

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

MARC FREEDMAN
VICE PRESIDENT, WORKPLACE POLICY
EMPLOYMENT POLICY DIVISION

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5522

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Mr. Gary Shinnors, Executive Secretary
National Labor Relations Board
1015 Half Street, S.E.
Washington, DC 20570-0001

By electronic submission: www.NLRB.gov

**RE: RIN 3142—AA12; Representation—Case Procedures; Notice of
Proposed Rulemaking**

Dear Mr. Shinnors:

On behalf of the U.S. Chamber of Commerce (“the Chamber”), we are pleased to submit these comments to the National Labor Relations Board (“Board”), pursuant to the Board’s Request for Information Regarding Representation Election Regulations, 82 Fed. Reg. 58783 (December 14, 2017). This letter provides the Chamber’s views regarding the Board’s amendments to its representation case procedures, adopted by the Board’s Election Rule published on December 15, 2014, 79 Fed. Reg. 74308 (“the Election Rule”, “Rule”). For the reasons enumerated below, the Chamber believes the Board should proceed with a rulemaking to rescind the Rule. In the alternative, the problems highlighted below indicate changes to the Rule that are needed if it is to be maintained.

The Chamber is the world’s largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. The overwhelming majority of the Chamber’s members are “employers” as defined by the Act and consequently are affected by the Election Rule.

The Election Rule purported to “remove unnecessary barriers to the fair and expeditious resolution of representation cases, simplify representation case procedures, codify best practices, and make them more transparent and uniform across regions” (*see* NLRB Gen. Counsel Memo. 15-06 (April 6, 2015)) (“GC Memo 15-06”). As the Chamber and many other organizations and commentators predicted, however, the Election Rule has created an election process that in actual practice creates substantial uncertainty for employees and employers regarding the scope of the bargaining unit, deprives employers of appropriate and fair hearings, unfairly limits employers’ ability and opportunity to meaningfully respond to union petitions and organizing campaigns, creates substantial process burdens on employers, and undermines the rights of employees to hear both sides of the issues in an election campaign.

To validate the problems with the Election Rule identified in these comments, the Chamber participated in a survey to selected management labor law practitioners. They were asked to respond anonymously if they had handled R Cases under the new regulations. The questions asked focused on the effect of the reduced deadlines on the R Case process, and whether and to what extent the reduced deadlines complicated bargaining unit determinations; were difficult to meet; imposed additional costs on employers; interfered with communications with employees; or were otherwise unfair or impractical. There were 33 anonymous respondents to the survey who indicated that they had represented clients in 198 R Cases in which 140 elections had been held under the new regulations. There was nearly universal agreement that the current Rules' imposed great difficulties on employers and their counsel. These difficulties manifested themselves in a variety of ways and select responses are included below to support various points.

Given the problems caused by the Election Rule, the Chamber respectfully submits that the Election Rule should be rescinded and the previous election procedures restored. Alternatively, if the Rule is to be kept it must be significantly modified consistent with the Chamber's specific comments below.

1) **The Election Rule's Unduly Burdensome and Unnecessary Time Deadlines Deprive Employers of Sufficient Opportunity to Address Issues, Cause Employers To Incur Significant Costs, And Rob Employees Of Time Necessary To Fully Consider and Understand Relevant Issues.**

Initially, the Chamber notes that the fundamental injustice advanced by the Election Rule lies in its "overriding emphasis on speed," which has harmed and will continue to harm both employees and employers in their ability to understand and address relevant issues. This is precisely the harm predicted by former Board Chairman Philip Miscimarra and former Member Harry Johnson in their dissent to the Election Rule: "[T]he inescapable impression created by the [Election] Rule's overriding emphasis on speed is to require employees to vote as quickly as possible – at the time determined exclusively by the petitioning union – at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues." 79 Fed. Reg. 74,460.

Chairman Miscimarra's points were validated by survey responses:

- "[I]t does not give the parties enough time to take action. [I]t forces the employer into a position of weakness, rather than having the stated effect of leveling the playing field."
- "The rules represent an incredible effort to weigh speed to election to the detriment of virtually every other aspect, including proper determination of the unit, due process in the unit determination, communication and preparation."
- "If the term 'denial of due process' had a picture in the dictionary, it would be the NLRB's election rule."

The following discussions highlight several of the problems created by the Election Rule's misguided emphasis on speed.

