COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2181 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

March 25, 2014

The Honorable Mark Pearce
Chairman
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Dear Chairman Pearce:

We write to request a 30-day extension of the comment period for the National Labor Relations Board's (NLRB) February 6, 2014 representation-case procedures proposed rule (RIN 3142-AA08). The public deserves additional time to analyze the significant changes proposed by the NLRB and also examine how the Board's decision in *Specialty Healthcare* will affect the proposed rule.

In general, existing NLRB election procedures are effective and fair. In 2013, for all petitions filed, the median number of days from the filing of a petition to an election was 38 days.[1] More than 94 percent of all initial elections were conducted within 56 days of the filing of the election petition,[2] and unions won more than 60 percent of the elections.[3] Former Acting General Counsel Solomon described nearly identical results regarding the timing of elections as "outstanding."[4]

Clearly, there is no pressing need to alter current election procedures. However, the proposed rule makes significant changes to the NLRB's representational election process, particularly the pre-election hearing process. Under the proposed rule, "absent special circumstances, the regional director would set the [pre-election] hearing to begin seven days after service of the notice of hearing."[5] The new Statement of Position, due at the start of the pre-election hearing,

---

[1] Median Days from Petition to Election (last visited on February 25, 2014), available at http://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election.
[2] *Id.*
[3] Disposition of Election Petitions Closed in FY13 (last visited on February 25, 2014), available at http://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/disposition-election-petitions-closed-fy13.
[4] General Counsel Memorandum 11-03 at "Introduction" (Jan. 10, 2011).
[5] 79 Fed. Reg. 7318, 7328 (February 6, 2014).

would "solicit the parties' position on the Board's jurisdiction to process the petition; the appropriateness of the petitioned-for unit; any proposed exclusions from the petitioned-for unit; the type, dates, times and location of the elections; and any other issues that a party intends to raise at hearing."[6]

The rule also provides, "[i]n those cases in which a party takes the position that the proposed unit is not an appropriate unit, the party would also be required to state the basis of the contention and identify the most similar unit it concedes is appropriate."[7] Finally, "[f]ailure to state a position would preclude a party from raising certain issues and participating in their litigation."[8]

Since this rule was initially proposed in 2011, the standard for determining the appropriateness of union bargaining units has changed significantly. On August 26, 2011 in *Specialty Healthcare*, the NLRB majority, with then-Board Member Brian Hayes dissenting, overturned 30 years of precedent and adopted a new standard for determining the appropriateness of union bargaining units.[9] Under the new standard, if the union-proposed bargaining unit is made up of a readily identifiable group[10] and the Board finds the employees in the group share a "community of interest," the Board will find the proposed unit appropriate. Any party seeking to change the unit must demonstrate employees in the new unit share an "overwhelming community of interest" with those in the proposed unit.[11]

There is still considerable uncertainty about the appropriate application of the new *Specialty Healthcare* standard.[12] In fact, two cases addressing this issue, *Macy's Inc.* and *Bergdorf Goodman,* are currently before the Board.[13] In *Bergdorf Goodman*, a NLRB regional director held that associates in women's shoes at a Bergdorf Goodman store were an appropriate unit. Similarly, another NLRB regional director held that cosmetic and fragrance workers at a Macy's in Saugus, Massachusetts, were an appropriate unit. The Board's ruling in these cases is essential to understanding the application of *Specialty Healthcare*. Even NLRB General Counsel Griffin has indirectly acknowledged this fact, stating in 2013 he will provide regional staff with a guidance memorandum addressing *Specialty Healthcare* when *Macy's* and *Bergdorf* are decided.[14]

NLRB regional staff is not the only party that would benefit from a guidance memorandum; employers, unions, and workers are also struggling to understand the implications of *Specialty Healthcare*. On several occasions, witnesses have expressed concerns before this committee as to

---

[6] *Id.* at 7328.
[7] *Id.*
[8] *Id.*
[9] 357 NLRB No. 83 (August 26, 2011).
[10] Such as employees that make up a job classification, department, or work locations.
[11] 357 NLRB No. 83, at 1 (August 26, 2011).
[12] *Kindred Nursing Centers East, LLC v. NLRB,* Nos. 12-1027, 12-1174 (6th Cir. Aug. 15, 2013).
[13] *Macy's, Inc. v. Local 1445, United Food and Commercial Workers Union*, 01-RC-091163; *The Neiman Marcus Group, Inc., d/b/a Bergdorf Goodman,* 02-RC-076954.
[14] James, Ben, *NLRB To Issue Guidance on Specialty Healthcare, GC Says*, Law 360, available at http://www.law360.com/articles/495760/nlrb-to-issue-guidance-on-specialty-healthcare-gc-says (Last visited on March 21, 2014).

their ability to find counsel and prepare the Statement of Position for the pre-election hearing in only seven days. This situation has been further complicated by the *Specialty Healthcare* decision. On March 5, Doreen Davis, a labor attorney with NLRB experience, highlighted the difficulty of determining whether employees share an "overwhelming community of interest" and questioned whether seven days provided sufficient time to prepare for the pre-election:

> *[U]nder the current rules, sometimes we are required to [prepare for the pre-election hearing] as soon as 10 days [after the petition for election is filed], but not 7 days, and under the current rules, we can litigate at the pre-election conference... We haven't waived issues that weren't raised in the pre-election conference... Under the new rules, there would be no opportunity to do that, unless you had stated it in your statement of position, which is due [] no later than 7 days after the petition is filed. So it is very challenging for small employers. It is equally challenging for large employers, because as an outside counsel, I have to learn their business, how it operates, which group of employees interact with whom, which employees have a community of interest with others. Do they have similar wages, hours, working conditions, supervision? Is what they do at that company related to what another employee does and how? There are many things that have to be learned in order to effectively represent an employer in these kinds of proceedings, and that is all being very much short-circuited under these proposed rules.*[15]

The public deserves a better explanation of how the Board will apply *Specialty Healthcare*; however, it is unlikely that either of the cases currently before the Board will be decided or the general counsel's memorandum will be issued before the close of the proposed rule's comment period. As such, we request a 30-day extension of the comment period to ensure the public has adequate time to understand and comment on the proposed rule, as well as discuss the broader effect of *Specialty Healthcare*.

Sincerely,

JOHN KLINE
Chairman
Committee on Education and the Workforce

PHIL ROE, M.D.
Chairman
Subcommittee on Health, Employment, Labor, and Pensions

cc: The Honorable George Miller, Senior Democratic Member, Education and the Workforce Committee

[15] Culture of Union Favoritism: The Return of the NLRB's Ambush Election Rule, Hearing before the House Education and the Workforce Committee, 113th Cong., 2nd Sess. (2014).