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Public Interest Comment¹ on
The National Labor Relations Board's proposed rule:
Representation Case Procedures
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Sofie E. Miller, Policy Analyst²

The George Washington University Regulatory Studies Center
Retrospective Review Comment Project

The George Washington University Regulatory Studies Center strives to improve regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the National Labor Relations Board's proposed rule amending representation case procedures is part of a new project to evaluate how well agencies are preparing for retrospective review and analysis of regulations, pursuant to Executive Orders 13563 and 13579. As such, it does not express judgment on the merits of NLRB's proposal or whether the proposed objectives are worthwhile, but rather attempts to evaluate whether NLRB's proposal incorporates plans for retrospective review, so that it and the public can determine whether those stated objectives are being achieved.

¹ This comment reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at <http://research.columbian.gwu.edu/regulatorystudies/research/integrity>.

² Sofie Miller is a Policy Analyst at the George Washington University Regulatory Studies Center, 805 21st St. NW, Suite 609, Washington, DC. She can be reached at sofiemiller@gwu.edu or (202) 994-2974.

Introduction

In this NPRM, the National Labor Relations Board (NLRB or the Board) proposes to amend existing rules governing the procedures by which representation cases are conducted. The proposed regulations govern how notice of an election may be served to an employer, when to determine which employees constitute a “unit” for purposes of representation, how union organizers obtain employee data, the types of issues that can be raised during a pre-election hearing, and in which cases it may be appropriate to appeal election results. The content of this proposed rule is substantially the same as the rule of the same name originally proposed in June, 2011 and finalized in December, 2011, and subsequently overturned by the district court on procedural grounds. The rule primarily affects businesses, employees, and the authority and scope of the Board’s regional directors with respect to pre-election hearings and appeals.

As a part of our ongoing Retrospective Review Comment Project, the GW Regulatory Studies Center examines significant proposed regulations—such as this one—to assess whether agencies include plans for conducting retrospective review as a part of their regulations, and submits comments to provide suggestions on how best to incorporate plans for retrospective review into their proposals. Although retrospective review is often thought of as occurring after the promulgation of a final rule, multiple government guidelines instruct agencies to incorporate retrospective review into their proposals during the rulemaking process.

Incorporating Retrospective Review into NPRMs

Through a series of executive orders, President Obama has encouraged federal regulatory agencies to review existing regulations. On January 18, 2011, President Obama signed Executive Order 13563, *Improving Regulation and Regulatory Review*, which reaffirmed the regulatory principles and structures outlined in EO 12866. In addition to the regulatory philosophy laid out in EO 12866, EO 13563 instructs agencies to

consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data, should be released online whenever possible.³

This ex-post review makes it possible for the public—and for the agencies that regulate them—to measure whether a particular rule has had its intended effect. In his implementing memo on

³ Exec. Order No. 13563, *Improving Regulation and Regulatory Review*, 76 FR 3821 (2011).

retrospective review, former Administrator of the Office of Information and Regulatory Affairs, Cass Sunstein, stated the importance of designing regulations to facilitate their evaluation:

With its emphasis on “periodic review of existing significant regulations,” Executive Order 13563 recognizes the importance of maintaining a consistent culture of retrospective review and analysis throughout the executive branch. To promote that culture, *future regulations should be designed and written in ways that facilitate evaluation of their consequences* and thus promote retrospective analyses and measurement of “actual results.” To the extent permitted by law, agencies should therefore give careful consideration to how best to promote empirical testing of the effects of rules both in advance and retrospectively.⁴
[Emphasis added]

