

# Labor and Employment Law Bulletin

## NLRB Proposes Significant Overhaul of Rules Governing Union Campaigns

Today, the NLRB proposed a significant overhaul to its existing rules governing union representation elections. If implemented, the rules would impact employers by giving them less time to campaign and by giving unions significantly more information about employees, including personal telephone numbers and e-mail addresses. The changes also would limit challenges and postpone the resolution of disputes regarding who can vote. All of these changes will impact how employers run campaigns and how unions organize employees. The NLRB will expedite consideration of the new rules and accept comments only for the next 60 days. The NLRB is expected to issue final rules later this year.

Dissenting from today's announced rulemaking, NLRB Member Hayes, a Republican, described the proposal as an attempt "by administrative fiat" to "impose organized labor's much sought-after 'quickie election' option, a procedure under which elections will be held in 10 to 21 days from the filing of the petition." He also criticized the changes to hearing procedures as focused on preventing parties, "primarily employers, from litigating issues in representation proceedings, even when legitimate issues are raised and a full record and Board review would seem to be essential."

Some of the more significant proposed changes include:

- **Employers Must Provide the NLRB and Unions More Information about Voters:** Employers will now give petitioning unions information about an employee's

phone numbers, e-mail addresses, job classification, work location and shift. This is in addition to existing requirements that the union receive employee home addresses. The NLRB would use e-mail addresses to send voters information about the election directly. Providing the union more information about employees will tend to give unions better access to employees. In conjunction with shifting NLRB decisions with respect to union access to employer-owned cell phones and e-mail addresses, this change may give unions greater access to employees on the job too. In anticipation of final rules, employers should make certain that their cell phone, e-mail and electronic communications policies are up to date.

- **Employers Will Have to Identify Issues Before Hearings or Risk Waiving Them:** Pre-election hearings will now be held within 7 days of the petition in most cases and post-election hearings 14 days after the tally of ballots issues at the close of voting. No later than the start of any hearing, an employer will have to identify all issues it intends to raise and make an offer of proof regarding the supporting testimony it would present. Employers would be barred from raising issues not covered by its prehearing statement. After a hearing, an employer will not have an automatic right to a brief and, in many cases, would not

even have a right to NLRB review. This will make it critical to investigate issues and research arguments as soon as a petition is received and to continue investigating throughout the election process.

■ ***Employers Will No Longer Be Entitled to a Hearing to Determine Who Votes:***

Under current rules, the parties have a right to a pre-election determination regarding significant issues regarding the voting unit. If the NLRB's proposals are adopted, employers could not litigate these issues before the vote unless they involve 20 percent or more of the voting unit. Voters would instead be challenged at the polls and the issues litigated after the fact. In practice, employees will not be certain if their votes will count. That can discourage turnout, particularly among pro-company voters. Moreover, there is a risk of abuse. A union can have the best of both worlds—excluding voters after the fact where their votes would prevent unionization and including them over their objection where their votes are not outcome-determinative. A union could even speak with challenged voters and ask how they voted so as to determine what issues to litigate. Unlike unions, employers cannot question employees in this fashion. All of these changes shift the balance in the rules in favor of a petitioning union.

■ ***Shortened Times for Pre-election and Post-election Hearings:***

Hearings would be set 7 days after a petition is filed and 14 days after the tally of ballots is issued, with limited grounds for postponement. This will tend to speed up the resolution of issues—and shorten many election periods—at the expense of giving employers a less robust opportunity to be heard.

On their face, the proposed amendments do not shorten the Board's internal practice of trying to schedule stipulated elections within 42-days from the petition filing. But by shortening the time targets at each step, the Board appears to be moving toward shortening the overall time between the filing of a petition and an election as well. Certainly Member Hayes reads the proposed changes this way. Keep in mind that the 42-day target is not codified in the existing rules. It is an informal rule that can be modified without further rulemaking after the underlying procedures are changed.

At bottom, the shifting election landscape will require employers to react faster to election petitions and do more to prepare for (and hopefully prevent) election petitions before they are filed.

If you have any questions about these or other issues, reach out to **Kenneth F. Sparks** (312-609-7877), **J. Kevin Hennessy** (312-609-7868) or **Mark L. Stolzenburg** (312-609-7512).

Vedder Price is a founding member of the Employment Law Alliance—a network of more than 3,000 employment and labor lawyers “counseling and representing employers worldwide.” Membership provides Vedder Price and its clients with network access to leading employment and labor counsel in all 50 states and over 100 countries around the world.

