks and other rules, and conform them, if necessary, to ensure that they are lawful."

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- Under the Board's decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the mere maintenance of a work rule may violate Section 8(a)(1) of the Act if the rule has a chilling effect on employees' Section 7 activity.
 - The most obvious way a rule would violate Section 8(a)(1) is by explicitly restricting protected concerted activity; by banning union activity, for example.
 - Even if a rule does not explicitly prohibit Section 7 activity, however, it will still be found unlawful if 1) employees would reasonably construe the rule's language to prohibit Section 7 activity; 2) the rule was promulgated in response to union or other Section 7 activity; or 3) the rule was actually applied to restrict the exercise of Section 7 rights.

Employer Handbook Rules Regarding Confidentiality

- Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as with nonemployees, such as union representatives. Thus, an employer's confidentiality policy that either specifically prohibits employee discussions of terms and conditions of employment— such as wages, hours, or workplace complaints—or that employees would reasonably understand to prohibit such discussions, violates the Act.
- Similarly, a confidentiality rule that broadly encompasses "employee" or "personnel" information, without further clarification, will reasonably be construed by employees to restrict Section 7-protected communications.
- In contrast, broad prohibitions on disclosing "confidential" information are lawful so long as they do not reference information regarding employees or anything that would reasonably be considered a term or condition of employment, because employers have a substantial and legitimate interest in maintaining the privacy of certain business information.

Unlawful Confidentiality Rules

- **Do not discuss "customer or employee information" outside of work, including "phone numbers [and] addresses."**
- **"You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential information relating to [the Employer's] associates was obtained in violation of law or lawful Company policy)."**
- **Prohibiting employees from "[d]isclosing ... details about the**
- **[Employer]."**
- **"Sharing of [overheard conversations at the work site] with your coworkers, the public, or anyone outside of your immediate work group is strictly prohibited."**
- **"Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information.. .. Do not discuss work matters in public places."**
- **"[I]f something is not public information, you must not share it."**

Lawful Confidentiality Rules

- **No unauthorized disclosure of "business 'secrets' or other confidential information."**
- **"Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination."**
- **"Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers."**
- The above were facially lawful because: 1) they do not reference information regarding employees or employee terms and conditions of employment, 2) although they use the general term "confidential," they do not define it in an overbroad manner, and 3) they do not otherwise contain language that would reasonably be construed to prohibit Section 7 communications

Employer Handbook Rules Regarding Employee Conduct toward the Company and Supervisors

- Employees also have the Section 7 right to criticize or protest their employer's labor policies or treatment of employees. Thus, rules that can reasonably be read to prohibit protected concerted criticism of the employer will be found unlawfully overbroad. For instance, a rule that prohibits employees from engaging in "disrespectful," "negative," "inappropriate," or "rude" conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful.
- Moreover, employee criticism of an employer will not lose the Act's protection simply because the criticism is false or defamatory, so a rule that bans false statements will be found unlawfully overbroad unless it specifies that only maliciously false statements are prohibited.

Employer Handbook Rules Regarding Employee Conduct toward the Company and Supervisors

- On the other hand, a rule that requires employees to be respectful and professional to coworkers, clients, or competitors, but not the employer or management, will generally be found lawful, because employers have a legitimate business interest in having employees act professionally and courteously in their dealings with coworkers, customers, employer business partners, and other third parties.
- In addition, rules prohibiting conduct that amounts to insubordination would also not be construed as limiting protected activities.

Unlawful Rules Regulating Employee Conduct towards the Employer

- **“Be respectful to the company, other employees, customers, partners, and competitors.”**
- **Do "not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors."**
- **"Be respectful of others and the Company."**
- **No "[d]efamatory, libelous, slanderous or discriminatory comments about [the Company], its customers and/or competitors, its employees or management.**
- **"Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative."**
- **"Chronic resistance to proper work-related orders or discipline, even though not overt insubordination" will result in discipline.**

Contrast...