(a) The Election Rule Unfairly Saddles Employers with Numerous Obligations That Have Very Tight Deadlines at the Outset of the Petition Being Filed.

The Election Rule imposes numerous unilateral obligations on employers almost immediately upon a petition's filing, including¹:

- Posting of a notice of petition for election within two days of receipt;
- If a hearing has been scheduled, the employer must, within a week of receipt of the notice of hearing, prepare a comprehensive Statement of Position addressing the issues the employer wishes to litigate at the hearing, including unit eligibility issues, all upon pain of waiving its legal rights to contest any issue not presented in the statement, which can include complex issues such as election bar questions and others that even seasoned labor practitioners may sometimes find difficult;
- Attending a pre-election hearing merely eight days after the notice of the hearing is served;
- Presenting written "offers of proof" in support of its position at the pre-election hearing, requires the employer to investigate and determine what matters and issues of proof should be offered, what the offer will be, and who are the best person(s) to testify on the matters and issues addressed in the offers;
- Communicating with and responding to the Board Agent regarding petition and election details for hours over a short period of time, all while having to prepare a detailed statement of position and prepare for a pre-election hearing; and
- Preparing "a list of full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular telephone numbers) of all eligible voters" (the expanded "Excelsior" list) within two days.

Because of both the inordinately constricted time deadlines and the risks of waiving legal rights, employers must immediately devote substantial attention to unit determination issues, including assessing the statutory supervisory status of particular employees and the appropriateness of the petitioned-for unit. This often requires in-depth meetings with on-the-ground supervisors to understand the day-to-day duties of particular employees. Simply put, the obligations imposed by the Election Rule—particularly in the required timeframes—have the

¹ Even before a petition is received, employers must be wary of the risk that a low-level manager, who happens to be off-duty or otherwise is occupied, is served with a petition and/or the notice of hearing, including through monitoring of his/her email.

effect of denying employers adequate time to investigate the issues and develop the testimony and evidence necessary to address representation issues.²

(b) The Election Rule Interferes With Employers' Rights And Ability To Meaningfully Communicate With Their Employees.

Both through the requirements on employers and by artificially abbreviating the time period between the filing of a petition and the election, the Election Rule interferes with employers' right and ability to meaningfully communicate with their employees during the election process.³ The time between the filing of the petition and the election has long been called the "critical period" for a reason—it is the window during which "the representation choice is imminent and speech bearing on that choice takes on heightened importance." *See* 79 Fed. Reg. 74,439-40 & n.59 (dissent). The critical period traditionally permitted an employer to educate its workforce on the changes that would necessarily occur in the event of unionization. For this reason alone, pre-petition statements concerning an employer's position on unionization, based on general observations at a time when no organizing efforts are taking place, are no substitute for post-petition speech.

Now, however, an employer's ability to respond to union campaign efforts and to provide a lawful management response to a union's argument in favor of unionization is severely and unreasonably restricted due to the limited duration of the critical period and the onerous administrative burdens unilaterally imposed on employers throughout it. Plainly put, the modifications imposed by the Election Rule ensure employers neither have the time nor the opportunity to engage in meaningful communication with their employees at the time when the representation choice is imminent. Furthermore, this impact is not an unforeseen or unintended

² Such obligations may also violate the Fifth Amendment of the U.S. Constitution and Section 9(c) of the NLRA by severely limiting the scope of the issues addressed at the representation hearing. As an example of the injustice created by the Election Rule, it permits (and even encourages) Regions to ignore issues of supervisory taint until after the election. Doing so disregards employees' Section 7 right to election conditions free from conduct the Board repeatedly has found to be inherently coercive. *See e.g., Harborside Healthcare, Inc.*, 343 NLRB 906 (2004); *Reeves Bros.*, 277 NLRB 1568 n.1 (1986); *Sarah Neuman Nursing Home*, 270 NLRB 663 n.2 (1984). This very harm is laid out in GC Memo 15-06, as it acknowledges that "a petition filed by a supervisor cannot raise a valid question concerning representation," but it directs that "[a]llegations of supervisory taint of the petition or showing of interest are normally determined through an administrative investigation conducted by the regional director independent of the pre-election hearing." *See* GC Memo 15-06. In fact, GC Memo 15-06 further directs that, even if a party asserts that pro-union conduct by a supervisor tainted the petition or the showing of interest, a Regional Director may decide not to permit litigation of supervisory status at any time prior to the election. The fact that the Election Rule permits Regions to conduct elections upon a potentially invalid petition without first giving employers an opportunity to litigate the issue is the very harm Section 9(c) seeks to avoid.

