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*Practice Group:*

*Labor and  
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## NLRB Changes Representation Election Rules

**By Hayes C. Stover**

Significant changes to the National Labor Relations Board (“NLRB”) union election rules and procedures represent yet another attempt by the Obama Administration and its appointees to hinder employers wishing to remain union-free. Ostensibly designed to shorten the median time of 38 days between filing a representation petition and the actual election, the altered rules would also limit the time in which employers can present their case to employees; shift some crucial pre-election issues to post-election hearings; and limit an employer’s review and appeal rights. While litigation is pending to enjoin the altered rules – presently set to take effect on April 1, 2012 – employers wishing to remain union free should be proactive in making their positions known to employees long before a petition is filed.

### Background

On December 21, 2011, the two Obama-appointed National Labor Relations Board (“NLRB”) members whose terms had not yet expired voted to substantially alter union representation election rules and procedures. Republican member Hayes opposed the changes. The [new rules](#) were published in the Federal Register on December 22. The altered rules affect several types of union representation petitions and elections. However, they primarily affect the processing of representation petitions filed by a union seeking to represent employees not then represented by a union if the employer is not willing to agree to an election. This Alert will focus on that situation.

A union wishing to represent unrepresented employees begins the process by filing a petition for an election with the NLRB. The union must provide evidence that 30% of the employees in an appropriate unit of employees have expressed a desire to be represented. ([See prior K&L Gates alert here](#)). The altered rules affect and increase the speed of the procedures following the filing of such a petition.

The altered rules represent a slimmed down version of rules changes first proposed on June 22, 2011. The stated purpose of both the original proposed changes and the December 21 changes is to shorten the time between the filing of a petition and the actual election. The median time gap is currently 38 days.

Unions have long complained that employers can use the current procedures to tie up and delay elections, allegedly using that time to intimidate employees into voting against the union. Employers complain that they are frequently unaware that a union is stalking their employees, and need a reasonable amount of time after a petition is filed to educate their employees about the negatives of union representation.

### Summary of Changes

Many of the NLRB’s rules and procedures are altered in one way or another. However, a summary of the major changes and the radical effect of the major changes on employers follows:

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1. Amend NLRB regulations to state that the purpose of pre-election hearings described in Section 9(c) of the National Labor Relations Act (“Act”) is solely to determine whether a question concerning union representation exists that should be resolved in a secret ballot election.

When a representation petition is filed, the NLRB Regional Director schedules a hearing, normally seven days after the petition is filed. Historically, the hearing was used to determine whether the proposed unit was appropriate; to determine whether specific employees should be included in or excluded from the unit; and to establish the time, place, and procedures for the elections. The effect of this change is to limit the pre-election hearing to questions whether the requested bargaining unit is appropriate for bargaining. Now excluded from the hearing would be disputes concerning whether particular individuals or job categories should be included in or excluded from the unit. Such a determination can be especially critical when the issue is whether certain individuals are supervisors or otherwise are employees exempt from coverage under the Act. If individuals ultimately determined to be supervisors are actively involved in the employer’s campaign, an election victory for an employer may be overturned because of such involvement, and such activities may be the basis of unfair labor practice charges. Likewise, if an employer avoids using any questionable supervisors in its campaign, the effectiveness of the campaign may be compromised and those supervisors may become alienated from management. Resolution of such issues is now postponed to post-election proceedings.

2. Give NLRB hearing officers authority to limit the presentation of evidence in a pre-election hearing to genuine issues of fact material to the existence of a question concerning representation.

This change gives the officer presiding over the pre-election hearing the authority to limit the hearing to evidence concerning issues of representation, consistent with change #1.

3. Provide for post-hearing briefs only with the permission of a hearing officer, rather than as a matter of right.

This change has the effect of possibly precluding the submission of post-hearing briefs, which under current rules is a matter of right. Employers may now be limited to briefs submitted at the hearing, briefs which may not be able to effectively anticipate evidence presented at the hearing.

4. Amend several of the NLRB’s rules to eliminate parties’ right to seek Board review of Regional Directors’ pre-election rulings while allowing parties to seek post-election review of such rulings.

This change has two related effects. First, under current rules a party who is unhappy with a pre-election decision by the NLRB Regional Director must file an appeal to the NLRB to preserve the issue. The NLRB has discretion whether to accept the appeal. That review right is now eliminated. The second related effect is that all pre-election disputes will now be decided only after the election is held, and such disputes will be combined with any issues that arise during the post-hearing/pre-election period or at the election itself.