This emphasis is repeated in Sunstein’s June 14, 2011 memo, “Final Plans for Retrospective Analysis of Existing Rules.” In its Draft 2013 Report to Congress on the Benefits and Costs of Federal Regulations, the Office of Management and Budget (OMB) states that such retrospective analysis can serve as an important corrective mechanism to identify any flaws in ex ante analyses or implementation. According to that report, the result of systematic retrospective review of regulations:

should be a greatly improved understanding of the accuracy of prospective analyses, as well as corrections to rules as a result of ex post evaluations. A large priority is the development of methods (perhaps including not merely before-and-after accounts but also randomized trials, to the extent feasible and consistent with law) to obtain a clear sense of the effects of rules. In addition, and importantly, *rules should be written and designed, in advance, so as to facilitate retrospective analysis of their effects.*

Applicability to Independent Regulatory Agencies

While executive orders, by definition, apply only to the executive branch, President Obama has made it clear that independent agencies (such as the National Labor Relations Board) should adhere to the same retrospective review principles as executive branch agencies. In his subsequent EO 13579, President Obama recommended that independent regulatory agencies, no less than those in the executive branch, should promote the goals of EO 13563:

⁴ United States. Office of Management and Budget. Office of Information and Regulatory Affairs. *MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: Retrospective Analysis of Existing Significant Regulations*. By Cass Sunstein. April 25, 2011.

To facilitate the periodic review of existing significant regulations, independent regulatory agencies should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.

In fact, NLRB cites EO 13563 in the text of its proposal, and states in a footnote that “While the Executive Order is not binding on the Board as an independent agency, the Board has, as requested by the Office of Management and Budget, given ‘consideration to all of its provisions.’”⁵ However, the Board does not make mention of EO 13579, despite its clear applicability to this rulemaking.

In line with the requirements of EO 13579, OMB’s implementation memo, and OMB’s Draft 2013 Report to Congress, it is clear that NLRB should incorporate specific plans for retrospective review and ex post evaluation into the text of its final rule.

Retrospective Review Requirements

Ideally, to evaluate whether an agency’s proposal was “designed and written in ways that facilitate evaluation of [its] consequences,” it should be measured against five criteria:

- Did the agency clearly identify the problem that its proposed rule is intended to solve?
- Did the agency provide clear, measurable metrics that reviewers can use to evaluate whether the regulation achieves its policy goals?
- Did the agency commit to collecting information to assess whether its measurable metrics are being reached?
- Did the agency provide a clear timeframe for the accomplishment of its stated metrics and the collection of information to support its findings?
- Did the agency write its proposal to allow measurement of linkages between actions required by regulation, outputs and outcomes to enable review of whether the standards directly result in the outcomes that the agency intends?

These standards are applied to the Board’s proposed rule in the sections below.

Executive Orders 13563 and 13579

While the Board does not cite EO 13579 in the text of its proposed rule, the Board makes explicit mention of the tenets of President Obama’s EO 13563:

⁵ 79 FR 7324, Footnote 34.

Consistent with Executive Order 13563, Improving Regulation and Regulatory Review, section 6(a) (January 18, 2011), the proposed amendments would eliminate redundant and outmoded regulations. The proposed amendments would eliminate one entire section of the Board's current regulations and consolidate the regulations setting forth procedures under section 9 of the Act, currently spread across three separate parts of the regulations, into a single part. The Board anticipates that, if the proposed amendments are adopted, the cost of invoking and participating in the Board's representation case procedures would be reduced for parties, and public expenditure in administering section 9 of the Act would be similarly reduced.⁶

It is apparent that the Board gave EO 13563 consideration during the promulgation of this rule, and it follows that the Board would additionally be receptive to suggestions on how best to build retrospective review into the text of its final rule.

Identifying the Problem

The first of the “Principles of Regulation” outlined by President Clinton in EO 12866 makes it clear that, as a first step, agencies must be able to identify the problem that justifies government action through regulation:

Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.

