

June 2015

ACTION ALERT – NEW NLRB ELECTION RULES

Beginning on April 14, 2015, new procedures went into place at the National Labor Relations Board for processing petitions, including petitions for representation elections, decertification, deauthorization, and unit clarification. These new procedures apply to any petition filed on or after April 14. This Action Alert summarizes the most significant changes in the new procedures.

New Forms – Filing with NLRB

The NLRB now uses new and different forms for each kind of petition. These forms can be found on the Board's website at this link: <http://www.nlr.gov/resources/forms>

A petition for a representation election will require the filing of the new Form NLRB-502(RC). The information required is similar to the information required on the prior form, *except* that the petitioning party will be required to propose a date, time, place, and type of election (mail-in or in-person).

The following will also need to be filed along with the Petition:

- (a) a showing of interest (usually signed authorization cards from more than 30% of the unit); and
- (b) a certificate of service (Form NLRB-5544) stating that the petitioning party has served copies of the Petition, Statement of Position (Form NLRB-505) and a Description of the NLRB's Election Procedures (Form NLRB-4812) on the Employer.

If all of those documents are not filed with the petition, the Region will not docket the petition and no representation case will be opened.

The petition can be paper filed or hand-delivered (as it has always been), filed by facsimile or e-filed. *Note:* e-filed means submitting the petition electronically via the www.nlr.gov web site. It does *not* mean emailing the form to the NLRB or the Regional Office.

If the Petition is e-filed or filed by facsimile, the original authorization cards or other evidence of a showing of interest must be received by the Region no more than 2 days after the filing of the Petition.

Service on the Employer

At the same time that a petition is filed, a copy of the Petition, the Description of the NLRB's Election Procedures (Form NLRB-4812), a blank Statement of Position form (Form NLRB-505), and a copy of the certificate of service must be sent to the employer.

Generally, service on the employer should be the same as the method of filing (or at least as fast). Service may be made personally, or by registered mail, certified mail, electronic mail (if the petition was filed electronically) or private delivery service. Service may be by fax only with the consent of the employer. When filing with the Board is done by hand, the employer (and any other party(ies)) is to be promptly notified of the filing by telephone, followed by service of a copy in a manner designed to insure receipt by the close of the next business day.

As always, do *not* send the showing of interest to the employer.

Hearing

The Board will schedule a hearing date on the eighth (8th) calendar day following the date the Petition is filed. If that 8th day falls on a holiday or weekend, the hearing will be scheduled on the next business day. Within two (2) days of receiving the Notice of Hearing, the employer must post a new form entitled Notice of Petition. If the employer also distributes notices to employees electronically, it must also distribute the Notice of Petition electronically. The Notice of Petition must remain posted until either the election Petition is dismissed or when the employer is required to post the Notice of Election, which may then replace the Notice of Petition.

The pre-election hearing will address fewer issues than it did under the old rules. Pre-election hearings may only be used to litigate issues of: jurisdiction, labor organization status, bars to an election (e.g. a contract bar, certification bar), whether an employee is a professional or guard, and the scope or appropriateness of the unit. Pre-election hearings will not address issues of: inclusion of specific individuals, supervisory or managerial status, confidential employees, dual function employees, individuals employed by a parent or spouse, or temporary employees, unless those issues affect a significant number of individuals included in the unit. While there is no hard-and-fast threshold for what counts as a "significant number," the rules suggest that threshold is approximately 20% of the total (the Regional Director in Region Four (Philadelphia) has advised that he will follow the 20% rule). The issues that are not addressed in the pre-election hearing will be considered at a post-election hearing, if deemed necessary after the unchallenged ballots are counted.

Note: The line between an issue about "inclusion of specific individuals" and "scope or appropriateness of the unit" (which can be litigated in the pre-election hearing) may not always be clear, and could depend on how the unit description in the petition is worded.

Statement of Position

By noon the day before the hearing, the opposing party must file a Statement of Position (SOP) identifying the specific objections and issues that that party intends to raise at the hearing. Any issue not mentioned in that SOP will be waived. For example, if an employer wants to exclude certain individuals or classifications from the unit, it must raise those objections on the SOP form and give specific reasons why they should be excluded. If the employer does not, it will be barred from raising those issues at the hearing, or even cross examining witnesses on those issues. (However, the employer will still be permitted to challenge individual ballots during the election, even if the objection is based on an issue it failed to raise in the SOP). The new SOP requirement means that we will no longer go to pre-election hearings without knowing what the issues are.

Employee (Excelsior) List

After the direction of election or the approval of an election agreement, the employer will have two business days to provide election lists (this list replaces the Excelsior List). The list must provide the name, address, classification, shift, and work location for each employee, as well as the personal email address and personal mobile phone number if the employer requires its employees to provide it with that information. Unions are *not permitted* to use this personal information for improper purposes (i.e. not related to organizing).

Notice of Election

If the employer seeks to include additional individuals in the unit, it must provide a separate list of proposed additions, giving the same information for each of those employees. If the employer seeks to exclude people from the proposed unit, it must provide a separate list of proposed subtractions, giving the same information for each of those employees. Thus, the employer may have to provide as many as three lists to the Union.

The employer must post the Notice of Election three (3) full working days prior to the election date. If the employer normally provides notices to its employees electronically, it must also distribute the Notice of Election electronically.

Objections to the Election

Following the election, election objections must still be filed within seven (7) days of the date of the election. However, evidence and/or offers of proof must now be filed along with the objections. (This replaces the prior rule where the objecting party had seven days to file objections and seven more days to provide evidence). While both the objections and evidence are filed simultaneously with the Board, the objecting party must only serve the employer with a copy of the objections (not the evidence).

Blocking Charges

If there are unfair labor practice charges that the charging party wants to use to block the election, the charging party must request a block. *Note:* this replaces the prior practice in which

blocking the election was the default unless there is a request to proceed. Under these new procedures, the default is no blocked election, unless the charging party otherwise requests. The request to block the petition must be made on the new Request to Block form (NLRB-5546) and includes a requirement that the charging party submit offers of proof to support the blocking claim.

Please note: because these rules provide for election procedures that are significantly different than the procedures in effect prior to April 14, 2015, we strongly recommend that you contact our office for assistance if you wish to file a petition for an election.

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325 Chestnut St, Ste 200 | Philadelphia, PA 19106
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