COALITION FOR A
DEMOCRATIC WORKPLACE

COMMENTS ON REPRESENTATION-CASE PROCEDURES: VOTER LIST CONTACT INFORMATION; ABSENTEE BALLOTS FOR EMPLOYEES ON MILITARY LEAVE; RIN 3142-AA17

Submitted by

THE COALITION FOR A DEMOCRATIC WORKPLACE

Submitted to

NATIONAL LABOR RELATIONS BOARD

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Of Counsel:

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INTRODUCTION

The following comments are submitted regarding the Board's proposed rule on the voter contact information to be provided during the processing of petitions relating to union representation of employees, and absentee ballots for employees in the military ("Proposed Rule"). The Proposed Rule was published in the Federal Register on July 29, 2020.[1]

COALITION FOR A DEMOCRATIC WORKPLACE

These comments are submitted on behalf of the Coalition for a Democratic Workplace ("CDW" or the "Coalition"). CDW encompasses hundreds of employer associations, individual employers and other organizations that together represent millions of businesses of all sizes. See Appendix 1. They employ tens of millions of individuals working in every industry and every region of the United States.

These employers and employees have a strong interest in the Board's Proposed Rule overruling the 2014 Rule that required employers to disclose employees' personal email addresses and cell phone numbers to petitioning labor organizations. The Coalition vigorously opposed this aspect of the 2014 Rule[2] and has long believed such disclosures improperly infringe on the privacy rights of employees and their employers in a manner contrary to law.

While the Coalition has not historically taken a position on the separate question of absentee ballots for employees on military leave during representation elections, CDW is generally supportive of the Board's proposed change in longstanding policy to permit employees in the military to receive absentee ballots. The Coalition does have concerns about the need for additional precautions to be taken to avoid imposing new burdens on employers; and our support for the Board's proposal is conditioned on the new policy being clearly restricted to the unique requirements of military service.

1. The Coalition Strongly Supports the Board's Proposal to Rescind the 2014 Rule's Compelled Disclosure of Personal Employee Email Addresses and Phone Numbers on Voter Eligibility Lists

The Proposed Rule would rescind the 2014 Rule to the extent that rule imposed a new requirement on employers to disclose "available email addresses" and "available telephone numbers" of bargaining unit employees on every voter eligibility list. CDW strenuously opposed this requirement when it was proposed and finalized in 2014 and applauds the Board's decision to rescind the 2014 Rule's unwarranted infringement on employee privacy.

As CDW pointed out in 2014, the previous Board never cited any statutory basis for the 2014 Rule, nor was any need demonstrated for the unprecedented intrusion into employee privacy rights resulting from that rule change to the longstanding *Excelsior* requirement.[3] The 2014 Rule thus improperly presumed a "need" to expand the *Excelsior* disclosure requirements while disregarding

[1] 85 Fed. Reg. 45,553.

[2] 79 Fed. Reg. 74,308.

[3] *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966). *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 768 (1969).

the fact that the premise of *Excelsior* has been unalterably changed: The communications revolution has, if anything, reduced the need for unions to obtain person-to-person addresses (and certainly not email addresses and phone numbers), because employees now have widespread access to union-sponsored web sites, Twitter, and social media sites such as Facebook and YouTube, none of which require the *involuntary* disclosure of sensitive and personal employee contact information in order for unions to reach their intended audience.

The disclosure of email addresses and phone numbers does nothing to help unions "identify issues concerning eligibility and, if possible, to resolve them without the necessity of a challenge."[4] Nor are email addresses and phone numbers essential to "an informed employee choice for or against representation"[5] given that the previously existing *Excelsior* requirements provided for disclosure of every eligible employee-voter's most reliable and near-universal points of contact, which are home addresses.

As the Board now recognizes,[6] the unprecedented disclosure requirements of the 2014 Rule greatly increase the threat of identity theft, a threat that has only increased since the rule was promulgated. The threat has indeed "grown exponentially," as the articles and federal government alerts cited by the Board attest.[7] Employee privacy interests thus constitute a much more fundamental reason not to require disclosure of personal phone numbers and email addresses. If anything has become clear during the explosive growth of electronic and social media, it is the number of people who have become dependent on these vehicles for communication, and the potential for abuse, harassment, malicious security intrusions, and identity theft. These risks add to the legitimate expectation of privacy to which every person is entitled, which warrants protection by federal agencies rather than indiscriminate mandated disclosure.

The Coalition also agrees with the Board's assessment that there is no meaningful distinction between the compelled disclosure of cell phone numbers and personal emails.[8] Both requirements should therefore be rescinded.

Now more than ever, unions often resort to corporate campaign activities, which have the overt purpose of causing injury to the employer's business and other relationships. Even before the 2014 Rule, an SEIU manual reportedly advocated legal and regulatory pressure to "threaten the employer with costly action by government agencies or the courts" and outside pressure "jeopardizing relationships between the employer and lenders, investors, stockholders, customers, clients, patients, tenants, politicians, or others on whom the employer depends for funds."[9] The 2014 Board turned a blind idea to the serious

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[4] *Excelsior*, 156 NLRB at 1241-42.

[5] *Excelsior*, 156 NLRB at 1241.

[6] 85 Fed. Reg. 45,560.

[7] *Id*., n. 44-47. *See also* numerous alerts of the Internal Revenue Service cautioning against disclosures of personal email address and/or cell phone numbers. http://www.irs.gov.; see also Rob Douglas, "2020 Identity Theft Statistics," *available at* https://www.consumeraffairs.com/finance/identity-theft-statistics.html.

