

NLRB's "Quickie" Election Rule Upheld

Last month, the United States Court of Appeals for the Fifth Circuit [affirmed](#) the lower court's decision upholding the National Labor Relations Board's "quickie" election rule. As reported in the [December 14, 2014 New York Labor and Employment Law Report](#), the final rule, among other things, significantly reduces the time period between the filing of an election petition to the date of the election, narrows the issues that may be raised at a pre-election hearing, and requires disclosure of employees' personal information, including personal telephone numbers and e-mail addresses. The rule was effective as of April 14, 2015.

The Associated Builders and Contractors of Texas, Inc. (ABC) mounted the challenge to the rule's lawfulness, asserting that the Board both exceeded its authority under the National Labor Relations Act (the Act) and violated the Administrative Procedure Act. ABC first argued that the rule unlawfully postpones the resolution of certain voter eligibility issues until after the election is complete, in contravention of the Act. The Fifth Circuit rejected this argument, reasoning that under the plain language of the Act the purpose of the pre-election hearing is to determine whether a question of representation exists — not to resolve all voter eligibility issues.

Next, ABC contended that the rule arbitrarily and capriciously requires the disclosure of employees' personal information to the petitioning union in violation of the Administrative Procedure Act. The Fifth Circuit found that the Board had sufficiently considered employees' privacy concerns as well as the burden on employers when it expanded the disclosure requirement, and thus, the requirement was not arbitrary and capricious in violation of the Administrative Procedure Act.

ABC also challenged the rule on the grounds that faster elections interfere with an employer's right to free speech during organizing campaigns. In rejecting this argument, the Fifth Circuit found that there is no language in the Act which requires a specified waiting period between the filing of the petition and the date of the election. Additionally, the Fifth Circuit noted that the Board's Regional Directors, who are responsible for setting the date of the election, are to consider the interests of both parties when setting an election date, which may include an employer's opportunity to communicate its views concerning unionization to its employees.

Now that the Fifth Circuit has joined an earlier decision from the United States District Court for the District of Columbia upholding the Board's "quickie" election rule, employers must be prepared to respond before an election petition is even filed. The time employers have from date of petition to date of election has been effectively cut in half (from about 6 weeks to about 3 weeks), making a successful counter campaign extremely difficult to mount without advance planning and preparation. We recommend regular supervisory training and the creation of a tentative campaign blueprint that is ready for immediate activation in the event of a union petition. As before, an employer's best opportunity to remain union-free comes from early awareness of organizing activity and an effective pre-petition campaign that discourages employees from signing the number of union authorization cards needed for the union to trigger an NLRB election.

If you have any questions about this Information Memo, please contact [Raymond J. Pascucci](#), [Erin Sylvester Torcello](#), any of the [attorneys](#) in our [Labor and Employment Law Practice](#), or the attorney in the firm with whom you are regularly in contact.



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