

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 87-19

9 March 1987

TO: All Regional Directors, Officers-in-Charge
and Resident Officers

FROM: Joseph E. DeSio, Associate General Counsel

SUBJECT: Federal Register Publication of Proposed Rule
Requiring Posting of Election Notice Three Days Prior
to an Election

Attached is a proposed rule, published in the Federal Register on 11 March 1987, that would require the posting of an election notice three days prior to a scheduled election.

The rule is being published in proposed form to allow for comments during the thirty-day period following publication. The Board has requested that the Regional Offices receive special notification of the proposed rule in order that they might comment on it if they desire. If you wish to comment on the rule, please submit such comments directly to the Executive Secretary's Office with a copy to the Associate General Counsel, Operations Management.

If you have any questions regarding the proposed rule or the comment procedure, please direct them to the Office of Representation Appeals or the Executive Secretary's Office.

J.E.D.

Attachments

MEMORANDUM OM 87-19

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 103

Election Procedures; New Rule

AGENCY: National Labor Relations Board.

ACTION: Notice of proposed rulemaking.

SUMMARY: In order to facilitate the election process, the National Labor Relations Board proposes to amend its rules to include a new provision that requires an employer to post, 3 days prior to an election, a notice notifying employees of an election conducted under section 9(c) of the National Labor Relations Act, 29 U.S.C. 159(c). The Board has resolved to utilize notice-and-comment rulemaking, rather than be presented with continuing litigation over the issue of the appropriate time period for posting an election notice.

DATE: Comments by: (Insert 30 days after date of publication in the FEDERAL REGISTER.)

ADDRESS: Comments should be sent to: John C. Truesdale,
Executive Secretary,
1717 Pennsylvania Avenue, NW.,
Room 701,
Washington, D.C. 20570,
Telephone: (202) 254--9430.

FOR FURTHER INFORMATION CONTACT: John C. Truesdale,
Executive Secretary,
Telephone: (202) 254--9430.

SUPPLEMENTARY INFORMATION:

Since its inception, the Board has given the highest priority to its election procedures. In order to achieve the fullest participation by an informed electorate, we deem it of the utmost importance that copies of the official Board Notice of Election be posted in conspicuous places by employers.

As noted in Kilgore Corp., 203 NLRB 118 (1973), enf. denied 510 F.2d 1165 (6th Cir. 1975):

Apart from information on the election notice as to the date, time and place of polling, eligibility requirements, and the type of ballot to be used, the official election notices now in use contain important information with respect to the rights of employees under the Act. The purpose of this latter information is to alert employees to their rights and to warn unions and management alike against conduct impeding a free and fair election. All these matters should have been brought to the employees' attention sufficiently in advance of the election that, by the day of the election, they could have asked any questions that bothered them---e.g., about the unit description and their possible eligibility or ineligibility thereunder---and could discuss the election issues with their fellow employees and friends so they might come to a reasoned decision by the date of the election.

Moreover, the notice assumes special importance in foreign language elections, since, in those elections, the notice is translated into as many foreign languages as are required to make the election procedures understandable to voters who do not read English.

In the past, though several Board Members have suggested the Board adopt a rule regarding notice posting (e.g., the expressed position of Member Murphy and the implied position of

Member Truesdale in Printhouse Co., 246 NLRB 741, 742 (1979)), the Board has chosen to proceed on a case-by-case basis. Kilgore Corp., 203 NLRB at 118; Kane Industries, 246 NLRB 738 (1979). The Board recently has received a number of cases posing this same issue, and has decided that the issue lends itself well to the rulemaking procedure. Posting of a notice is a relatively simple matter, and one not worthy of extensive litigation in each case as to how long the notice need have been posted in the particular circumstances, depending on size of the electorate, number of trips made by each employee per day past the notice, size of turnout, good or bad faith of the employer, etc. See, e.g., Kane Industries.

The Board has considered various periods for its proposed posting requirement. A period of 7 calendar days was among those considered, and in some respects would have been more desirable since it would afford the employees a longer time to familiarize themselves with the election details and their rights under the Act. However, a period of 7 days' length might also have required the delay of a number of elections in view of the length of time it takes to prepare and deliver some notices, particularly those for foreign language voters. Hence, the Board has decided upon a period of 3 full working days in the proposed rule, defining working days as all days other than Saturdays, Sundays, and holidays.

In order to avoid the expense of certified mail and the necessity to keep track of certified receipts, the Board will conclusively presume the employer received the notices in sufficient time for the required posting, absent notification by the employer to the Regional Office 5 working days prior to the election. Though not made part of the proposed rule, Regional Office personnel will endeavor to remind employers of their obligation to notify them 5 working days in advance of the election if the notices are not received. In all cases of alleged nonreceipt, Regional Offices will make every effort to deliver new notices to employers in sufficient time for posting. A party shall be estopped from objecting to nonposting if it is responsible for the nonposting.

The proposed rule provides that, in cases involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, notices shall remain posted until the end of the election.

As required by the Regulatory Flexibility Act, it is hereby certified that this rule will not have a significant impact on small business entities.

List of Subjects in 29 CFR Part 103

Administrative practice and procedure, Labor management relations.

For the reasons set forth in the preamble, 29 CFR Part 103 is proposed to be amended as follows.

Part 103---OTHER RULES

1. The authority citation for 29 CFR Part 103 is revised to read as follows:

Authority: Section 6, National Labor Relations Act, as amended (29 U.S.C. 151, 156), and section 553 of the Administrative Procedure Act (5 U.S.C. 500, 553).

2. Part 103 is amended by adding Subpart B to read as follows:

Subpart B---Election Procedures

§ 103.20 Posting of election notices.

Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to the commencement of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

The term "working days" shall mean all days other than Saturdays, Sundays, and holidays.

A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the

election notice for posting unless it notifies the Regional Office at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

Dated, Washington, D.C. March 6, 1987

By direction of the Board.

National Labor Relations Board.

Joseph E. Moore,
Acting Executive Secretary.