



NLRB Election Rule Changes “Temporarily Suspended” Following Court Decision

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Last week, a federal district court decided that the National Labor Relations Board (NLRB) lacked a quorum when it voted to change its union representation election rules and, as a result, the changes that went into effect April 30, 2012, are invalid and unenforceable.

The NLRB had enacted the changes to streamline the procedure for processing disputed representation cases with the intended result of holding elections within a very short timeframe of 7 to 14 days (sometimes referred to as “quickie” or “ambush” election rules). The court’s action is good news for employers because this shortened timeframe would have been extremely union-friendly, as it would have significantly reduced the time an employer would have available to mount an educational campaign to inform employees about the issues and the facts associated with union representation.

In light of the court’s decision, the NLRB “temporarily suspended the implementation” of the changes. The NLRB must now decide whether to appeal the decision or attempt to enact the changes again.

What happened? The NLRB is a five-member body that requires a quorum of three members to decide cases and promulgate rules. In late 2011, the NLRB had only three members because two positions were vacant. Based upon a previous United States Supreme Court decision, all three members were needed to constitute a quorum to vote to adopt the election rule changes. On December 16, 2011, the final draft rule was circulated to the three members for an electronic vote. Chairman Mark Pearce and Member Craig Becker voted in favor of the final rule. Member Brian Hayes, who had vigorously opposed the changes, did not vote on the final rule. Because member Hayes ignored and did not take any action, the court determined that he was not “present” for the electronic vote and he could not be counted toward establishing the necessary 3-member quorum.

What happens next? The NLRB may appeal this week’s decision to the federal appellate court; however, this would likely not provide a “quick fix” because the appeal process will take many months, and the NLRB may not ultimately prevail.

Another option is to present the proposed rule changes to the current NLRB for a vote. However, the current composition of the NLRB also presents some uncertainty as to whether adopting the changes now will stand up to a legal challenge. Three of the five current NLRB members are presidential recess appointments, and those recess appointments have been challenged in a separate court action. Thus, a vote to adopt the changes by the current board could also be invalidated if the challenge to these recess appointments is successful.

Stay tuned. We will continue to keep you informed of any new NLRB developments regarding the election rule, the posting rule which was also recently enjoined, and related labor law issues.