5. Eliminate language in the NLRB’s current Statement of Procedure recommending that a Regional Director should not schedule balloting within 25 days of directing an election.

The effect of this change is to allow the Regional Director the unfettered discretion to schedule the election with almost no elapsed time after the election is ordered. Two rules not affected by the changes provide only minimal delay. First, a still valid rule requires an employer to post a notice of the election at the work site at least three working days prior to the election. A second rule requires an employer to provide a list of the eligible employees’ names and addresses to the union within seven

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working days after the direction of the election. These would appear to be the only time requirements imposed on the Regional Director.

6. Amend one of the rules to provide that requests for special permission to appeal a Regional Director's pre-election ruling will be granted only in extraordinary circumstances.

The effect of this change is to further limit any appeals.

7. Amend rules to make NLRB review of post-election disputes discretionary.

The effect of this change is to create the possibility that any and all disputes will have the Regional Director as the final decision maker within the NLRB.

Under current rules, the employer must appeal any post-election dispute to the NLRB. The NLRB's decision then becomes final. There is no direct appeal of election issues to the federal courts. Instead, if an employer wishes to contest any election issue, it must refuse to bargain with the union that won the election. In what is a normally perfunctory unfair labor practice proceeding, the NLRB affirms that all its prior decisions were correct, and the employer is found guilty of an unfair labor practice for refusing to bargain. Only by appealing that unfair labor practice decision to a federal court of appeals may the employer receive a judicial review of the underlying election issues.

Under the revised rules, the unfair labor practice proceedings may become more substantive because those proceedings may be the first time that the NLRB, other than the Regional Director, actually hears and decides the election issues.

### What Happens Next?

The altered rules do not take effect until April 1, 2012. However, multiple reactions have already begun.

Member Hayes has not yet issued his dissent to the altered rules and is expected to do so prior to April 1.

The U.S. Chamber of Commerce and the Coalition for a Democratic Workplace on December 20 filed a lawsuit in federal district court in the District of Columbia asking that the altered rules be enjoined. The Complaint alleges that the altered rules (1) violate the Act; (2) exceed the NLRB's authority; (3) violate employer's First and Fifth Amendment rights to free speech; (4) are an abuse of discretion because they were issued by only two of the NLRB's normal five members (at the time, there were two NLRB vacancies); (5) violate the Regulatory Flexibility Act; and (6) violate the employer's rights under Section 8(c) of the NLRA to communicate with its employees.

The litigation will very likely be affected by President Obama's "recess" appointment of three new NLRB members (two Democrats, one Republican) on January 4, 2012. These appointments are an attempt to fill the two vacancies that existed on December 21, and to fill the vacancy created by the expiration of the earlier recess appointment of Member Becker on January 3, 2012. The legality of the appointments themselves is subject to some question as to whether Congress was in fact recessed. However, it is very probable that the now three member Democratic majority will vote to affirm the new rules. Such an action would affect some of the issues raised in this litigation.

Senator Mike Enzi (R-Wyo.) has stated that he will use the Congressional Review Act to challenge the altered rules.

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### Conclusions

If the altered rules survive, employers will in many cases suffer serious consequences. First and foremost, an employer will have a far more limited period of time prior to an election during which to educate its employees. Second, the employer may go into the election with many critical issues unresolved. Third, the NLRB itself may never review issues until the unfair labor practice stage.

The altered rules are yet another attempt by the Obama Administration and its appointees to slow the decline of unions in the U.S., and to truncate the employer's opportunity to make its position on unions known to its employees. Accordingly, an employer who wishes to remain free of unions must be proactive in making its position known to its employees long before a petition is filed. The employer's employee handbook or personal manual should make clear the employer's intent to remain union free. During employee communication meetings, the employer can remind employees of the employer's position. If the [NLRB's poster rule](#) is not overturned, the employer may post its own notice along side the NLRB posting. In summary, every employee should be aware that the employer does not believe that a union would be beneficial to the employer or the employees, and that the employer will take all legal steps to oppose any attempt at unionization.

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#### Author:

**Hayes C. Stover**  
 hayes.stover@klgates.com  
 +1.412.355.6476

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