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New NLRB Representation Petition Regulations

The NLRB recently voted to change some election procedures in order to reduce unnecessary litigation, adopting parts of a broader proposal to modernize and streamline the election process. These changes went into effect with respect to all Representation Petitions filed on or after April 30, 2012. However, a lawsuit was filed by the U.S. Chamber of Commerce seeking an injunction to stop these Regulations, and the Court issued a temporary injunction on May 14, 2012. The injunction was based on the Court's conclusion that the Board did not have a quorum when they adopted the Regulations. The Board now has a quorum and it is very likely that they will re-adopt these Regulations and they will go into effect in the near future. These new Regulations are summarized as follows:

1. Defining the Scope of the Pre-Election Hearing. The first amendment alters Section 102.64 of the Rules to explicitly state that the purpose of the hearing is to determine whether a question concerning representation exists and amend Section 102.66(a) to give the Hearing Officer the discretion to limit the hearing to relevant matters. Currently, questions concerning a small number of employees may be litigated at great lengths and expense, despite having no effect on the final result. The disputed individuals' eligibility to vote only becomes an issue if their vote would have made a difference in the final outcome of the election and is resolved after the election. More eligibility issues will be deferred utilizing the challenged ballot procedure than previously. Furthermore, the Hearing Officer will have the authority to preclude hearing on matters when the Employer fails to articulate a complete answer in response to a request for an offer of proof. In other words, the Employer will be required to explain in detail all of the evidence the Employer expects to present and how it bears on the question of the appropriateness of the unit before the Hearing Officer will allow a hearing to proceed with respect to that issue. Unnecessary hearings can now be eliminated or greatly shortened.

2. Limiting Post-Hearing Briefs. The second amendment alters Section 102.66(d) of the Rules to give Hearing Officers the discretion to control the filing, subject matter and timing of any post-hearing briefs. This amendment was adopted because most cases involve only

routine issues based on well-known principles of NLRA law. Briefing as little to the decision-making process, but it introduces further delay and adds significantly to the parties' litigation expenses.

3. Consolidating Pre- and Post-Election Appeals. The third amendment alters Sections 102.67 and 102.69 to eliminate the need to file multiple appeals. Currently, parties must file one appeal to seek Board review of pre-election issues and a separate appeal to seek Board review of post-election issues, such as challenges to voter eligibility and objections to a party's conduct during the course of the election. This amendment consolidates the two appeals into a single post-election procedure, which saves the parties from having to file and brief appeals that may become moot based upon the outcome of the election. This change also conforms NLRB procedures with the ordinary Rules found in both state and federal courts which limit interlocutory appeals.

4. Eliminating the 25-Day Waiting Period. The fourth amendment follows directly from the third by removing the 25-day waiting period after a Regional Director's pre-election decision issues. Under the current Rules, Section 101.21(d) recommends that the Regional Director refrain from setting an election date sooner than 25 days after ordering an election to allow the Board sufficient time to consider any request for review. Because the new Rules eliminate pre-election appeals, the waiting period no longer serves any purpose.

5. Establishing a Standard for Interlocutory Appeals. The fifth amendment also takes aim at the problem of multiple appeals to the Board in a single case. The current Rules fail to establish any standard for filing of interlocutory appeals concerning individual rulings by Hearing Officers or Regional Directors during the course of a pre-election hearing. As a result, parties may, and have, filed numerous appeals in a single case regarding discreet rulings as to what evidence may, or may not, be permitted. By altering Section 102.65(c), the new Rules make clear that the Board will grant such interlocutory appeals only under "extraordinary circumstances where it appears that the issue will otherwise evade review".

6. Establishing Standards for Post-Election Procedures. The amendment to Sections 102.62(b) and 102.69 codifies a long-established practice in which Regional Directors decide challenges and objections to elections through an investigation without a hearing when there are no substantial or material factual issues in dispute. The amendment also makes Board review of the Regional Director's decisions discretionary. This change will require parties to identify specific prejudicial error by the Regional Director or some other compelling reason for Board review, allowing the Board to devote its limited time to cases where its review is warranted.

Assuming that the changes are reinstated by the Board, I believe that they will accomplish the purposes of streamlining the election process and making it more difficult for Employers to unnecessarily drag out the election. Hopefully, this will make it more difficult for Employers to threaten and mislead their employees and allow for free elections.

RESPECTFULLY SUBMITTED,

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