HR POLICY ASSOCIATION®
The Association of Chief Human Resource Officers

July 25, 2011

Honorable Members of the House of Representatives
United States House of Representatives
Washington, DC 20515

RE: Support for Limitations on National Labor Relations Board Actions

Dear Representative:

On behalf of the HR Policy Association, I am writing to encourage the Congress to take strong action to limit the activities of the National Labor Relations Board, which, in recent months, has taken a number of actions that pose a serious threat to the ability of companies doing business in the United States to compete on a global scale. These actions discourage companies from opening and expanding operations in the United States, thus foreclosing hiring opportunities that are the key to job growth and economic recovery.

HR Policy Association is a public policy advocacy organization representing chief human resource officers of major employers. The Association consists of more than 330 of the largest corporations doing business in the United States and globally, and these employers are represented in the organization by their most senior human resource executive. Collectively, these companies employ more than 10 million people in the United States, and their chief human resource officer is responsible for finding, hiring, and developing the talent needed to staff their organizations.

The Association recently released its *Blueprint for Jobs in the 21st Century: A Vision for a Competitive Human Resource Policy for the American Workforce,* which represents nearly 18 months of work among the Association's members. The 125 page report paints a detailed picture of the new global economic, social, legal, and demographic forces influencing job growth in the United States, and then offers 20 specific recommendations in the fields of education, workforce development, immigration, regulatory reform, and health care to encourage job growth and employee retention in the United States.

One of these recommendations is: "The U.S. workplace regulatory scheme should be premised on fostering the preservation and creation of jobs, targeting limited resources available for enforcement on those who mistreat their employees." The recent actions of the Board would take U.S. employment law in the exact opposite direction and create major disincentives to employers to locate work in the United States.

Among others, the more objectionable recent actions by the Board include:

- Proposed changes in the rules governing union representation elections, including a substantial shortening of the election period from the current median of 38 days to as little as 10 days. This change is being proposed even though unions already win two out of every three elections conducted by the NLRB. Such a brief period will deprive employees of the ability to hear and discuss among themselves the views of both their employer and their co-workers, which was one of the most offensive aspects of the card check provisions under the Employee Free Choice Act, which has been rejected by Congress. (Attached is a Policy Brief that explains the changes and their implications.)

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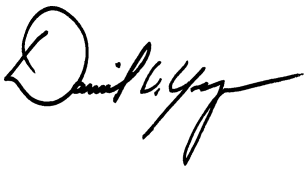
- The issuance of a complaint by the NLRB General Counsel against Boeing for engaging in honest and open discussions with its union regarding the location of a new line of production. While we strongly believe that Boeing did not engage in any violation of the law—and have filed an *amicus curiae* brief with the Board to that effect—we believe that congressional action to limit the damage to U.S. competitiveness by this case through legislation such as H.R. 2587, the Protecting Jobs From Government Interference Act, is highly appropriate.
- Consideration of a fundamental change in the rules governing the identification of units of employees within a workplace who will vote on and potentially be represented by the union. The change under consideration would effectively result in European-style "minority unions," so called because union presentation is fragmented within the workplace among small, discrete units, even where they have common concerns regarding their terms and conditions of employment with some or all of the broader workforce at the location.
- Expansion of the Board's authority to certain critical aspects of non-union workplaces, such as alternative dispute resolutions, under the guise of protecting "concerted activity" by employees, even where union-related issues are not involved.

We strongly encourage Congress to take action, either through changes in the statute or in the funding of the Board, to limit or curtail these activities. Thank you for your consideration.

