March 21, 2018

VIA ELECTRONIC FILING
ONLINE AT www.nlrb.gov

Roxanne Rothschild
Deputy Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington DC 20570

Re: Notice & Comment Submission
29 CFR Parts 101 and 102
RIN 3142-AA12

Dear Ms. Rothschild:

This correspondence is submitted on behalf of Geisinger Health (“Geisinger”) in response to the National Labor Relations Board’s request for information from the public regarding the representation election regulations at 29 CFR 101 and 102 (“the Election Regulations”), adopted by the Board’s final rule and published on December 15, 2014 (“the Election Rule”). Specifically, this submission addresses Geisinger’s position regarding whether the Rule should be (1) retained without change, (2) retained with modifications, or (3) rescinded, requiring the Board to revert to the election regulations that were in effect prior to the 2014 Election Rule’s adoption.

Geisinger Health, as one of the nation’s largest health service organizations, serves more than 3 million residents throughout 45 counties in central, south-central and northeast Pennsylvania, and also in southern New Jersey at AtlantiCare, a Malcolm Baldrige National Quality Award recipient. In 2017, the Geisinger Commonwealth School of Medicine and Geisinger Jersey Shore Hospital became the newest members of the Geisinger Family. Geisinger's physician-led system is comprised of approximately 30,000 employees, including nearly 1,600 employed physicians, 13 hospital campuses, two research centers, and a 583,000-member health plan, all of which leverage an estimated $12.7 billion positive impact on the Pennsylvania and New Jersey economies. At the current time, Geisinger has collective bargaining agreements with the Service Employees International Union (“SEIU”) Healthcare Pennsylvania, CTW, CLC (at Geisinger-Lewistown Hospital in Lewistown, Pennsylvania and Geisinger Wyoming Valley Medical Center in Wilkes-Barre, Pennsylvania) and the Pennsylvania Association of Staff Nurses & Allied Professionals (at Geisinger Community Medical Center in Scranton, Pennsylvania).

Geisinger welcomes the opportunity to comment upon the questions presented by the Board and endorses the position that the Board has the authority to reconsider past decisions and rules and to revise, replace and rescind such decisions and rules with proper notice and comment in accordance with applicable federal law. See FCC v. Fox Television Stations, Inc., 556 U.S.
Recognizing that the 2014 Election Rule amendments modified long-standing and well established principles of Board law, and were promulgated without presenting sufficient justification for the proposed amendments, Geisinger advocates for a rescission of the 2014 Rule and for the Board to revert to the election regulations in effect prior to the 2014 Election Rule’s adoption. Geisinger supports rescinding the 2014 amendments to the Election Rule for the reasons specifically outlined below:

The Petition:

The 2014 changes modified the information (e.g., type of election requested, date of election, time of election, and location of election) that the union must include when filing an election petition. Such modifications provide considerable advantage for the union by creating a rebuttable presumption that all of its specified requests are proper. Additionally, modifying the required information allows the union to strategically pick the date, time, location, and type of election; making it easier for union supporters to vote versus non-union supporters. While the employer is required to articulate its position in a subsequently submitted position statement, the union has the first opportunity to state its preference on these issues; the employer may only rebut these preferences if it does not agree. For these reasons, the 2014 Election Regulations should be rescinded.

Mandatory Pre-Election Posting:

Under the 2014 Election Rule, the employer is required to post at its location(s) a Notice of Petition for Election to advise employees about various topics (e.g., filing of the petition, their rights under the NLRA, election procedures, and rules governing campaign conduct). The Notice of Petition must be posted within two (2) business days following service of the Petition or served electronically via email. Such a shortened time for posting presents a disadvantage to employers and may easily expose them to an Unfair Labor Practice charge. This posting requirement also has negative implications for free speech.

First, the 2014 Election Rule deprives employers of speech rights as provided by § 8(c) of the National Labor Relations Act. The amended election procedures impinge on speech guarantees provided by § 8(c). Section 8(c) protects “expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form,” provided there is no “threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c). This free speech guarantee favors wide and robust debates regarding labor disputes. As such, “an employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board.” NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).
The period prior to an election is a critical time when the employer can exercise its speech guarantees and provide information to its employees regarding the election, as well as the consequences of unionization. The 2014 Election Rule provides for a much quicker election process and, thus, restricts the employer’s ability to fully explain the pros and cons of union representation before an election (i.e., the very spirit of § 8(c) of the NLRA) and limits an employee’s ability to be an informed voter. Employers have been especially disadvantaged by these rules because they have been required by these modifications to, within days of learning about a petition election, retain outside counsel, educate outside counsel on their operations, initiate a counter-organizational campaign. The employer has also been required to prepare a position statement within one day of the pre-election hearing. Therefore, the amended rules have infringed upon the employer’s right to free speech by truncating the overall time period for the election. The right to engage in free speech is only meaningful if there is time to engage in such speech prior to the election.

