

## NLRB's One-Two Punch: Micro Bargaining Units and Expedited Elections

**A** week after the Bureau of Labor Statistics reported that the percentage of private-sector workers who belong to unions rose in 2013, a labor-leaning National Labor Relations Board (NLRB) proposed expedited election rules effectively making organizing unrepresented employees easier.

The Board's proposed changes to representation case procedures "are identical to the representation procedure changes first proposed in June of 2011."<sup>1</sup> Coupled with micro bargaining units and the Department of Labor's proposed reinterpretation of the Labor-Management Reporting and Disclosure Act (LMRDA), unions are attaining the changes they previously sought with the failed Employee Free Choice Act.

The Board's proposed rules would shorten the current 42-day petition-to-election timeline to what many believe will be 10 to 21 days by:

- Requiring representation hearings to be held within seven days of the filing of a union petition and allowing NLRB hearing officers to limit pre-election hearings only to matters relevant to whether an election should be held. The hearing officer will have the authority to limit testimony, and to decide whether or not to accept post-

hearing briefs. Before these changes, an employer's legal counsel could use the pre-election period to thoroughly investigate and research that the petitioned-for group was appropriate, and to provide the employer with additional time to communicate their campaign messages.

- Prohibiting pre-election appeals and consolidating and reviewing all appeals until after the election is held.

The rules also would:

- Require employers to directly provide the union with all targeted employees' telephone numbers, email addresses, work locations and shifts within two days of the direction of election so the unions can more easily contact employees; and
- Eliminate the mandate for the NLRB to review hearing officers' decisions. Additionally, any reviews that are conducted will be allowed only after the election is held, leaving more final decisions in the hands of career civil servants.

### *A Familiar Refrain*

The Board's deadline for comments about the proposed rules is April 7, 2014. Responses to comments filed will be due one week later. Employers, unions, employees and employer associations filed about 65,000 comments after the Board originally proposed these changes in

<sup>1</sup> Press Release. "The National Labor Relations Board Proposes Amendments to Improve Representation Case Procedures." National Labor Relations Board. 4 Feb. 2014.

June 2011. In December 2011, the Board ultimately approved a subset of its proposed rules.

Only a lawsuit filed by U.S. Chamber of Commerce and the Coalition for a Democratic Workplace challenging the changes prevented actual implementation. In mid-2012, the U.S. District Court for the District of Columbia ruled that the expedited election rules were invalid. The court did not rule on the legal merit of the proposed changes. Rather it held that the Board did not have the three-member quorum it legally required to issue the rule. The Board, now acting with a full complement of confirmed members for the first time in 10 years, likely will proceed with these new rules as it had previously attempted. This is only the second time in the history of the National Labor Relations Act that the NLRB has exercised its rulemaking authority.

### *Micro Bargaining Units*

The other major decision that is impacting employers is the NLRB ruling against Specialty Healthcare and Rehabilitation Center of Mobile, AL (Specialty Healthcare). (This ruling occurred before the controversial presidential recess appointments therefore it is not under review.) It applies to all employers except acute healthcare organizations. Since this decision, there already have been cases where the NLRB rules in favor of unions claiming a “community of interest” among employee population carve-outs. It will have consequences even more serious than the shortened election rules. For example:

- If a union realizes it doesn’t have the support needed to win an all-employee election, this ruling allows it to cherry pick small groups of employees it thinks it can organize. In the case of Specialty Healthcare, the bargaining unit targeted consisted of one job title, certified nursing assistants.
- Because it permits an increased number of bargaining units, the ruling could allow

several unions in the same workplace, each representing a handful of employees and with different collective bargaining agreements.

- The Specialty Healthcare decision will make it far easier for unions to get their foot in an employer’s door. Instead of having to rely solely on external organizing, unions will use the micro-unit employees to organize their peers throughout the workplace.

### *How to Prepare*

With this one-two punch, it is essential for employers to develop strategies to understand and proactively resolve employee concerns and to create a firewall before a union petition is filed. It takes a tremendous amount of work to win a representation election under the current time frames. The NLRB’s new restrictions will virtually guarantee an increase in union win rates. At a minimum, in advance of a petition, employers need to:

- Assess vulnerabilities to union organizing, and proactively remedy the issues causing the employee dissatisfaction;
- Educate leaders and board members about union tactics and election rules under the National Labor Relations Act;
- Identify ways to measure employee dissatisfaction and vulnerability to union organizing on an ongoing basis instead of just once every year or two by using employee surveys;
- Conduct a bargaining unit analysis, particularly since position statements may need to be filed in advance of an election to preserve right to challenge after an election takes place, and perhaps more importantly, because there may be significantly less time to prepare an Excelsior list in advance of an election;
- Conduct a supervisory status analysis to determine who can be trained as

supervisors under the NLRA and who would potentially be an eligible voter;