Sincerely,



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Policy Brief

NLRB's Expedited Election Rules Would Curtail Employees' Ability to Make a Fully Informed Decision on Union Representation

Complicated Changes in Election Procedures Shortening Typical Elections from 38 to as Few as 10 Days Ensure Less Information for Employees and More For Unions (including Email Addresses and Phone Numbers)

On June 22, 2011, the National Labor Relations Board (NLRB) issued a Notice of Proposed Rulemaking with respect to Representation-Case Procedures (76 Fed. Reg. 36812) which contains a number of controversial changes to the highly complex rules and procedures governing union representation elections conducted by the NLRB. While most of these changes have generated controversy in and of themselves, it is the broader goal of the proposed changes—a substantial shortening of the election period from the current median of 38 days to as little as 10 days—that prompts the strongest objections from the employer community. Such a brief period will deprive employees of the ability to hear and discuss among themselves the views of both their employer and their co-workers, which was one of the most offensive aspects of the card check provisions under the Employee Free Choice Act. What follows is a brief description of the proposed regulations and the concerns regarding the changes. A more comprehensive analysis of the proposed rules has been provided by the Jones Day law firm.[1]

Election Data Indicates Proposal is a Solution in Search of a Problem In a statement issued in conjunction with publication of the rules, NLRB Chairman Wilma Liebman states that, despite some improvements over the years, "the current [election] rules still seem to build in unnecessary delays, to encourage wasteful litigation, to reflect old-fashioned communication technologies, and to allow haphazard case-processing." Yet, the case is not made in the proposal for this apparent breakdown. Indeed, in his dissent, NLRB Member Brian Hayes cites NLRB data to show that the vast majority of elections proceed in a very expeditious manner. Currently, the NLRB's internal objective in representation cases is to complete elections within 42 days of the filing of the petition. However, in 2010, the regional offices exceeded this objective, completing initial elections in representation cases in a median of 38 days from the filing of the petition.[2] Citing BNA data,[3] Member Hayes further adds: "Inasmuch as unions prevailed in 67.6 percent of elections held in calendar year 2010 and in 68.7 percent of elections held in calendar year 2009, the percentage of union victories contemplated by the majority in the revised rules must be remarkably high."

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[1] Available at http://www.hrpolicy.org/downloads/2011/Jones_Day_Outline_NLRB_Proposed_Rulemaking_Representation_Cases.pdf

[2] NLRB General Counsel, Summary of Operations (Fiscal Year 2010), GC. Mem. 11-03, at 5 (January 10, 2011).

[3] "Number of NLRB Elections Held in 2010 Increased Substantially from Previous Year," Daily Lab. Rep. (BNA), No. 85, at B-1 (May 3, 2011).

Failure to Seek Stakeholder Views In addition to its failure to justify the need for the proposed changes, the credibility of the proposed rules is further undermined by the decision of the Board not to solicit any views from the stakeholder community before issuing the proposal. In our *Blueprint for Jobs in the 21st Century*, HR Policy recommends "involvement of essential stakeholders in the formulation of new employment policies" (*i.e.*, through a process of negotiated rulemaking) as a solution to the problem of existing rules failing to reflect the realities of the workplace. Instead of being formulated through a collaborative process, employment regulations often simply implement the wish list of a powerful interest group. Moreover, President Obama's Executive Order 13563 specifically states that "[b]efore issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking." While independent agencies like the NLRB are not required to comply with the Executive Order, they should operate within its spirit, particularly in a highly sensitive matter like union representation elections, where a number of interests are affected. As Member Hayes notes in his dissent, there were a number of ways of involving the affected stakeholders in this process, including negotiated rulemaking or, at the very least, receiving comment by the Board's standing Rules Revision Committee and by the Practice and Procedures Committee of the American Bar Association. Indeed, some of the proposed changes, such as allowing the electronic filing of key documents with the Board, have not generated significant opposition and, as part of an overall collaborative process, could be part of a package of welcome improvements to the Board's election procedures.