³ Those rights are governed by Section 8(c) of the Act, which states that: "The expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. §158(c). The policies reflected in Section 8(c) favor uninhibited, robust, and wide-open debate. *See e.g., Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008) (Section 8(c) of the Act manifests congressional intent to encourage free and robust debate on labor-management issues); *Healthcare Assn. of N.Y. State v. Pataki*, 471 F.3d 87, 98-99 (2d Cir. 2006) (Section 8(c) allows employers "to present an alternative view and information that a union would not present"). And, consistent with Section 8(c), "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

consequence, it is one of the specific reasons the Rule was issued. The Chamber's initial comments on the proposed rule predicted this exact outcome:

The Board has stated that its rules are designed to reduce the time for the scheduling of an election to as little as 10 to 21 days following the filing a petition, roughly cutting more than in half the median time of 38 days for holding elections under the current system. This is grossly unfair and threatens to deny the due process and free speech rights of employers and employees...The Board's proposal threatens to seriously undermine the rights of employers and employees – recognized under §8(c) of the Act and by the Supreme Court – to engage in a free and open discussion on the issue of union representation and collective bargaining.⁴

Various survey responses described the Rule's impact on the ability of employers to communicate with employees and how this undermined the fairness of the election process:

- “It is an outrageous hindrance to employers and their ability to communicate with their own employees. In my view the new rules were a deliberate attempt to obstruct the ability to communicate.”
- “Very challenging especially for clients who cannot stop operations (food processing, syringe producers, etc.) and with rotating shifts. Significant impact on operations, productivity, profitability, ability to meet client needs and communicate effectively with employees.”
- “The new rules definitely limit the amount of information employers can share with employees.”
- “A full discussion and reflection – an informed choice was not available due to timing and difficulty reaching all with information.”
- “Because of the shortened election timeframes, yes my client's ability to react and communicate has been hampered.”
- “Greatly – my clients had to rush to respond to the administrative requests, which reduced their ability to communicate its views to its employees.”

Of even greater importance, the truncated time deadlines adversely affect the employees' Section 7 right of free choice in matters of union representation. Employees, many of whom may have little if any experience with unions and do not understand concepts such as collective bargaining, union security, and exclusive representation, are denied the opportunity to consider and understand the obligations and commitments they are undertaking if they choose union representation and the rights they are giving up.

⁴ Comments of U.S. Chamber of Commerce on NPRM published at 76 Fed. Reg. 36812 (June 22, 2010), submitted August 22, 2011, pages 4-5.

In contrast, the Election Rule permits unions to act at their leisure (and in secret) in disseminating information to employees in support of their organizing efforts and to file petitions at a time when they are confident they have secured sufficient support to prevail in the election. The prior election processes provided employers – even ones with no previous notice of a union’s efforts – with a meaningful opportunity to address the relevant issues with their workforces and to communicate lawful responses to unions’ organizing efforts.

Survey responses confirmed that unions have been able to communicate to employees for months or years before an employer is notified:

- “The unions typically have been campaigning for 3-6 months before the filing of a petition or demand recognition.”
- “The union has months of messaging prior to petition.”
- “Usually the union’s position was disseminated well in advance (as reflected by the cards submitted to support the petition).
- “[U]nion’s position was clearly conveyed in all cases, pre-petition activity was thorough”
- “We learned that in one of our elections, the union had spent 6-8 months prior to the petition organizing and meeting with employees in secret.”
- “[C]learly the union has an advantage now – union has months/year to campaign while unbeknown to employer until day of petition”
- “Union’s position was known, but employees did not understand that ‘position’ was not factual or truthful.”

(c) The Election Rule Ignores The Heavy Costs To Employers.