This step is crucial to the formulation of any policy. Without knowledge of the problem that the agency is trying to address, the public cannot assess whether the policy or regulation at hand has had the intended effect, which is key in retrospectively evaluating regulation. Throughout the text of the proposed rule, NLRB references the problems it is attempting to address:

The proposed amendments would remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation. In addition to making the Board processes more efficient, the proposed amendments are intended to simplify the procedures, to increase transparency and uniformity across regions, and to provide parties with clearer guidance concerning the representation case procedure.⁷

⁶ 79 FR 7323

⁷ 79 FR 7323

While the proposal is not explicit whether the problems stem from “the failures of private markets or public institutions,” the Board goes on to list some other reasoning and intent behind promulgation of this rule that provide some insight into what problems the Board intends to solve with its proposal. At this point, it should be noted that this comment does not address whether the Board has correctly identified a problem that necessitates a regulatory solution; instead, it merely seeks to know whether the Board has identified a problem at all and whether metrics are in place to evaluate whether the proposal meets the stated goal. In the proposal text, the Board further states that

the NPRM attempts to focus on identifying and minimizing unnecessary barriers to the fair and expeditious resolution of questions concerning representation. Unnecessary litigation, even when not accompanied by delay, can and should be eliminated. It is costly and wasteful to employees, to employers, to unions, to the Agency, and ultimately to the public. Indeed, the mere threat of unnecessary litigation is unfair as parties can be unjustly compelled to enter stipulations on unreasonable terms or on terms they cannot intelligently evaluate, simply to avoid the costs and delays inherent in litigation. Reducing unnecessary delay is therefore an important purpose of the proposed changes... But reducing unnecessary delay is by no means the sole purpose of the proposed changes. As the NPRM explains, the proposals are not only designed to remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation, but also to simplify representation-case procedures and render them more transparent and uniform across regions, to reduce the cost of representation proceedings to the public and the agency by eliminating unnecessary litigation, and to modernize the Board's representation procedures.⁸

Based on the information provided in the text of the proposal, the problems that the Board identifies are as follows:

1. Some representation cases take too long to resolve due to unnecessary delay, and this is a problem because unnecessary litigation wastes public and private resources
2. Board processes are not optimally efficient
3. The existing procedures are too complicated, have too much variation, and are not transparent enough
4. Relevant parties are not adequately informed of representation case procedure

As with any policy, success in this case will depend upon whether the identified problems are addressed—and, to some extent, solved—by implementation of the rule. Therefore, to build a

⁸ 79 FR 7336

successful plan for retrospective review into this rule, we must measure how effective this rule is at addressing the problems listed above.

Measurement Criteria

In order to measure the success of this rule following implementation, it is necessary for the Board to define what constitutes a “success.” Any stated metrics of success should be linked to the problems identified by the Board, to show that the standards that the Board is proposing are effectively solving the problem at hand. Of course, not all positive outcomes can be directly measured; however, many can be, and the proposed rule stage is the perfect time to introduce a plan to measure the rule’s effects to gauge its efficacy.

Although the Board does not explicitly say that it will use any metric or set of metrics to evaluate its rule, the Board does reference several anticipated outcomes of its proposal that could potentially be measured after its implementation. Therefore, the ability to measure these intended outcomes can help the Board and the public determine the rule’s success or failure.

Stated Metrics

Below are 10 potential metrics, identified by the Board in its proposed rule, that may enable measurement of the rule’s success.

1. The cost of invoking and participating in the Board’s representation case procedures will be reduced, as will public expenditures from administering section 9 of the National Labor Relations Act. (79 FR 7324)
2. A higher percentage of final decisions about representation proceedings disputes will be handled by the Board's civil service regional directors. (79 FR 7323, 79 FR 7334)
3. An earlier and more complete identification of disputes and disclosure of relevant information will facilitate parties’ entry into election agreements. (79 FR 7326)
4. Requiring employers to provide union organizers with a list of employees’ information will eliminate unnecessary administrative burden, delays, and resulting litigation. (79 FR 7327)
5. The Statement of Position form will not require additional preparation beyond that which is currently done to prepare for pre-election hearings. (79 FR 7328)
6. The Statement of Position form will reduce the time and other resources expended in preparing to participate in representation proceedings. (79 FR 7328)
7. Both litigation and consideration of disputes concerning the eligibility or inclusion of individual employees will be deferred until after the representation elections. (79 FR 7330)
8. The proposed amendments’ adoption of dual notice procedures will be an interim measure. During this interim period, while the employer remains obligated to post the

