

BRIEFING FOR OPRA MEMBERS

The NLRB's "Quickie" or "Ambush" Election Rule and Important Considerations for Providers Now

By: **Suzanne J. Scrutton and Nelson D. Cary**
Vorys, Sater, Seymour, and Pease LLP

OPRA members have likely heard or read about a recent rule change dealing with union elections from the National Labor Relations Board (NLRB). The NLRB is the federal agency responsible for administering the National Labor Relations Act (NLRA). The NLRA regulates the conduct of employers and unions on matters related to union organizing, collective bargaining, and protected, concerted activity.

The recent rule change – which the business community has dubbed the “quickie” or “ambush” election rule – has received a lot of coverage, some helpful and some not. This summary will provide OPRA members a clear (and non-technical) understanding of what has changed and what providers may want to consider doing about it. Any OPRA member with employees who are currently non-union, and that is concerned with lawfully maintaining that status, should carefully review this summary and consider whether additional legal advice should be obtained.

Summary of New Rules

The NLRB's new rule is quite lengthy and involves a number of different technical changes to the rules governing union elections. Fundamentally, however, the changes are designed to speed up the union election process. Under current law, a union that wants to have the NLRB conduct a secret ballot election for employees must file an “election petition” with a regional office of the NLRB. Under the prior rules, the median amount of time that passed from the filing of the petition to the holding of the secret ballot election is 38 days.

Under the new rules, the NLRB shortens various deadlines during the election process, limits an employer's right to dispute certain issues (like who should vote and which employees are supervisors), and takes other steps designed to decrease the number of days between the filing of a petition and the holding of an election. For example, one of the significant new requirements is that the employer must file a “Statement of Position” on various issues regarding who should be allowed to vote. The statement is due as soon as seven days after the employer receives notice of the union's election petition. Failure to file precludes the employer from ever raising issues it should have raised in the statement. While some have suggested that the combined effect of all these changes will result in elections held in as little as ten days, the more likely scenario is that the current median number of days until a vote is held will fall to 20 - 25.

In addition to the changes in the rule to speed up the election process, the new rule also requires employers to provide more information to the union earlier in the election process. For example, under prior law, an employer had to provide a list of employees and their home addresses to the union within seven days after the regional office sets the election date. It could take a couple of weeks under the prior rules for the NLRB's regional office to set the election date.

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Under the new rules, the employer must provide to the union not only employees' home addresses, but also their personal e-mail addresses (if the employer has them) and home phone numbers. The employer must do so **two days** after the regional office sets the election date, which will also occur more quickly than under prior law. The employer must also provide, **before the election date is even set**, a list of employee names and their job classification, work location, and shift (if applicable). That information will usually be required within seven days of the employer receiving the union's election petition. Thus, not only must the employer provide information **sooner** than under current law, it must also provide **more** information about its employees and operations.

Practical Effect on Providers of the New Rule

Decreasing the number of days before a union vote could be potentially problematic for an OPRA member that desires to exercise its right under the NLRA lawfully to oppose a union organizing effort. When a union files an election petition, it typically has been working with employees for some period of time to persuade them that union representation is beneficial. Accordingly, if a petition comes as a surprise to an employer, it could struggle to catch up. Less time to communicate usually means a less effective communication of the employer's message.

In addition, unions (not employers) benefit from increasing the amount of information the employer must provide. The personal contact information for employees gives the union better access to employees to communicate the union's message. The other information provides useful insight for a union into the employer's organizational structure and workforce, which the union may not have otherwise received under the prior rules.

Current Status of the Rules

The rules went into effect on April 14, 2015. After the rules were announced late last year, several employer groups filed lawsuits against the rule in two different federal courts. Recently, an employer, which received a union election petition under the new rules, has filed a third federal lawsuit, which the court has consolidated with one of the other pending lawsuits. In addition, Congress attempted to legislatively overrule the new regulations. President Obama vetoed that legislation. The two federal courts have yet to rule on the request for an injunction in the lawsuits, although one of the federal courts has at least heard oral argument from the parties on the request for an injunction.

