



Arizona Hospital and Healthcare Association

Submitted Electronically

August 22, 2011

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

RE: RIN 3142-AA08 Proposed Rule: Representation--Case Procedures

Dear Mr. Heltzer:

On behalf of our 102 member hospitals and healthcare organizations, the Arizona Hospital and Healthcare Association (AzHHA) welcomes the opportunity to respond to the National Labor Relations Board's (NLRB's) proposed rule regarding case procedures for employee representation, published in the Federal Register on June 22, 2011.

The proposed regulations unnecessarily and substantially shorten the time between the filing of a petition and the election, and defer—and in some cases eliminate—the opportunity for a full evidentiary hearing or Board review of contested issues. These changes violate the spirit of the National Labor Relations Act (NLRA) by forcing an election before employees have full information. The regulations also require the employer to disclose personal employee information without employee consent. For these reasons, discussed more fully below, AzHHA urges the NLRB not to adopt the proposed regulations.

Importantly, the NLRB's own election statistics belie its position that expedited procedures for elections are needed. In fiscal year 2010, for example, 95.1 percent of all initial elections were conducted within 56 days of the filing of the petition. Initial elections were conducted in a median of 38 days from the filing of the petition and the agency closed 86.3 percent of all representation cases within 100 days, surpassing the NLRB's internal target rate of 85 percent. The Acting General Counsel described the achievement of these results as "outstanding." (GC Memo 11-03, introduction) For all petitions filed, the average time to election was 31 days. Voluntary election agreements were obtained in 92 percent of the merit petitions. (GC Memo 11-09 at 18) Despite these impressive statistics, the regulations seek to unfairly shorten the time between elections and petitions, eliminate pre-election evidentiary hearings, remove review rights, and impose draconian waiver standards, all to the detriment of employers and their ability to

communicate with employees regarding the potential pitfalls of unionization. There is no sound reason for these changes.

The time frames suggested in the proposed rules ignore the realities of the workplace and union campaign activity. In most circumstances, the employer is unaware of an organizational drive until a petition is filed. By that point, union organizers have been hard at work for many months. Having had the luxury of communicating with employees for an extended period of time, at the apex of union support, the union files a petition. From that point, the proposed regulations require an election within 10 to 21 days. After the union has had months to communicate its message to employees, the proposed regulations ensure that employers are disadvantaged; they receive an extremely short period of time to engage in a dialogue with their employees.

This one-sided approach is not contemplated by the NLRA and is contrary to the free speech provisions of Section 8(c). As recognized by the United States Supreme Court, the enactment of Section 8(c) manifested a “[c]ongressional intent to encourage free debate on issues dividing labor and management.” *Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966). While the NLRB is authorized to regulate a narrow zone of speech to ensure fair elections, it is not empowered to make rules that inhibit the flow of information and result in ill-informed employees casting their votes in elections rushed by NLRB rules. The proposed regulations significantly curtail the employer’s ability to participate in the unionization debate. This contravenes the spirit of Section 8(c) and the NLRA generally.

To the further detriment of employers, the proposed regulations also impose short deadlines that the employer must meet prior to the election, further taxing the employer’s resources and limiting its ability to lawfully communicate with the affected employees. For example, within the limited time frame between the filing of the petition and the election, the proposed regulations require the employer to provide an electronic voter list to the union within two days of direction of an election. In addition, within seven calendar days (five business days) after a hearing notice is served, the proposed regulations require the employer to submit a formal Statement of Position that must raise all contested issues with respect to the election. Considering the fact that most employers will need to obtain the advice of counsel in connection with these activities, and that all employers have a business to run in the meantime, the imposition of timeframes that shorten deadlines while at the same time increasing the burden on employers is unworkable, unfair and detrimental to the information exchange that is supposed to accompany the election process. The result will be uneducated voters and/or an increase in the number of unfair labor practices.

The limited timeframe permitted for the Statement of Position is particularly problematic. The proposed regulations provide a short fuse for submission of such a statement—five business days from the notice of hearing—but require it to be all inclusive. Employers

are required to identify all issues relating to the petitioned-for unit; any proposed exclusions from the petitioned-for unit; the existence of any bar to the election; the type, date, time and location of the election; and any other issues that the employer intends to raise at hearing. If the employer takes the position that the petitioned-for unit is not appropriate, it is also required to state the basis for that contention and identify the most similar unit it concedes is appropriate. If the employer intends to contest the eligibility of individuals occupying classifications within the proposed unit, it is required to identify the individuals and state the basis for the proposed exclusion.

These issues certainly deserve consideration in the pre-election process. The problem, however, is that the proposed regulations require this statement to be submitted within five working days and mandates that any issues not raised within this short timeframe are forever waived. Even for larger employers with ready access to experienced labor counsel, this timeframe will often be insufficient to obtain legal advice and research all potential issues; for small employers who are unfamiliar with complex labor law issues and don't have regular counsel, the problems are exacerbated. Coupled with the draconian penalty of waiver, the proposal is unreasonable, unfair and unnecessary.

The proposed regulations also operate to defer eligibility issues involving less than 20 percent of the bargaining unit until after the election, casting a cloud of uncertainty over the election process. Individuals whose eligibility is contested (up to 20 percent of the proposed unit) will be permitted to vote, with the issue of eligibility deferred until after the election. As a consequence, employees will be required to vote without knowing the composition of the unit; even worse, uncertainty about whether their vote will count could discourage employees from voting at all. Moreover, the parties will not know, prior to the election, whether certain individuals are supervisors, creating further constraints on an employer's communication with its employees and increasing the likelihood of inadvertent unfair labor practices. These provisions further erode an informed decision-making process.

Finally, the proposed regulations require the employer to electronically disclose, within two days after an election is scheduled, not only the names and addresses of employees in the proposed bargaining unit, but also their telephone numbers and e-mail addresses. (The proposed regulations are unclear regarding whether the disclosure obligations relate to home or work telephone numbers and addresses.) AzHHA finds the mandated disclosure of this confidential information, without employee consent, to be particularly troubling. Employees should be entitled to choose whether their personal contact information is released. The two-day timeframe is also unnecessarily short and is likely to result in errors (and thus, more post-election disputes) as employers rush to produce this expanded form of voter list.

The NLRB should not adopt the proposed regulations. They hamper the free flow of information envisioned by the NLRA and will result in ill-informed voters. The

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shortened timeframes are unnecessary and operate to the detriment of employers who will have little time to retain counsel, train management, and lawfully communicate to employees while simultaneously meeting the increased burdens imposed on them. In addition, employers should not be required to disclose personal employee information without their consent.

For these reasons, AzHHA respectfully encourages the NLRB to withdraw this proposal.

Sincerely,

A handwritten signature in black ink, appearing to read "Laurie Liles". The signature is written in a cursive, flowing style.

Laurie Liles
President and Chief Executive Officer