## Chicago Labor and Employment Group Members

Thomas G. Abram..... 312-609-7760	Thomas G. Hancuch..... 312-609-7824	Paul F. Russell ..... 312-609-7740
Bruce R. Alper..... 312-609-7890	Benjamin A. Hartsock..... 312-609-7922	Richard H. Schnadig ..... 312-609-7810
Paige O. Barnett..... 312-609-7676	J. Kevin Hennessy..... 312-609-7868	Robert F. Simon ..... 312-609-7550
Mark I. Bogart..... 312-609-7878	Scot A. Hinshaw..... 312-609-7527	Patrick W. Spangler ..... 312-609-7797
Lawrence J. Casazza..... 312-609-7770	Jonathan E. Hyun ..... 312-609-7791	Kenneth F. Sparks ..... 312-609-7877
Katherine A. Christy ..... 312-609-7588	John J. Jacobsen, Jr. .... 312-609-7680	James A. Spizzo ..... 312-609-7705
Michael G. Cleveland..... 312-609-7860	John P. Jacoby..... 312-609-7633	Kelly A. Starr ..... 312-609-7768
Steven P. Cohn..... 312-609-4596	Edward C. Jepson, Jr. .... 312-609-7582	Mark L. Stolzenburg ..... 312-609-7512
Christopher T. Collins ..... 312-609-7706	Michael C. Joyce..... 312-609-7627	Theodore J. Tierney ..... 312-609-7530
Emily T. Collins ..... 312-609-7572	Philip L. Mowery ..... 312-609-7642	Timothy J. Tommaso ..... 312-609-7688
Megan J. Crowhurst ..... 312-609-7622	Joseph K. Mulherin ..... 312-609-7725	Thomas M. Wilde, <i>Chair</i> ..... 312-609-7821
Thomas P. Desmond ..... 312-609-7647	Christopher L. Nybo..... 312-609-7729	Jessica L. Winski..... 312-609-7678
Aaron R. Gelb..... 312-609-7844	Margo Wolf O'Donnell ..... 312-609-7609	Charles B. Wolf..... 312-609-7888
Elizabeth N. Hall..... 312-609-7795	Michelle T. Olson ..... 312-609-7643	
Steven L. Hamann ..... 312-609-7579	James S. Petrie ..... 312-609-7660	

## New York Labor and Employment Group Members

Alan M. Koral..... 212-407-7750	Jonathan A. Wexler ..... 212-407-7732	Mark S. Goldstein ..... 212-407-6941
Neal I. Korval..... 212-407-7780	Lyle S. Zuckerman..... 212-407-6964	Daniel C. Green..... 212-407-7735
Laura Sack ..... 212-407-6960	Michael Goettig..... 212-407-7781	Roy P. Salins ..... 212-407-6965

## Washington, D.C. Labor and Employment Group Members

Amy L. Bess..... 202-312-3361
Sadina Montani ..... 202-312-3363

### VEDDERPRICE®

222 NORTH LASALLE STREET  
CHICAGO, ILLINOIS 60601  
312-609-7500 | 312-609-5005 • FAX

1633 BROADWAY, 47th FLOOR  
NEW YORK, NEW YORK 10019  
212-407-7700 | 212-407-7799 • FAX

1401 I STREET NW, SUITE 1100  
WASHINGTON, D.C. 20005  
202-312-3320 | 202-312-3322 • FAX

[www.vedderprice.com](http://www.vedderprice.com)

### About Vedder Price

Vedder Price P.C. is a national business-oriented law firm composed of more than 265 attorneys in Chicago, New York and Washington, D.C. The firm combines broad, diversified legal experience with particular strengths in labor and employment law and litigation, employee benefits and executive compensation law, occupational safety and health, general litigation, corporate and business law, commercial finance, financial institutions, environmental law, securities, investment management, tax, real estate, intellectual property, estate planning and administration, health care, trade and professional association, and not-for-profit law.

© 2011 Vedder Price P.C. The LABOR AND EMPLOYMENT LAW BULLETIN is intended to keep our clients and interested parties generally informed on labor law issues and developments. It is not a substitute for professional advice. For purposes of the New York State Bar Rules, this bulletin may be considered ATTORNEY ADVERTISING. Prior results do not guarantee a similar outcome. Reproduction is permissible with credit to Vedder Price P.C. For additional copies or an electronic copy of this bulletin, please contact us at [info@vedderprice.com](mailto:info@vedderprice.com).

Questions or comments concerning the LABOR AND EMPLOYMENT LAW BULLETIN or its contents may be directed to the firm's Labor Practice Leader, Thomas M. Wilde (312-609-7821), the Managing Shareholder of the firm's New York office, Neal I. Korval (212-407-7780), or, in Washington, D.C., Amy L. Bess (202-312-3361).