- Ensure compliance with all legal requirements;
- Train leaders to recognize and effectively respond to employee dissatisfaction and early signs of union organizing;
- Improve stakeholder communications;
- Develop rapid-response teams and strategies to deal with union activity;
- Strengthen employee engagement to minimize interest in union representation;
- Develop a fully vetted and approved expedited campaign strategy with all supporting documents, to use should the worst occur;
- Train managers in effective leadership and communication skills;
- Provide advocacy training so that employees first go to their supervisors/managers, not elsewhere; and
- Develop an organizational philosophy about union/employee relations and ensure leaders and employees have understanding of the position beginning with new hire and new manager orientations.

An essential step is top-to-bottom education. The management team, particularly first-line supervisors, must be trained. Many organizations limit awareness training by providing only the legal do's and don'ts. This is a mistake because it generally scares managers into focusing on what they can't say. While compliance training is an important element, the management team needs the ability to discuss this important matter with employees. Managers should receive skill-building training and become comfortable engaging employees in discussions about the organization's position about unionization. This approach allows managers to practice their methods in small-group settings so they can feel comfortable

dealing with employee questions, initiating conversations and can recognize the first signs of union activity.

The next step in training is with employees. Often, employers fear that by talking with employees about unions they promote union activity; nothing could be further from the truth. From the first day of orientation employees should understand the organization's position about labor unions and the rationale behind it. They should know what a union authorization card looks like, and the significance of their signature. Additionally, employees will need to understand the implications and consequences of unionization including what collective bargaining is and how it works, and how union representation can change their relationship with their employer and fellow employees. Organizations that fail to discuss the subject are giving a union an opportunity to get its message to employees first, leaving the organization with the more difficult task of debunking the union's message and explaining why a union is not in the best interest of the organization, employees or patients. A well-articulated position statement is the foundation all other components of your Labor Relations Readiness System.

Another important preparatory step is for human resources and other leaders to determine which employees and job classifications would fall into particular bargaining units, and which employees would be classified as supervisors. With an abbreviated election period, it will be nearly impossible to assess bargaining units or supervisory status after a petition is filed and still run a winning campaign.

Shorter union election campaigns require a trained and ready organizational response; there won't be time to assemble one once a petition is filed and an election is scheduled. One solution is a Labor Relations Readiness Response Team comprised of carefully selected leaders who receive in-depth training that

prepares them to serve as internal labor relations and communications resources.

Readiness Response Teams:

- Share knowledge and coach their peers about union-avoidance techniques;
- Conduct labor relations education and training for managers and supervisors;
- Serve as educators to staff and employees, and provide needed training;
- Are alert to early signs of organizing activity;
- Deploy at the first sign of union organizing and monitor all union activity;
- Provide feedback on campaign strategy, communications and educational materials provided to managers and employees;
- Serve as an advisory board to Human Resources and senior leaders on employee relations issues;
- Identify training needs and activities; and
- Help coordinate campaign information and strategy.

Unions trying to organize a workplace have had months to hone their messages in face-to-face encounters with employees. Given the complexity of large businesses and the number of legal, senior leadership, financial, operational and human resources reviews needed to produce an important document, trying to play catch-up in three weeks or so won't work. Instead, we recommend producing pre-approved messages, letters, talking points and other communications far in advance of organizing that can be deployed at the first sign of union activity.

Similar to a disaster preparedness binder and called a Labor Relations Readiness Manual, this compendium contains the basic tools needed to successfully manage early stage union organizing activity with information and communication strategies for all affected stakeholders. At a minimum, it should include:

- Supervisor/manager educational materials including conversation starters, guidance on how to talk about unions with employees, frequently asked questions, talking points and messaging on key issues likely to arise in an organizing campaign;
- Management and executive visibility strategies to promote trust between employees and management; and
- Draft employee and stakeholder communications materials.

### *The Healthcare Industry*

Continuous, rapid change has become the new normal in the healthcare industry. With the ongoing introduction of the Patient Protection and Affordable Care Act, change will accelerate. Lower pay increases, right-sizing, lay-offs, cost reduction initiatives, mergers and acquisitions and increased pressure to do more with less all will lead to triggering incidents that unions will attempt to leverage. These actions will create anxiety and uncertainty among employees, and can make them more prone to listen to union organizers' promises. The NLRB has taken steps to help unions become more successful in their organizing campaigns. Employers should be taking proactive steps to maintain an environment of positive employee relations.



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