Employer Ambushed by Labor Board's New Election Rule

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Much has been written about the National Labor Relations Board's new "ambush" election rules. The rules are a one-two punch to employers: first, by substantially shortening the pre-election period; and, second, by imposing onerous information disclosure obligations. (For more on the rules, see our article, Preparing for Labor Board's Quickie Election Rule.)

Illustrating what a difficult blow the second punch can be is the case of *Danbury Hospital,* No. 01-RC-153086 (Sept. 16, 2015), in which an NLRB Hearing Officer ordered a re-run election. More than 700 hospital employees out of 866 eligible voted in an NLRB election in which the union lost 390-346. The union filed "objections" with the NLRB demanding a new election be held because, according to the union, the hospital did not do enough to supply voter email addresses and cell and home telephone numbers as part of the voting list the new rules require an employer to provide. After a hearing on those objections, an NLRB Hearing Officer, agreeing with the union, ordered a re-run election.

The Rule

The new rule on an employer's obligation to provide voter contact information provides:

> Absent extraordinary circumstances, within two business days after the issuance of the direction of election, the employer must provide the Regional Director and the parties the list of the full names, work locations, shifts, job classifications, and contact information (including home address, *available* personal e-mail addresses, and *available* personal cellular or phone numbers) of all eligible voters ....

(Emphasis added.)

Information Provided

Thus, under the new rule, in a short time, the hospital was required to compile substantial contact information about the eligible voters and provide it to the union and the NLRB.

The hospital's Human Resources department maintained a database, known as "Lawson," which included employees' names, addresses, home and cell phone numbers, and personal email addresses. Once a year, the hospital requested that employees update their information. Nevertheless, the information in the Lawson system was incomplete because not every employee provided all the information requested.

The list submitted by the hospital to the NLRB and the union included columns for the employees' name, position title, work location, shift (days, evenings, nights, or "variable"), home address (street, city, state, and zip code), personal email address, home telephone, and cellular telephone. The hospital relied exclusively on the Lawson information, and as a result, the list included only 45 "personal email addresses," 51 cellphone numbers, and 807 home telephone numbers. For 48 employees, there was no entry for home phone, cell phone, or personal email address.

Other Information

The evidence submitted at the hearing showed that additional contact information was "available" in ways other than through Lawson. For example, the hospital's Human Resource department utilized an applicant tracking software system to process and track, among other things, internal employee applications for open positions which included internal candidates' personal email addresses.

The evidence also showed several departments used other systems to collect employee contact information. For example, the Emergency Department used a software system called "Mutare" to "blast" information by, email or "voice call," among other formats. The hospital's staffing office used a scheduling program called ANSOS, which included telephone numbers from Lawson supplemented

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with other contact information, including personal cell phone information, obtained from sources other than Lawson. Additional evidence showed that various floors and departments maintained telephone numbers and personal email addresses.

Hearing Officer Decision

Noting in particular the small percentage of personal email addresses included on the list, the Hearing Officer decided that "[t]he credited evidence supports a conclusion that the Employer had in its possession personal email and telephone information that it failed to include and provide to the Union in the Voting list." The Hearing Officer also found that the record established that the Lawson information was not the employer's most current or accurate contact information; that substantially more and better contact information was available; and that the employer "made no effort whatsoever" to include this in the Voting List submission.

Finally, she held that "common sense and a 'reasonable amount of diligence' would have led [the hospital] to at least *inquire* of Staffing whether they had better or different contact information than that which originated in Lawson." In the Hearing Officer's opinion, "the Employer has not substantially complied with §102.67(l), and its obligation to provide available personal email addresses and available personal cellular numbers, of eligible employees."

The Hearing Officer rejected the employer's argument that the union was obligated to show prejudicial effect, in view of the fact that "the election could have been decided differently based on as few as 23 voters voting for rather than against the [union]."

The employer argued that it acted in good faith, because it relied on Lawson, the "main repository" for employee information. However, the Hearing Officer decided the employer's good faith was immaterial to the resolution of the case. The record evidence readily reflected that the employer had in its possession, in electronic format, a great deal more than it provided, and therefore, the employer had failed to establish substantial compliance with the Board rule. Given the closeness of the election and the potentially large amount of excluded contact information that is at issue, she recommended the objection be sustained.

Further Review

The Hearing Officer's Report is subject to review by an NLRB Regional Director, and if appealed, by the NLRB in Washington, D.C. Thus, it is not precedential and could be reversed.

Nevertheless, the Report provides lessons for employers faced with union representation petitions and an obligation to provide employee information under the new NLRB election rules. Employers should exercise due diligence in completing these lists. Although it appears employers are not required to ask employees for their contact information in order to satisfy the rules (instead, providing the information they and their supervisors and managers have available), the precise contours of an employer's obligation to gather "available" employee contact information will not be known until the NLRB decides the question. As of now, it appears that if complete information to satisfy the rules may be obtained only by resorting to several "available" (documented or electronic) sources within the employer's control, the employer must make the effort to do so. Further, the Hearing Officer suggested the employer in these circumstances might have requested additional time to submit the lists, as provided in the rules, if its search of several sources of information for a large a volume of data could not be completed in the time normally allotted.

Jackson Lewis attorneys are available to answer inquiries regarding this and other workplace developments.

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