Where does this leave OPRA members concerned about the rule? It is possible that one or both of the federal courts could issue an injunction against the rule, which would prohibit the NLRB from enforcing it nationwide. However, whether and when that might happen are entirely up to the courts' discretion. Meanwhile, the NLRB is actively enforcing and administering the new rules now.

Three Areas of Concern for Providers

In order to respond effectively and proactively to the NLRB's new election rules, providers should focus on three different areas: employee relations, proactive management, and campaign logistics.

Employee Relations

Positive employee relations depend, among other things, on effective communication with employees. When considering the possibility of union organizing, communication is likewise important. Thus, employers need to consider proactive communications to employees about unions. What is the employer's position on unions? Does the employer have (and should it have) a lawful statement about unions in its employee handbook? Does the employer ever discuss (and should it discuss) the issue of unions during orientation?

The compression of the election timeline in the new rules also places a premium on supervisory training. Questions OPRA members should consider include: Do supervisors know what to look for? Have supervisors been trained on how to lawfully identify such activity? Do supervisors know what to do with that information if they get it?

Finally, an employer's written policies, procedures, and handbooks all play an important role in the employee relations picture. The new election rules place a premium on ensuring that employers maintain policies that encourage positive employee relations and lawfully regulate employee conduct. Accordingly, a provider wanting to be proactive on this issue should review its handbook, policy manual, or similar documents to ensure they meet the NLRB's latest pronouncements on these issues.

Proactive Management

Even under the old rules, employers confronted with a union organizing campaign faced a significant logistical challenge in responding. The new election rules accentuate some of these problems by compressing the period of time and by requiring additional information. The provider confronted with a union election petition will need to answer questions like: Who will communicate with employees on behalf of the employer about unions? Who will communicate with funding agencies, the Board of Trustees, and the public regarding the election campaign? What will the employer's message be and is that message lawful under the NLRA?

A union election also brings with it an intense focus on how the employer has organized its operations. An employer needs to know with some degree of certainty whom it believes are its supervisors and whether they satisfy the NLRB's test for supervisory status. It also needs to know which employees will be grouped with which other employees in order to effectively communicate with them about a union election. A provider must assess whether it should take the opportunity to address these issues proactively, before any election petition is ever filed.

Finally, an easy question that should be answered early in order to be proactive is whether the employer needs employee e-mails. The new regulations only require that they be shared with the union if the employer has them. The new rules do not require the employer to collect home emails or to share with the union any company e-mail addresses that employees utilize.

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Campaign Logistics

A final set of questions a proactive provider will want to address to be ready for union organizing under the new rules involves simple logistics. For example, can the provider's HRIS system efficiently generate the information that the new regulations require employers to give to unions? Is the provider ready with communications to its employees about a union election petition? How will the employer deploy management resources in response to union organizing activity?

Conclusion

Any OPRA member that is currently non-union, and desires to remain that way, should have a concern about these new rules. That provider should take proactive steps to ensure that it is ready to meet the challenge should any of their employees ever decide that union representation would be desirable.

A provider that wants to take a proactive approach should retain qualified labor counsel to advise it. Rules regarding union organizing and what is lawful and not lawful are highly technical and sometimes counterintuitive. It is important to have legal advice during that process.

OPRA resources for members include the two hours of free legal advice from the Vorys Law Firm, which could be used for this purpose, as well as the Vorys' labor law blog, www.vorysonlabor.com, which has been covering the union election rules (among other issues) since they were first proposed. Finally, if a provider is interested in learning more about these rules, please contact the OPRA office so that OPRA can determine if additional education opportunities (e.g., a webinar or seminar) should be offered.

About the Authors

Nelson Cary is a partner in the Vorys Columbus office and a member of the labor and employment group. He represents management in a broad range of labor and employment matters, including counseling employers on compliance with, and defending employers in litigation arising out of, the Family and Medical Leave Act (FMLA), Americans with Disabilities Act (ADA), Title VII, Age Discrimination in Employment Act (ADEA), Fair Labor Standards Act (FLSA), and similar state laws.

Suzanne Scrutton is a partner in the Vorys Columbus office and a member of the health care group. She has experience representing providers in the fields of long term care, behavioral health and developmental disabilities. Suzanne has extensive experience with regulatory issues, Medicaid reimbursement and regulations, as well as contract negotiations with various payor sources.