- **"Being insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer or vendor will result in" discipline.**

Unlawful Rules Regulating Employee Conduct towards the Employer

- **"Refrain from any action that would harm persons or property or cause damage to the Company's business or reputation."**
- **"[I]t is important that employees practice caution and discretion when posting content [on social media] that could affect [the Employer's] business operation or reputation."**
- **Do not make "[s]tatements "that damage the company or the company's reputation or that disrupt or damage the company's business relationships."**
- **"Never engage in behavior that would undermine the reputation of [the Employer], your peers or yourself."**

Lawful Rules Regulating Employee Conduct towards the Employer

- When an employer's handbook simply requires employees to be respectful to customers, competitors, and the like, but does not mention the company or its management, employees reasonably would not believe that such a rule prohibits Section 7-protected criticism of the company.
- **No "rudeness or unprofessional behavior toward a customer, or anyone in contact with" the company.**
- **"Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of [company] business."**
- **"Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors."**
- **"Each employee is expected to abide by Company policies and to cooperate fully in any investigation that the Company may undertake."**

Unlawful Employee-Employee Conduct Rules

- **"[D]on't pick fights" online.**
- **Do not make "insulting, embarrassing, hurtful or abusive comments about other company employees online," and "avoid the use of offensive, derogatory, or prejudicial comments."**
- **"[S]how proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion."**
- **Do not send "unwanted, offensive, or inappropriate" e-mails.**
- **"Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by e-mail...."**

Lawful Employee-Employee Conduct Rules

- When an employer's professionalism rule simply requires employees to be respectful to customers or competitors, or directs employees not to engage in unprofessional conduct, and does not mention the company or its management, employees would not reasonably believe that such a rule prohibits Section 7-protected criticism of the company.
- **"Making inappropriate gestures, including visual staring."**
- **Any logos or graphics worn by employees "must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message."**
- **"[T]hreatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors."**
- **No "harassment of employees, patients or facility visitors."**

Unlawful Rules Regulating Third Party Communications

- **Employees are not "authorized to speak to any representatives of the print and/or electronic media about company matters" unless designated to do so by HR, and must refer all media inquiries to the company media hotline.**
- **"[A]ssociates are not authorized to answer questions from the news media. . . . When approached for information, you should refer the person to [the Employer's] Media Relations Department."**
- **"[A]ll inquiries from the media must be referred to the Director of Operations in the corporate office, no exceptions."**
- **"If you are contacted by any government agency you should contact the Law Department immediately for assistance."**

Lawful Rules Regulating Employee Communications with Outside Parties

- **"The company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and to maintain our reputation as a high quality company. To best serve these objectives, the company will respond to the news media in a timely and professional manner *only* through the designated spokespersons."**

Unlawful Rules Banning Employee Use of Logos, Copyrights, or Trademarks

- **Do "not use any Company logos, trademarks, graphics, or advertising materials" in social media.**
- **Do not use "other people's property," such as trademarks, without permission in social media.**
- **"Use of [the Employer's] name, address or other information in your personal profile [is banned]... . In addition, it is prohibited to use [the Employer's] logos, trademarks or any other copyrighted material."**
- **"Company logos and trademarks may not be used without written consent"**

Lawful Rules Protecting Employer Logos, Copyrights, and Trademarks

- **"Respect all copyright and other intellectual property laws. For [the Employer's] protection as well as your own, it is critical that you show proper respect for the laws governing copyright, fair use of copyrighted material owned by others, trademarks and other intellectual property, including [the Employer's] own copyrights, trademarks and brands."**
- **"DO respect the laws regarding copyrights, trademarks, rights of publicity and other third-party rights. To minimize the risk of a copyright violation, you should provide references to the source(s) of information you use and accurately cite copyrighted works you identify in your online communications. Do not infringe on [Employer] logos, brand names, taglines, slogans, or other trademarks."**

Unlawful Handbook Rules Relating to Restrictions on Leaving Work

The following rules were unlawful because they contain broad prohibitions on walking off the job, which reasonably would be read to include protected strikes and walkouts.

- **"Failure to report to your scheduled shift for more than three consecutive days without prior authorization or 'walking off the job' during a scheduled shift" is prohibited.**
- **"Walking off the job ..." is prohibited.**

In contrast, the following handbook rule was considered lawful:

- **"Entering or leaving Company property without permission may result in discharge."**

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