The Election Rule imposes significant risks and heavy costs to employers in both preparing to comply with the Election Rule and then actually complying with the Election Rule once a petition is filed. Some of the obligations and risks employers – both large and small – are often saddled with include:

- Because of the frenzied pace between the petition and the election, employers’ human resources professionals, managers and legal counsel, are often forced to literally “drop what they are doing,” ignoring other professional and personal obligations, to devote near around-the-clock attention to addressing the requirements under the Election Rule and preparing for the pre-election hearing. Often, this includes substantial work on weekends and over holidays,⁵ requires rush travel by employer witnesses and legal counsel, and

⁵ For instance, the Chamber is aware of employers being forced to address election obligations over the Thanksgiving and Christmas breaks. Not only does this cause significant inconvenience for those involved, but it

occurs at the expense of other productive business activity. Merely because many employers have marshalled the resources to ensure technical compliance with the Election Rule's stringent (and one-sided) requirements, the Board should not ignore the fact that the costs of compliance are heavy and unacceptable and that they need to be addressed.

The survey responses confirmed, unequivocally, that the compressed timeframes resulted in increased legal fees to employers by requiring more lawyers to insure the necessary work was done on time:

- "Yes. Big teams in each case."
 - "Yes. In some cases 3-4 additional attorneys just to help with workload."
 - "Dramatically."
 - "Of course."
 - "Always."
- In addition to grossly underestimating the cost and economic impact of compliance, the Election Rule ignores the number of small businesses affected by its proposal and the economic impact of the proposal on those small employers, who are less likely to employ human resources departments or legal counsel who are experienced with compliance with the Act. Indeed, 96 percent of the Chamber's members are small businesses with 100 or fewer employees, and 75 percent of the Chamber's members have 10 or fewer employees. The Board failed to account for the fact that nearly all of the small businesses are subject to the Board's jurisdiction and are, therefore, impacted by the need to commit time and resources to keep abreast of and comply with the Act's complex legal requirements.

These fundamental flaws in the Rule are inconsistent with the goal of the Act to provide a fair opportunity for both sides to present their views and ensure an election process that truly reflects the wishes of the employees and therefore warrant it being rescinded. However should the Board decide to maintain the Rule, the following problems must be addressed:

2) **Employers Are Unfairly Shackled With Burdensome Requirements During The First Days Following The Filing Of A Petition.**

Not only are the obligations on employers following the filing of a petition overly burdensome, but, as noted above, they obligate employers to react in extremely unreasonable timeframes.

also can serve as a major distraction to voting employees, who may not want to be bothered with quick deadlines and an influx of information during the holidays.

(a) The Election Rule Should Be Modified To Eliminate The Burdensome Statement Of Position.

Perhaps the most problematic requirement is the obligation for an employer to prepare and file a comprehensive Statement of Position addressing the issues it wishes to litigate at the hearing,⁶ among other information, upon risk of waiving its legal rights to contest any issue not presented in the statement, within a mere seven days of the notice of petition. The following requirements in the Statement of Position should be addressed:

- ***Stating whether the proposed unit is appropriate and if not, other employees that should be added or excluded to make the unit appropriate.*** An employer ought not be required, on pain of waiving the issue, to identify – much less concede the appropriateness of – any unit, before a question has been asked or a word of testimony spoken at the pre-election hearing, or the employer (and other parties) have had any opportunity to probe the rationale for the proposed unit and any possible alternatives thereto. The requirement that the employer not only agree or disagree with the union’s proposal, but go further and make a proposal itself, amounts to a forced pleading and raises serious due process and free speech concerns. Since the union is seeking to organize employees, not the employer, it is the union’s responsibility to propose a unit appropriate for collective bargaining.
- ***Identifying any individuals occupying classifications in the petitioned-for unit whose eligibility to vote the employer intends to contest and the basis for each such contention.*** The Board also should do away with this requirement for the same reason as above. Unless and until the petitioned-for unit has been subject to examination at a hearing, or a unit has either been agreed upon by the parties or deemed appropriate by the Board, requiring an employer to identify who is in the unit, and who it believes is not eligible to vote, is a significant burden and often a waste of time and resources for the employer and other involved parties. In the hearing process, any unqualified voters and employees not sharing a community of interest may be excluded from the unit and other employees sharing a community of interest may be added, thus obviating any employer objections that may have existed to the unit as originally requested. Further, once the unit has been determined, the employer may wish to contest individuals whose identity is not known until the election list is prepared or individuals not identified in the list attempt to vote. In those circumstances, the employer should not – indeed cannot – be put to the burden of identifying who it plans to contest before the hearing is even conducted.
- ***Describing all other issues the employer intends to raise at the hearing.*** Identifying all legal issues at this very early stage is simply not practical. The preclusive effect of failure to do so makes this requirement unjust and a denial of due process.
- ***Providing full names, work locations, shifts, and job classifications of all individuals in the proposed unit and the employer’s proposed unit.*** As discussed above, we submit that

⁶ The Election Rule does not impose a similar obligation on unions in RC cases.

it is inappropriate to require an employer, on pain of forfeiture or preclusion, to identify – much less concede, by absence of objection, the appropriateness of – a unit.