Second, the amended election procedures impinge on employers’ First Amendment speech rights by requiring employers to post a mandatory post-election notice in the workplace two (2) business days after the employer receives the notice that a petition has been filed. The First Amendment provides “both the right to speak freely and the right to refrain from speaking at all.” Wooley v. Maynard, 430 U.S. 705, 714 (1977). This applies both to individuals and corporations alike. Pac. Gas & Elec. Co. v. Pub. Utilities Comm’n of Ca., 475 U.S. 1, 16 (1986). The 2014 Election Rule modified the earlier rule by requiring employers to disseminate a message that the employer may not support or agree with simply because someone filed a petition for election. Such election petition may also not even provide a valid basis to proceed with an election. The employer is required to post this notice after the petition has been filed, but before there is a determination as to whether the election should even occur.

Each of these modifications to the pre-2014 Election Rule creates unlawful, burdensome and inequitable obligations for and restrictions on the Employer. As such, the 2014 Election Regulations should be rescinded.

Voter List:

Regulations prior to 2014 required the employer to provide the Excelsior list seven (7) business days after the approval of an election agreement or issuance of a Decision and Direction of Election. This requirement was shortened to two (2) business days through the promulgation of the 2014 Election Rule. Additionally, instead of simply providing the Excelsior list to the Region, an employer must now also provide this list to the union (and in electronic format). Previously, the employer was only required to provide the names and addresses of eligible voters. Excelsior Underwear, Inc., 156 NLRB 1236, 1939-40 (1966). Currently, the employer must provide: full name, home address, personal (not work) email address if available, personal home and cellphone numbers if available, work location, shifts, and job classification. 29 C.F.R. §§ 102.62(d), 102.67(l). In an organization the size of Geisinger (i.e., tens of thousands of employees), potential bargaining units could contain thousands of employees. As such, the current rule would require such organization to accurately reflect all of this information within two (2) business days. Gathering and producing this information in such a short time period is
unreasonable and unduly burdensome. It is especially difficult to provide information regarding shifts for this amount of employees in this timeframe.

This rule change also allows the union to campaign directly to employees in an invasive and aggressive manner via personal email address and phone number. Providing this information to the Board and the union also raises significant privacy concerns. Notably, privacy and identity theft concerns are greater today than when the Board approved the amended rules. Additionally, there are no articulated penalties for misuse of employees’ personal information in the current rules. As such, the 2014 Election Rule should be rescinded. At a minimum, however, the Board should adopt and outline penalties for misuse of employees’ personal information or require that the information be destroyed after a certain period of time.

**Hearing:**

Under the 2014 Election Rule, most disputes regarding voter eligibility and bargaining unit inclusion and exclusion will not be solved until after the election. This limits an employer’s ability to present an effective campaign and prevents effective pre-election consideration of issues in violation of §§ 3(b) and 9(c)(1) of the NLRA, which in turn prevents effective post-election review of these issues.

Leaving issues, such as supervisory status and whether certain employees are part of the voting unit, unresolved undermines the employer’s ability to present an effective campaign. It also undermines the employees’ ability to make informed decisions during the voting process. Most importantly, it deprives employers of their statutory right to a proper pre-election hearing because the 2014 rules permit hearing officers to exclude evidence regarding fundamental issues affecting the election process, such as whether certain employees or groups of employees are eligible to vote in the election. See 29 C.F.R. § 102.64(a) (“Disputes concerning individuals’ eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted.”); id. § 102.66(a) (a party’s indisputable right to introduce at the pre-election hearing is now limited to “the existence of a question of representation”). This deprives interested parties (both employees voting and the employer) a full and adequate opportunity to present evidence on all substantial issues prior to the election. Additionally, by permitting the hearing officer to exclude pertinent evidence regarding supervisory status and voter eligibility, the amended rules fail to provide an appropriate pre-election hearing for all employees as required by § 9(c)(1) of the NLRA.¹

¹ Section 9(c)(1) requires an “appropriate” pre-election hearing and an adequate “record of such hearing”:

Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office,
Finally, by permitting hearing officers to reject evidence on the scope of the bargaining unit for voter eligibility and inclusion purposes, the amended rules make the taking of evidence useless for all of the decision-making requirements of §§ 3 and 9 of the NLRA. This in turn undermines any effective post-election review of these issues, as there is no sufficient record for such review.

The amended rules also disregard the statutory text of Section 9 of the NLRA, which makes clear that “an appropriate hearing upon due notice” must occur before an election because this hearing provides the Board with information to determine how and whether the election should occur. See § 9(c)(1). Section 9(c)(4) further reinforces the importance of a hearing prior to the election as it only allows “the waiving of hearing by stipulation.” § 9(c)(4) (emphasis added).

Statement of Position:

Under the 2014 Election Rule, the employer must file a Position Statement with the Regional Director and serve it to all parties by noon on the business day before the hearing is set to open. The employer must raise issues that it wishes to litigate otherwise they will be waived. Such a modification in the historical rule has resulted in employers forfeiting the legal right to pursue issues not included in that statement. The employer must also identify any individuals in classifications in the petitioned-for unit whose eligibility to vote the employer intends to contest. Such 2014 modifications to historical rules impose significant restrictions and limitations on employers, which ultimately result in prejudices which were never contemplated by the NLRA.

Conclusion

For all of these reasons, Geisinger submits and supports rescinding the 2014 Election Rule and requiring the Board to revert to the election regulations that were in effect prior to the 2014 Election Rule’s adoption.

Very truly yours,

s / Joseph R. Martin
Joseph R. Martin
Director of Labor and Employee Relations
Geisinger Health

who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereto.