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Lessons We Learned In Winning A Union Election Under the NLRB's New Rules

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On April 14, the National Labor Relations Board changed its rules for processing union elections. The new rules stack the deck against employers by decreasing the time between the filing of a petition and the election, which means that an employer now has less time to educate its employees about the potential impacts of unionization. The new rules also add procedural requirements that employers must address, which can distract the employer from the more important task of running its campaign. Given the significant changes, many have questioned whether it is possible to win an election under the new rules.

Having just completed our first election under the new rules, we can say that the answer is “yes.” But it wasn’t easy. Though the election concluded with a resounding company victory, the chances of success looked far grimmer when the union’s petition arrived a mere 23 days before the election. Under the old rules, the average time between petition and election was 38 days. Excluding weekends and a holiday, we had only 15 working days. Our experience under the new rules taught us that, though elections are still winnable, there is no room for error, and there is not enough time to begin a campaign from scratch once the petition is filed.

Preserving Challenges to the New Rules

There are numerous pending lawsuits challenging the legality of the new rules. We chose not to file a lawsuit, but we wanted to preserve an objection to the new rules so that we could take advantage of a favorable ruling should one be obtained. We were confident that we could not enter into a stipulated election agreement and forego the filing of the newly required Statement of Position because doing so could waive the objection. Thus, we filed a Statement of Position objecting to the new rules. At the same time, there were no problems with the union’s proposed bargaining unit or other issues necessitating a hearing. Thus, the question became: How do we avoid a stipulated election that could waive the challenges to the new rules, while at the same time avoiding a *pro forma* hearing merely to give the regional director a “record” upon which to direct an election?

We posed that question to the NLRB’s Region staff and made several suggestions for solutions, including stipulating various elements of the case. They came back with a proposal that the parties enter into a stipulated record that would include our objections to the new rules and that the regional director would then rely upon that stipulated record in directing the election. It was not until 4 p.m. the day before the scheduled hearing date that these issues were finally resolved.

To be clear, our preservation of objections in the stipulated record really only punted the issue by a few weeks. Had the client lost the election, it would have needed to file objections to the election and refuse to bargain with the union to preserve its objections to the new rules.

Navigating the New Procedural Requirements

The new rules feature additional procedural hoops that an employer must jump through while running its campaign. The most critical new procedural requirement is the Statement of Position (SOP), which must be filed within seven days after the election petition is filed. This meant that, in addition to getting the campaign up and running, we had to analyze the positions included and excluded by the petition and gather facts about those positions to determine whether there were bargaining unit scope issues. Even with a relatively small unit, this took a day, and it significantly distracted us from the more important task of running the campaign.

The new rules also required us to file and produce to the union two separate employee lists – an employee list due when the SOP is filed and a voter list with additional information due within two days after the election has been officially scheduled. The information on the lists includes home addresses, home phone numbers, email addresses and personal cell phone numbers (if available) and employee positions, shifts and pay schedules. Though not entirely clear, we concluded that the obligation to provide “available” email addresses and cell phone numbers meant that we needed to poll supervisors and search any other source of information maintained by or available to the company. Between pulling the information stored on the centralized personnel system and retrieving the cell phone and email information from each of the supervisors, we spent multiple days ensuring that these lists were accurate.

Campaigning Under the Shortened Time Frame

As for the campaign itself, the time went much more quickly than we had anticipated. We did not have the time in the 15 working days provided to determine from scratch how we were going to carry out the campaign, who was going to deliver the campaign messages, who was going to give speeches, write speeches, select handouts to circulate, and all of the other logistical issues that come up during an election. Thankfully, we had prepared a template of a plan to be used under the new rules, and as a result, we were able to quickly tailor that plan and hit the ground running upon receipt of the petition. By way of example, three hours after we got it, the plant manager was walking into a meeting with employees with talking points and a letter to distribute to employees explaining the company’s initial position. The ability to begin the campaign within hours allowed the client to take advantage of every single day during the shortened time frame. The only way to do that is to plan in advance and have the strategy and materials prepared in advance.

While we had anticipated that a barrage of campaign information in the shortened time frame might make employees somewhat weary and fatigued, our experience in this campaign confirmed that this is the new reality. Thus, an important planning point for all campaigns under the new rules must center around how much information you can dispense in a relatively short time. Now more than ever, videos, a website, home mailings and other forms of non-traditional communication are critical components of campaigning because they are the only way to ensure that all of the important information is communicated to employees, while at the same time not over-burdening them with group meetings at the risk of turning them off.

Preparation In Advance Is Key

The key takeaway of our first experience under the new rules is crystal clear: The victory was made possible, in large part, because we had planned in advance and were able to begin the campaign within hours after the petition was received. Had we not been able to flip the switch on the campaign, the result may have been different or at least a lot closer.

A union organizing campaign and election under the new rules is a crisis. And to borrow a line from PR expert Wade Gates, a crisis is no time for original thought. Upon receipt of an election petition, an employer will not have the time to decide how it is going to execute its campaign and all of the other related logistical questions. Almost all of that work needs to be done in advance and included in a plan of

action so that, when the petition is filed, the employer can move directly into campaigning. At the end of the day, employers who fail to prepare in advance for elections under the new rules may very well be preparing to fail.

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