- ***Seven days is wholly insufficient for the employer to file its Statement of Position.*** Contrary to the Board’s statement in the prior rulemaking process, that “given the variation in the number and complexity of issues that may arise in a representation proceeding, the amendments do not establish inflexible time deadlines . . .” 76 Fed. Reg. at 36187, the Election Rule does in fact establish deadlines that are both inflexible and inadequate to address the many various issues that arise shortly after a petition has been filed. Simply put, given an employer’s other obligations, it cannot simply drop everything in the interest of responding to a petition in such a short time frame, particularly without the assistance of counsel. Seven or less days is insufficient time for an employer to locate and retain counsel, evaluate the issues, and gather the information necessary to prepare and submit the Statement of Position.⁷ To the extent that an employer fails to raise an issue because of the tight timeframe, and is precluded from raising it subsequently, this would amount to a denial of due process. Such a scenario is most likely to occur with smaller employers that do not have ready access to experienced labor counsel and/or human resources professionals.

Among the responses from the survey illuminating the problems with the Statement of Position were the following:

- “Perhaps most difficult has been the deadline to comply with the filing of the position statement while preparing witnesses for the unit composition hearing – it often results in less-than-ideal work product, which ultimately harms the potential bargaining unit members.”
- “Routinely find that material evidence and issue[s] arise after deadline. Takes time to assess facts and issue in order to fully vet concerns. Also, takes time to realize what one does not know.”
- “In large unit cases the accumulation of the information needed very shortly after the petition is filed is time consuming and often daunting. This all occurs while needing to prepare for either a hearing and/or filing a position statement. The 8 day window is NOT enough time and the NLRB’s strict refusal to grant extensions borders on utterly ignoring due process.”

⁷ While the Rules provide for a two business day extension to the hearing and Statement of Position deadline under “special circumstances” and an additional two business day extension for “extraordinary circumstance,” this is insufficient to provide employers with due process. Furthermore, such extension requests have been extremely infrequently granted by the Regional Directors, who have been ordered to push the pace of elections.

(b) The Requirement That The Hearing Be Set Within Eight Days Of The Petition Is Unreasonable.

Requiring employers to attend a hearing (often out-of-town) within eight days of the petition being filed puts employers at a serious disadvantage because this timeframe does not provide employers with sufficient time to prepare for the hearing. Employers should not be expected to immediately “drop what they are doing” to do so. Removing this requirement will have the benefit of providing employers, unions, Board Agents, and Regional Directors more time and flexibility in reaching an agreement. Indeed, under the current timing rules, employers and unions are often forced to prepare for an election hearing only to learn at the last minute that the hearing is not necessary as a result of the Regional Director having approved the election agreement. This unnecessary expenditure of fees and time can be largely eliminated through eliminating a hard deadline for the hearing and permitting Regional Directors to exercise discretion that considers the complexity of the issues and other common sense scheduling issues such as travel, pre-existing obligations, and holidays.

The timeframe for setting the hearing date elicited the following responses from the survey:

- “They have a business to run too and essentially had to drop everything to deal with the issues, to the detriment of their other obligations.”
- “Had to bring witnesses from CA all the way to Newark to argue unit description. Board made everything inconvenient for the employer.”
- “8 days is absolutely ridiculous with busy clients whose management team is on the road.”
- “[T]he lack of flexibility in selecting an election date makes it increasingly difficult for clients to manage their operations while still responding to the organizing effort in an effective manner.”
- “Difficult, burdensome and unfair. One of the R hearings was held a few days before Christmas; another was held on a Friday, December 30th when it was extremely difficult to assemble witnesses. Most of the Region staff were on vacation that day, yet for most of the day we were told that the hearing must be completed on December 30th, regardless of how long it took. We finally insisted that the hearing officer contact the RD and notify him that we refused to stay past 5:30 pm, since it would mean that all of our witnesses would miss their flights home. The region relented, but then required us to travel on the New Year’s Day holiday (Jan. 2) to resume first thing in the morning on January 3. We felt bullied throughout this proceeding.”
- “The rule is a disaster for large bargaining units where there are significant questions about eligibility and, in our cases, employee status.”

