FINAL COUNTDOWN…Less than One Month to Prepare for Ambush Elections

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The most significant changes to federal labor law in the past 50 years are set to take effect on April 14, 2015. President Obama has promised to veto any attempt by Congress to stop it, and Congress does not have enough votes to override the veto. Although pending lawsuits allege the National Labor Relations Board lacked power to make the changes, there is no guarantee that the courts will rule on the cases in time or will repeal the law – a move most legal scholars do not anticipate occurring.

Changes to Period between Filing Representation Petition and Pre-Election Hearings

The changes make it unequivocally easier for unions to organize employees. While the reduced time-period between filing a representation petition (which triggers the holding of a union election) and conducting the election garners most press, the myriad of changes, together, will increase unionization rates in the United States.

After April 14, 2015	Currently
Representation petitions may be filed via email	Representation petitions are filed via fax or hand delivery
The petitioner (employee/union) gives the petition to the employer	The NLRB mails the petition to the employer
Employer must post and distribute a Board-provided notice with details about the petition, election, and protected activities under the National Labor Relations Act	Employer has the option to voluntarily post a general notice of the election
NLRB Regional Director will set a hearing for one week after the petition is served	A hearing will only be set if requested by a party, and then it is set for a few weeks after the request

The word “hearing” is NLRB parlance for a trial. Just like court trials, hearings require the identification of issues and evidence, preparation of witnesses, and are conducted according to the Federal Rules of Evidence. After April 14, employers have one week between receiving the representation petition and going to trial over pre-election issues. The tremendous amount of activity in that one week will overwhelm unprepared employers and prohibit them from focusing on campaigning for the impending election. The list of activity includes:

- Provide a comprehensive written “statement of position” by noon on the business day preceding the pre-election hearing. The statement sets forth the Company’s position on all issues concerning the validity of the petition or proposed bargaining unit, i.e. composition, unit placement, exclusions, and eligibility. Any issue the employer omits from this statement is forever waived.
- Provide a list of employees’ names, work locations, shifts, and job classifications (but not contact information) to the union and the Regional Director for the petitioned-for unit. The employer must provide a separate list of employees it believes should be added to or removed from the petitioned-for unit.
- On the record before the hearing closes (and in its statement of position), the employer must set forth its desired day, time, place, and type of election, i.e. secret ballot, mail in, etc., as well as the payroll period for voter eligibility.

- Pre-election hearings will only determine whether an election should be conducted. Regional Directors have discretion as to who actually gets to vote on issues affecting only a small percentage of the voting unit to post-election litigation.
- Currently, both sides submit post-hearing briefs with case law and citations to the transcript and official record. After April 14, briefs may be filed only with permission from the Regional Director.
- Elections will not be stayed or delayed for the appeal of Regional Director rulings. Either party may seek post-election review from the Board.

Changes to Period between Pre-Election Hearing and Election

Within days, if not sooner, of the pre-election hearing, the Regional Director will issue a Direction of Election. The Direction of Election will set forth the date, time, location, and manner of the election, as well as who is eligible to vote and any other pertinent information. After the Direction of Election is issued, the employer must provide an *Excelsior* List, which is a list of information about eligible voters.

After April 14, 2015	Currently
The Company must provide the *Excelsior* List directly to the union within two (2) business days after the Direction of Election	The Company must provide the *Excelsior* List to the Regional Director within seven (7) calendar days after the Direction of Election
The *Excelsior* List must include the name, home address, work and home email addresses, home and cell phone numbers, as well as work location, shift, and job classification of each eligible voter	The *Excelsior* List must include the name and home address of eligible voters.

Unions have a waiveable right to receive the *Excelsior* List at least 10 days prior to an election. If waived, the election will happen sooner. Thus, it is extremely important to understand, if a pre-election hearing is not held, and the union waives its right to the *Excelsior* List, **the law allows for an election just 10 short days after the Representation Petition is filed**.

Regional Directors will hold pre-election hearings only if absolutely necessary. Unions are likely to forego the 10 day *Excelsior* List period, opting for a shorter (or no) time period – especially in smaller bargaining units, when the union has an overwhelming majority of support, or if the union already has the voters' contact information. Why? Because statistically unions have greater success at winning representation elections, the shorter the time-period is between when the representation petition is filed and the election is held.

Days Between Filing Representation Petition and Election	Union Win Rate
43 or more days	61%
36 to 42 days	60%
29 to 35 days	72%
22 to 28 days	78%
15 to 21 days	86%
1 to 14 days	89%

Proactive Steps Companies Must Take Now to Help Remain Union-Free

With a potential union election just 10 to 21 days after the filing of a representation petition, employers cannot wait until a petition is filed to determine the appropriate course of action, identify potential issues, train supervisors, formulate communication strategies, and develop campaign messages. Companies that wait will not stay union-free.

This is particularly true in light of other recent NLRB decisions – approving "micro-units" that allow unions to dissect employers by targeting smaller employee groups within a larger facility; expanding single and joint employer status to employers who use contingent workers; allowing employees to use employer email systems for organizing; and increasing union access to employer property to engage in organizing activity.

Companies wanting to stay union-free must prioritize proactive strategies and advanced preparation. This includes communicating with employees about unions even absent evidence of suspected union activity. The best way to avoid a union is to provide a work environment where unions are unnecessary. Therefore, open, honest, and direct communication, competitive wages and benefits, recognizing and rewarding employee achievement and merit, and treating employees fairly, with dignity, and with respect are some basic union avoidance mechanisms.

Companies should also take preliminary steps, now, that will save precious time in the future if faced with a union organizing drive. Remember, once in, a union is extremely difficult to remove. Companies that lose a union election cannot shut down and re-open non-union. Losing a union election will change the course of your company. Some proactive steps companies must take now include:

- Determine which employees meet the NLRB test for supervisory status, since only non-supervisors may vote in elections. The NLRB test is different from tests for other workplace laws.
- Train corporate leadership teams regarding early warning signs of union activity, how to respond to union activity and pro-union propaganda, how to lawfully communicate with employees about unions (what management can and cannot say are not intuitive).
- Determine the logistics necessary to hold multiple employee meetings and send pro-company literature to employees' homes.
- Analyze potential bargaining unit issues, i.e. supervisory status of select employees (assistant managers, front line supervisors who may or may not be NLRB "supervisors"), single or multi-site bargaining units, community of interest issues, and the potential for micro-units to be formed.
- Review handbooks and personnel policies to ensure NLRB compliance and to avoid a potential rerun election.

No union organizing campaign is the same. So, it is unrealistic to have a "campaign-in-a-box." Instead, have a rapid response plan. The plan should have templates and forms. For example:

- Prepare draft campaign calendars based on 10 and 21- day campaign periods.
- Have a telephone / email notification protocol so all key personnel know about the organizing or representation petition as soon as possible; include legal counsel to preserve attorney-client privilege.
- Develop appropriate campaign material in advance of the filing of a petition.
- Prepare an outline for the required NLRB position statement, attaching supporting exhibits.
- Draft "boiler plate" language for legal arguments related to supervisory status, community of interest, single or multi-site bargaining units, etc.

While some of the above steps are time consuming, they should be done now, when your company has the time to complete them, and legal counsel should assist with their preparation. After April 14, 2015, there will be no time for companies to adequately perform each of these steps, prepare for the pre-election hearing, and try to develop the company's campaign against unionization.

These changes are severe, and before you know it, they will be here.