



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

Re: Notice of Proposed Rulemaking, Representation Case Procedures, RIN 3142-AA08

Dear Mr. Heltzer:

On behalf of the National Small Business Association (NSBA), I am writing in opposition to the proposed rulemaking on Representation Case Procedures, RIN 3142-AA08. This rule would dramatically tilt the elections process against our small-business members in the favor of large, organized labor. In these comments I will address what our members saw as an unfair process leading up to the final comment deadline as well as the problems inherent with the proposal itself.

Process Concerns

NSBA took issue with the process surrounding this rule, and urged—to no avail—that a rule of this magnitude be given more time than what originally was outlined. A truly fair and equitable process would have provided ample time for input from the millions of small-business stakeholders across the country.

Timing

The first issue NSBA raised was the expedited timeline for interested parties to testify at the single public hearing held on July 18 and 19. The rule was announced June 22, with a follow-up announcement on June 27 that interested parties must notify the board by July 1, a mere five days later, of their intent to testify. This simply wasn't enough time for most small-business owners.

The second issue NSBA raised was a comment period that was far too short to enable small-business stakeholders a fair opportunity to read, consider and comment on such a significant rule change. Small-business owners rarely have attorneys or labor specialists on staff, and when it comes to regulatory changes it is either the business owner him/herself who must then become a regulatory expert, or he/she must hire outside help. In this economy, neither option is workable for already time- and cash-strapped small-business owners.

Putting such a sweeping change in place under such an unusual and questionable process sends a strong message to small businesses that their needs are inconsequential. Despite our opposition to legislation such as the Employee Free Choice Act, we acknowledge that there are always going to be differences in opinion. Those differences, however, should never be manifested in the form of an unfair process that limits open and honest discourse.

There exists a strong perception that the NLRB is working to enact through back-channels legislation that was unsupported by Congress. In a time when the administration of President Barack Obama is calling for restraint, common-sense, and a rethinking of the regulatory burdens imposed on small businesses by the federal government, this entire regulatory initiative is contrary to the President's announced goals and is therefore quite perplexing.

Failure to Complete an Initial Regulatory Flexibility Analysis

As stated previously, small-business owners rarely have attorneys or labor specialists on staff, and must themselves bear the burden of regulations. To aid in that process, Congress has enacted several pieces of legislation to account for small businesses in the regulatory process, namely the Regulatory Flexibility Act (RFA). Although the NLRB technically followed letter of the law for the RFA, one of the most significant and repeatedly cited loopholes in the law is its failure to require agencies to conduct an Initial Regulatory Flexibility Analysis (IRFA). This loophole essentially leaves up to the rule-writers whether or not they believe a rule will “have a significant economic impact on a substantial number of small entities.”

The NLRB internally—in-lieu of a formal IRFA—determined their rule would not affect a substantial number of small entities. As evidence, the rule goes on to state that the board has held elections in fewer than 2,500 small entities, on average, per year over the past five years. In NSBA’s opinion, 2,500 small businesses per year is not insignificant. NLRB even states that because there is no definition of “significant” or “substantial”, both terms will vary given the problem that needs to be addressed. The proposal even goes so far as to say it would result in a decrease in costs for small employers due to the streamlined process and cites “reducing the length of evidentiary hearings and deferring litigation of issues that may be rendered moot by elections,” as such evidence.

This argument fails to take into account the long-term costs and indirect costs an employer would be saddled with under the new rules which greatly reduce the amount of time a small-business owner has — again the sole regulatory chief within his or her business—to prepare for an election. This reduced time would make it even more likely that the small-business owner will have to seek outside assistance.

It is clear from the section on the RFA included in this proposal that the NLRB simply doesn’t get it when it comes to small business. The proposal points out four major new requirements in the proposal that they believe “might” increase costs. One in particular is the new “Statement of Position” where an employer must complete a binding written statement prior to the hearing which could be a mere seven days after a petition is filed. Should the employer fail to file that statement, or not explicitly name a certain concern, the rule basically strips an employer’s rights to protest or provide evidence against the election, or bring up new concerns not originally included in the Statement of Position at a later date.

The rule states that employers “shall be precluded from contesting the appropriateness of the petitioned-for unit at any time and from contesting the eligibility of inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses, if the employer fails to timely furnish [the information required].”

To get around the Statement of Position, the board states small employers would simply have to enter into an election agreement. The Statement of Position is a very detailed document, contrary to what the NLRB claims, which holds significant legal implications for small firms. To think such an all-encompassing requirement with such significant legal implications doesn’t represent a substantial impact—as NLRB does—is remarkably short-sighted, particularly given that small firms could have a mere seven days to complete and file it. This requirement represents an unquestionable substantial burden on small firms, and is a clear attempt to coerce small firms toward an election rather than trying to fight it.

Further underscoring unique disadvantage small firms face is the win rate for unions in representation cases. In FY 2009, unions won representation cases 63.8 percent of the time. For firms with fewer than 10 employees, the union win-rate jumps to 74.1 percent, demonstrating a clear need to take a closer look at how these elections impact small firms differently.