(c) The Requirement that An Employer Submit A Voter List Within Two Business Days After The Direction Of Election Or The Approval Of A Stipulated Election Agreement Should Be Eliminated.

Many employers do not have employees' personnel information stored electronically. Even the employers that do have employees' personnel information stored electronically do not have it in a proper format for simply printing it out or otherwise easily gathering without divulging sensitive protected information. Therefore, many, if not most, employers will have to create the voter list manually, not just "print out a copy." The two days window is simply an insufficient amount of time in all but the most unusual cases.

3) The Limitations On The Scope Of The Questions That May Be Resolved At The Pre-Election Hearing Should Be Eliminated.

(a) The Election Rule Should Guarantee Employers The Right To Litigate All Unit Issues At The Pre-Election Hearing.

The Election Rule eliminates the right of employers to litigate an individual's eligibility before the election. 29 C.F.R. §102.64(a); *see also* GC-Memo 15-06. This creates several practical problems:

- The Act explicitly protects the right of employers to communicate with voters during the election campaign. In order to do so effectively, they must know who those voters are. Under the current system, employers often do not know the full scope of the unit.
- Employers must be able to participate in an election knowing the identity of the statutory supervisors. First, employers are legally responsible for the actions and statements of their supervisors during the election campaign; the employer must know who to train on the law. Second, this lack of clarity puts the employee at risk of violating his or her obligation to unequivocally support the employer in the course of a campaign. Third, if an employer believes in good-faith that a particular employee is a statutory supervisor, statements to that employee can be found to have violated the Act should it turn out that the employee is not a statutory supervisor. Failure to establish statutory supervisory status early, and beyond any doubt, renders each "gray area" employee virtually unapproachable to the employer during a campaign. That serves neither the employer's interests nor that employee's interests.
- The employee voters are denied knowledge of the full scope and make-up of the bargaining unit. This knowledge is important, particularly if the individuals are interested in knowing, for example, whether certain job classifications, certain individuals, or even they themselves will be included in the unit.

Simply put, the uncertainty and confusion this rule imposes on both employees and employers is not justified and must be addressed, particularly because employers often receive questions during the critical period from employees regarding their status and are unable to give a definitive answer under the current rules.

(b) The Election Rule Should Permit the Filing of Post-Hearing Briefs in All Circumstances.

For unit and other issues that may actually be litigated, the Election Rule restricts the use of post-hearing briefs to only instances in which a party obtains “special permission” from the Regional Director (29 C.F.R. §102.66(h)). To the best of the Chamber’s knowledge, this “special permission” is rarely granted. This is an unjustified restriction, as parties should be permitted to file timely post-hearing briefs on important legal issues (such as unit composition) to help aid the decision-maker in its decision on both the factual evidence presented and the relevant law to be applied.

Furthermore, the parties should be given fair and adequate time to prepare post-hearing briefs. The Regional Director should take into account – without the directive that it push the process unnecessarily - the time to receive and review hearing transcripts, research relevant law, and draft a brief.

(c) The Election Rule Should Eliminate Offers Of Proof In Lieu of Testimony.

The requirement to submit offers of proof in lieu of the testimony of witnesses and documentary evidence as to the issues to be litigated at the hearing (29 C.F.R. §102.66(c)) is another unjustified restriction. Offers of proof may be useful in adjudicating relevance of proposed witness or other evidence, but they cannot substitute for live witnesses, particularly if the constraints on the scope of the hearing are removed, as suggested above. Obviously, one purpose of a hearing is that the decision-maker can fully evaluate the factual evidence, including the veracity of the witnesses. Further, presenting written offers of proof (in the extremely short timeframe) consumes the time that would be necessary to produce witnesses – time that is wasted if the current system is kept in place.

(d) The Election Rule Should Restore Pre-Election Review By The Board.

The Election Rule virtually eliminates the discretionary review procedures for pre-election regional office rulings by the Board to only situations “where compelling reasons exist.” 29 C.F.R. §102.67(d); GC Memo 15-06. This amounts to no more than achieving so-called efficiency in the representation case process through the denial of due process rights of would-be petitioners and abdication of one of the Board’s most important functions under the Act.

4) The Voter List Requirements Should Be Modified To Provide More Clarity And Reduce The Burden On Employers.

The existing voter list requirement, including the format required by the General Counsel, is ambiguous and creates an undue burden on employers in the context of very limited time and complex legal and factual issues. This is particularly true given that a typical consequence of failing to comply with the timing and information requirements of the voter list is the draconian remedy of setting aside of the election. *See, e.g., Ridgewood Country Club*, 357 NLRB 2247 (2012); *Automatic Fire Systems*, 357 NLRB 2340 (2012).

Accordingly, the Election Rule should be modified as follows:

- **Delete the requirements that employers provide employees’ “work locations, shifts, [and] job classifications.”** These terms are ambiguous. For instance, many employees do not have a set shift but rather fluctuate. In addition, many employees work in multiple work locations. The requirement to include this information - much of which is irrelevant - creates an undue burden on employers in the context of very limited time and complex legal and factual issues. Why unions need this information when they did not need such information in order to effectively win elections for more than 70 years is unclear.
- **Delete the requirements that employers provide employees’ “available personal email addresses and available home and personal cellular (“cell”) telephone numbers” (the expanded “Excelsior” list).** This requirement has created a number of problems, particularly in the context of very limited time and complex legal and factual issues. The term “available” is ambiguous and can include numerous sources technically “available” to the employer but which are either reasonably overlooked or extremely time-consuming to search.⁸ As a result of this requirement, employers arguably have to search through: employee databases, job applications, resumes, call-in lists, leave files, benefits documents, managers’ emails, work/personal phones, files and calendars. Obviously, this is an extremely time-consuming process. Accordingly, the Board should change the Election Rule so that employers need only rely upon an existing employee database rather than obligating them to search numerous potential sources for “available” employee personal contact information. In many instances, this is information the employee may not want the employer to have.
- **Allow employees to opt-out of their information being provided to a third party union.** The requirement also results in an invasion of employees’ privacy, who are subject to having their personal email addresses and phone numbers bombarded with unwanted communications from a third party. The federal government should not mandate the disclosure of the personal contact information of those who do not wish to provide such information simply because unions want it. If the Board is inclined to allow for the disclosure of such personal contact information, the Election Rule should be modified to allow employees the opportunity to opt-out at the beginning of their employment and after an employer receives an election petition.

⁸ For instance, in a Regional Director decision applying the Election Rule, an election was set aside - even though there was no prejudice shown to the union - due to the employer’s failure to search multiple sources of information, despite the employer having provided a complete list of voter names and addresses culled from its human resources database, having provided a phone number for about 94% of the listed voters and having provided all personal email addresses from the human resources database. *The Danbury Hospital*, Case 01-RC-153086 (Oct. 16, 2015). The Election Rule also provides no guidance as to what employers must do in the event manager is off-duty during the relevant timeframe.

5) **The Election Rule Should Ensure Adequate Notification To The Employer.**

Currently, there is nothing in the Election Rule or otherwise that restricts the individual who may be served on behalf of an employer. Thus, virtually any member of management who is located at the facility in question may be served. This creates a significant risk that the employer also timely receive an initial notification of the petition or other legal documents. For instance, if the petition is served upon a low-level manager who happens to be out of the office for vacation or otherwise, a significant risk exists that the employer will not be notified of the petition. Accordingly, the methods of notifying the employer should be fewer and more reliable.

One approach to allay this risk is to restrict the persons who may be served so as to constitute proper service. For instance, the Board could require that any petition be served on both the top management-level on-site representative and the employer's top human resources employee (to the extent the employer has one). The Election Rule needs to be amended to assure an employer receives adequate notice of a petition and its obligations.

Similarly, the Election Rule requires that employers post a "Notice of Petition for Election" within two business days after service of the petition and "also distribute it electronically if the employer customarily communicates with its employees electronically." 29 CFR §102.63(a)(2). To the extent the employer does not receive the petition timely and/or the notice of hearing, there is a significant risk it will not be able to timely post the notice. And, as with the failure to timely submit the voter list, the consequences of failing to timely post a notice can be quite draconian: the election may be set aside. *See, e.g., Systems West LLC*, 342 NLRB 851 (2004).