- final notice of election, the failure of a regional office to provide electronic notice to any eligible voter will not be the basis for overturning the results of an election. (79 FR 7332)
9. Litigation will not simply be shifted from before to after elections; rather, the total amount of litigation will be significantly reduced. (79 FR 7333)
 10. Denying review of regional directors' resolution of post-election disputes—when a party's request raises no compelling grounds for granting such review—will eliminate the most significant source of administrative delay in the finality of election results. Together with simultaneous filing of objections and offers of proof and prompt scheduling of post-election hearings, the proposed amendments will reduce the period of time between the tally of votes and certification of the results. This will reduce the time during which employers are uncertain about their legal obligations. (79 FR 7334)

This comment does not offer a view as to whether achieving these outcomes will maximize public welfare, or whether additional consequences (positive or negative, intended or unintended) should be considered in developing the proposal. However, based on the text of the rule itself, it is clear that the above metrics are what the Board intends to result from its rule, and therefore they should be used in this case for ex post evaluation of the rule.

Information Collection

In order for retrospective review to be effective, the Board should identify how it will gather information to assess whether its stated metrics are being accomplished. Nowhere in its proposal does the Board describe how it might collect the relevant information to evaluate its rule after implementation. Consistent with the requirements of the Paperwork Reduction Act, the Board should commit to collecting the information needed to measure the rule's success.

Timeframe

The text of the proposed rule does not include a timeframe for retrospective review. In its final rule, the Board should identify a timeframe for review, indicating how soon after implementation it will begin to measure the progress of its stated metrics.

Measure Linkages

While some of the Board's stated metrics directly address one of the problems that the Board is seeking to solve, several do not, and it is unclear how well some of the metrics measure accomplishment of the goals of the rule. The Board should attempt to make clear how the measures it identifies address the problems that its rule is intended to solve.

As the Board commits to measuring the effects of its rule, it should also be aware of mediating factors that may have accomplished or undermined the stated metrics absent the rule.

Determining linkages between the Board's rule and the measured outcomes is necessary to ensure that the policy itself resulted in the desired outcomes, rather than other factors beyond the Board's control.

Recommendations

Each of the below recommendations addresses a specific stated metric listed previously in this comment, and is intended to simplify the retrospective review of this rule for the Board.

- The Board should measure reductions in private expenditure on invoking and participating in the Board's representation case procedures, and clearly state in its final rule how significant the anticipated reductions are.
- The Board should measure reductions in public expenditures from administering section 9 of the National Labor Relations Act, and clearly state in its final rule how significant the anticipated reductions are.
- The Board should measure the ease with which parties can enter into election agreements, and clearly state in its final rule what the baseline against which these improvements (if they exist) will be measured.
- The Board should measure "administrative burden," and define how significant a reduction would need to be in order for this rule to accomplish its stated goals.
- The Board should clearly state in its final rule the extent to which delays must be reduced to accomplish the goal of this rule.
- The Board should assess the amount of preparation currently done for pre-election hearings in order to ensure that its rule does not add to this burden, but instead reduces the time and other resources expended in preparing to participate in representation proceedings.
- The Board should ensure that the proposed dual notice procedures are in fact an interim measure by establishing a sunset for this provision.
- The Board should commit to assessing that the failure of a regional office to provide electronic notice to any eligible voter will not be the basis for overturning the results of an election.
- The Board should clearly state the target reduction in overall litigation that its rule seeks to accomplish, and should commit to measuring changes in the overall litigation levels as a result of this rule to make sure that pre-election litigation isn't merely shifted to the post-election stage.
- The Board should measure changes in the period of time between the tally of votes and certification of the results following implementation of its rule, to ensure that the rule is effective in reducing that time.