Proposal Concerns

With regards to the rule itself, NSBA's small-business members have time and again pleaded their case for restraint and fairness when it comes to regulations. Expediting a detailed process such as union elections is the exact opposite of such restraint and fairness, and it will make an already burdensome process nearly impossible for the small-business owner who is still responsible for payroll, selling product, handling employee benefits, and a host of other duties that frequently fall on the one person in charge.

Election Timing

The proposed rule focuses on an alleged effort to streamline and expedite the elections process. Over the past decade, however, the median time between a petition being filed and the elections is only 38 days. In FY 2010, the average time between a petition filing and the election was just 31 days. Historically, the NLRB has had a target timeframe of 42 days between petition and election—more time than what currently is the norm.

Given this already-beaten timeline goal and the fact that unions prevailed in 64.8 percent of elections in FY 2010, NSBA's small-business owners are unconvinced that there is any major flaw in the process, and cannot fathom what "major delays" could, in good faith, have prompted this proposal. The primary objective of the National Labor Relations Act is to "assure employees the fullest freedom to decide whether or not they desire union representation." This proposal is a clear effort to make unionizing campaigns easier and quicker for unions which is not in the spirit of the law that directs the process. Employees ought to have unfettered access to information from both sides on the implications of a unionizing campaign before a vote would happen.

Unions can spend months or even years in advance of filing a petition to encourage employee support of unionization. The unions control when a petition is filed, giving them the upper-hand in planning and spreading information to the workforce. Employers, under this proposed rule, would then bear the full brunt of a shortened timeframe which, in certain circumstances, could be just 10 days following the filing of a petition.

Disclosure of Employee Contact Information

The proposed rule would require the disclosure of business e-mail addresses and phone numbers of employees on the eligible voter list, and also could require disclosure of personal phone numbers and e-mail addresses by expanding the current law to include "available e-mail addresses and available phone numbers" for inclusion on that list. This is a drastic and unfair expansion on the information employers would be required to provide on their employees, and constitutes an intrusion of privacy for employees. Such disclosures could pose serious litigation risks for employers down the road.

Exacerbating the burden posed by this increase in information that would be required for the eligible voter list, the proposal calls for a reduction in the amount of time an employer has—from seven to two days—to provide a voter eligibility list, and would now require that list to be submitted in electronic form. NSBA members oppose both the expanded information disclosure as well as the dramatic reduction in time for which employers have to compile such a list.

Deferrals of Pre-Hearing Elections

The proposal would enable regional directors and hearing officers to deny employers the right to a pre-election hearing over disputes about eligible voters. Previously, both the NLRB and courts have come to the conclusion that, as the law spells out, a pre-election hearing is necessary to ensure fairness to employers and to protect the rights of employees to make informed choices in the elections.

Enabling an elections process to proceed without the pre-hearing process likely will result in more litigation and a longer elections process in the long-run, as employers will be forced to address discrepancies and file unit challenges after-the fact and could result in the need to restart the elections process. Furthermore, the fact that post-election reviews would now be discretionary severely tilts the process against employers who have every legal right to educate their employees on the implications of becoming an employee in a unionized shop.

Conclusion

Despite the goal of streamlining elections, NLRB was ultimately unable to estimate by how much time the process would be shortened. Some labor law experts have estimated the new rules could cut it by nearly half. If—as is laid-out in the proposal—an election could be held just 10 days following the filing of a petition, employers would have no reasonable hope of accurately and fairly educating their employees.

Of particular concern to small businesses, the majority would be hard-pressed-- yet forced-- to secure a contract with an external law firm who would represent their interests. As any small-business owner can tell you, securing such an agreement could be very difficult in 10 days while at the same time fulfilling all other duties as the head of a small firm.

Small-business owners have struggled to stay afloat the last three years amidst the deepest recession since the Great Depression. Implementing new, onerous regulations that would cause additional problems for already struggling small businesses only adds insult to injury. Small-business owners face unique challenges in navigating federal regulations and, according to NSBA surveys, consistently rank “reduce the regulatory burden” as one of the most important things Congress and the administration ought to do. According to NSBA’s most recent Mid-Year Economic Report, regulatory burdens represent the fourth largest challenge to the future growth and survival of small firms—even before federal taxes and the national deficit.

There exists among the small-business community growing concern about regulations and the burdens they impose. This proposal from the NLRB is a perfect example of what’s wrong with the regulatory process. Small-business owners justifiably fear this proposal will put them at a distinct competitive disadvantage to both unions and larger businesses.

NSBA remains committed representing the interests of America’s small-business owners and I hope that the NLRB realizes that this proposal is the wrong solution at the wrong time.

Sincerely,

A handwritten signature in black ink, appearing to read "Todd McCracken", with a long horizontal line extending to the right.

Todd McCracken, President and CEO
National Small Business Association