Moreover, the requirement that employers distribute the notice electronically if they "customarily communicate" with employees in such a manner should be eliminated or modified, as it simply creates another uncertain obligation. For instance, an employer that occasionally emails its entire workforce has little direction in determining whether it has a "customary" practice of communicating with employees in such a manner and it must comply with this requirement. The Chamber is aware of many employers that have had to grapple with this issue following receipt of a petition.

Similarly, the Board should eliminate or modify the same requirement for the distribution of the "Notice of Election." 29 CFR §102.67(k).

6) **The Validation of the Union's Evidence Of Support Should Be More Transparent.**

The Chamber submits that there should be more structure, transparency and accountability around validating the showing of support. Under current Board policy, the Region is to presume the validity of written authorizations unless called into question by the presentation of objective evidence. NLRB Case handling Manual (II) Sec. 11027.1. Further, the Board's Rules and Regulations do not provide any procedure whereby an employer can contest interest. Indeed, under long-standing Board policy, employers are not permitted to review cards during the Region's investigation into the showing of interest. *See The Midvale Co.*, 114 NLRB 372 (1955).

Particularly when combined with the overemphasis on speed following the filing of a petition, these policies give employers and employees little, if any, opportunity to meaningfully determine whether the petitioning union has actually raised a sufficient showing of interest such that an election should be held.

There should be a better-defined structure, more transparency and more accountability in the validation process. Moreover, the Regional Director should not serve any party with the petition until the Region has fully validated that the petitioning union has submitted sufficient evidence demonstrating a showing of interest.

7) **The Post-Election Review Processes Should Give Regional Directors More Discretion.**

The current Rules direct that when a party files objections to the conduct of an election or to conduct affecting the results of an election, and the Regional Director determines the evidence described in the accompanying offer of proof could impact the election results, the Regional Director is directed to set a hearing for 21 days after the preparation of the tally of ballots or as soon as practicable thereafter. 29 C.F.R. §102.69(c)(1)(ii). The 21 day directive should be eliminated, and the Regional Director should be given discretion in scheduling a hearing based upon factors such as the complexity of the issues, anticipated length of the hearing and the scheduling consideration.⁹

Further, the Election Rule only permits post-hearing briefs upon special permission of the Hearing Officer and within the time and addressing the subjects permitted by the Hearing Officer. 29 C.F.R. §102.69(c)(1)(iii). As with the restrictions on briefs following the pre-election hearing, these are unjustified restrictions, as parties should be permitted to file legal briefs to help aid the decision-maker in its decision on both the factual evidence presented and the relevant legal issues.

Finally, as with Board review of pre-election regional office decisions, the Election Rule virtually eliminates the discretionary review procedures for post-election Regional Director rulings by limiting Board review to only situations “where compelling reasons exist.” 29 C.F.R. §102.69(c)(2). The fact that an employer is not given enough time to properly prepare for the hearing, is restricted from litigating certain issues at the hearing, is subject to waiver of challenging certain things if not raised or in the position statement, is not given a fair opportunity to communicate with the employees compared with that given to the unions is thus compounded by severely restricting an employer’s ability to raise critical issues post-election. Not only does this potentially amount to a denial of due process rights, but the lack of Board review encourages employers to commit a technical Section 8(a)(5) violation and litigate the regional office decisions in unfair labor practice proceedings through the federal court system, thus expending resources that should not have to spent, and prolonging the process—directly contrary to the stated intent of the Election Rule.

⁹ To be clear, the Chamber submits that no hearing should be held any time prior to 21 days.

Conclusion

These comments demonstrate unequivocally the inherent flaws in the Election Rule. The management-side labor law bar uniformly sees the Election Rule as unnecessarily prejudicial to employers and their counsel, and consequently as a direct denial of due process.

To address the deficiencies and procedural harms identified above, the Chamber respectfully requests that the Board pursue a rulemaking to rescind the 2014 Election Rule and restore the previous election procedures. In the alternative, the 2014 Rule should be substantially modified along the lines indicated in these comments.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Mr. Friedman".

Vice President, Workplace Policy
Employment Policy Division

Of Counsel:

Robert Quackenboss, Partner
Ron Meisburg, Special Counsel
Hunton Andrews Kurth LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037