Curtailing Employee Access to Essential Information Before Voting Under the Board's proposed "hurry up and vote" procedures, employees will be denied critical information in making an informed decision regarding whether to be represented by a union—a decision that in the vast majority of situations is, as a practical matter, a permanent one that will bind not only the voting employees but later hires as well. There are two critical areas where key information will be limited or curtailed:

- **Shorter Campaign Periods** While the proposed rules do not identify a specific time target, a key provision in the changes requires the NLRB regional director to set the election at "the earliest date practicable." Member Hayes estimates that the changes will result in elections between 10 and 21 days. This is far shorter than the current 38 day median (within which, as BNA data indicates, unions win 2 of every 3 elections already), which is itself a considerably shorter period already than voters have in deciding whether a candidate will represent them for 2, 4 or 6 years in Washington. In most cases, this gives employees ample opportunity to hear not only from their employer but to discuss the issues among themselves. Both the Board and the U.S. Supreme Court have recognized that Federal labor policy favors "uninhibited, robust, and wide-open debate in labor disputes" and that the enactment of Section 8(c) "manifested a congressional intent to encourage free debate on issues dividing labor and management."[4]

[4] See Chamber of Commerce of the United States v. Brown, 554 U.S. 60, 60-68 (2008); Franzia Bros. Winery, 290 N.L.R.B. 927, 932 (1988). Section 8(c) of the National Labor Relations Act protects an employer's right to communicate with employees regarding unions and representation issues.

- **Not Knowing Who Else the Union Would Represent** In seeking to expedite the election process, the proposed rules would eliminate pre-election proceedings in certain situations where the employer disputes the union's claim of which employees will vote upon and potentially be represented by the union. Currently, the Board will make a "unit determination" in those situations before the employees vote. The dispute may be based on different job classifications or, as discussed below, whether certain employees are exempt supervisors and therefore excluded from the voting and the representation. The proposed rules provide that, where the disputed group of employees involves fewer than 20 percent of the total number, all employees are to vote anyway, with the votes to be counted after the unit determination is made. Thus, in a casino setting, the blackjack and poker dealers may have to vote without knowing whether their terms and conditions of employment will be covered by a collective bargaining agreement that also covers waiters and waitresses, bartenders and others that may or may not have a sufficient "community of interest" with them.

Uncertain Status of Supervisors One critical group that will be affected by the "20 percent" rule just described are supervisors, whose exempt status as such determines not only whether they will vote and be represented by the union, but also whether their conduct is regulated by the same rules that apply to the employer. Thus, if they participate as employees in the campaign and it is later determined that they were in fact supervisors, statements they made for or against the union could be deemed coercive. This could result in the election being overturned, as occurred in *Harborside Healthcare, Inc*., 343 N.L.R.B. 906 (2004) where an employee who helped the union solicit supporters was later deemed a supervisor.

Denial of Employer Due Process Rights A number of the changes, purportedly in the interests of expediting election procedures, would curtail the ability of employers—especially small businesses—to effectively present their position to the Board on critical issues like which employees should or should not be in the unit. Many of these highly technical but significant changes would violate the requirement of "an appropriate hearing" under the National Labor Relations Act,[5] including:

- Limiting access to the NLRB for review of both pre-election and post-election determinations made by regional bureaucrats who often are not lawyers;
- Requiring employers to articulate and substantiate their positions on key election issues prior to any hearing or risk waiving those arguments; nor could they offer evidence or cross-examine witnesses with respect to virtually any issues not raised by them at the outset, even if those issues have a critical impact on the employees;
- Requiring an employer who contests the union's description of the "appropriate unit" to identify "the most similar unit" that the employer would deem appropriate, and provide the names, work locations, shifts and job classifications of those employees, which would then become available to the union.

[5] 29 U.S.C. § 159(a)(1).

Expanding Union Access to Employees' Personal Information Under current procedures, once an election is ordered, employers are required to provide the union with a list of the names and addresses of the employees who will be voting. The proposed rules would expand the information required under so-called "*Excelsior* lists"[6] to include telephone numbers and email addresses, though it is not clear whether this information would be personal, business or both. Either is problematic. If personal email addresses and telephone numbers are required, this would be a significant incursion on employees' privacy. If the requirement involves business telephone numbers and email addresses, this would be an unprecedented expansion of union access to employers' workplaces.

[6] Named after *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966).