[8] 85 Fed. Reg. 45,561, n. 50. *See also*, Warzel, "Jeff Bezos' Phone Hack Should Terrify Everyone," New York Times (Jan. 24, 2020), *available at* http://www.nytimes.com/2020/01/24/.

[9] F. Vincent Vernuccio, *Labor's new strategy: Intimidation for dummies*, WASHINGTON TIMES, July 15, 2011 (www.washingtontimes.com/ news/2011/jul/15/labors-new-strategy-intimidation-for-dummies/). To the same effect, the AFL-CIO's Industrial Union Department has long advocated the use of "coordinated

potential for unions to abuse the additional disclosures of personal employee information as a means of expanding their pressure tactics.

Computer-related systems are central in virtually every business, and companies engage in extraordinary efforts and expense to limit external risks to those systems. Requiring the broad-based disclosure of business email addresses for all unit employees significantly expands these security risks and provide government-mandated opportunities for non-employees to introduce malicious software and viruses, presenting problems for all employers, especially small businesses. At the same time, in the event of security breaches, the breadth of required disclosures could create insurmountable obstacles in efforts to identify the parties responsible for any resulting damage, especially because the union would predictably disclaim responsibility or involvement.[10]

As the Board's NPRM correctly points out, the 2014 Rule's expansion of *Excelsior* disclosure requirements imposed significant unwelcome costs on employees who receive unwanted phone calls and texts which exceed mobile device data limitations and time-based charges. Such unexpected mobile device costs have already been identified by the Federal Communications Commission ("FCC") and the Government Accountability Office ("GAO") as a significant problem affecting 30 million Americans or approximately 34 percent of mobile device users in the United States.[11]

The Coalition also agrees with the Board's understanding of the reasoning expressed in *United States Department of Defense v. FLRA*,[12] where the Supreme Court – though acknowledging the right of private sector unions to obtain home address information – stated that the "individual privacy interest . . . is far from insignificant."

For all of these reasons and the grounds stated in the Board's Proposed Rule, the 2014 Rule's compelled disclosures of employee email addresses and phone numbers should be rescinded in the Final Rule.

2. The Coalition Can Support the Board's Proposed Rule on Absentee Ballots for Employees Serving in the Military, Provided Certain Protections for Employers Are Addressed

As noted above, the Board's Proposed Rule addresses the separate issue of whether to change the Board's longstanding policy disallowing voting by absentee ballots, limited to employees

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corporate campaigns" which apply pressure to many points of vulnerability: "It means seeking vulnerabilities in all of the company's political and economic relationships – with other unions, shareholders, customers, creditors, and government agencies – to achieve union goals," and "the union is looking for ways in which it can use its resources to expand the dispute from the workplace to other arenas . . . ." Ind. Union Dept., AFL-CIO, DEVELOPING NEW TACTICS: WINNING WITH COORDINATED CORPORATE CAMPAIGNS at 1-3 (1985).

[10] *See* Hayley Tsukayama, *Verizon customers see outages as worker strike continues*, WASH. POST, Aug. 12, 2011 (http://www.washingtonpost.com/business/economy/verizon-customers-see-outages-as-worker-strike-continues/2011/08/12/gIQAzSJzBJ_story.html).

[11] 85 Fed. Reg. at 45561.

[12] 510 U.S. 478, 500 (1994).

serving in the military. CDW's coalition members uniformly support the military and the employees who choose to serve in it. Though the Board's policy on absentee ballots is of long standing and has been upheld by the courts,[13] the Board's Proposed Rule presents a thoughtful case for a limited change to the policy that would be limited to military service, would leave it up to the parties whether to request absentee ballots for any specific employees, and would set appropriate time limits for mailing and returning absentee ballots.[14]

The Coalition remains concerned that the Board may be underestimating the logistical issues posed in determining the availability and locations of employees engaged in military service, and CDW opposes placing any additional burden on employers to determine whether an absent employee qualifies for an absentee ballot or how to locate the employee. The Board's Proposed Rule states: "As proposed, all a party need do to comply with the change is timely inform the Board when it is aware of such voters; parties are not required to affirmatively ascertain whether such voters exist."[15] The Board nevertheless acknowledges that a party's failure to comply "may in some circumstances give rise to objections, related litigation, and potentially a second election . . . ."[16]

The Coalition therefore must condition its support for the Proposed Rule on inclusion of certain safeguards. These should include clarification that employers are not under any obligation to make a determination whether an individual is entitled to cast an absentee ballot, and should not be penalized for failing to inform the Board of such a determination if made. Nor should employers be required to investigate the military address of any employee, a task which the Board acknowledges is an uncertain undertaking. In addition, the Board should make absolutely clear that the proposed change in its policy on absentee voting is uniquely limited to employees actively engaged in military service for reasons that separate this policy from other types of leaves of absence.

CONCLUSION

For the reasons stated above, CDW strongly supports the Board's proposal to rescind the provisions of the 2014 Rule requiring disclosure of employee email addresses and phone numbers. CDW conditionally supports the Board's proposal to allow employees engaged in military service to vote via absentee ballots.

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[13] *See Cedar Tree Press, Inc*., 169 F.3d 794 (3d Cir. 1999) (upholding the Board's no-absentee-ballot policy due to likely logistical costs and potential delays in the voting process).

[14] 85 Fed. Reg. 45561-45565.

[15] *Id*. at 45566.

[16] *Id*.