



September 28, 2020

Roxanne Rothschild  
Executive Secretary  
National Labor Relations Board  
1015 Half Street S.E.  
Washington, DC 20570

Sent via email to: Regulations@nlrb.gov

**RE: RIN 3142-AA17; Comment on National Labor Relations Board's Proposed Rule Relating to Voter List and Military Ballots Representation Rules**

Dear Ms. Rothschild:

For over seventy years, the Society for Human Resource Management (SHRM) has represented the interests of human resources professionals and advocated for better workplaces where employers and employees thrive together. Today, with 300,000+ HR and business executive members, SHRM impacts the lives of more than 115 million workers in a number of ways, including ensuring that laws and policies impacting work, workers, and the workplace are sound, practical, and responsive to the realities of the modern workplace. The substantial majority of SHRM's members are covered by the National Labor Relations Act ("NLRA" or "Act") and have an interest in the Act and its administration, including representation case procedures. SHRM presented testimony and submitted written comments regarding the Board's election rules proposed in 2011, 2014, and 2017.

On behalf of its members, SHRM submits these comments on the National Labor Relations Board's ("NLRB" or "Board") Notice of Proposed Rulemaking ("NPRM" or "Proposed Rule"), published at 85 Fed. Reg. No. 146, 45553 (July 29, 2020).<sup>1</sup>

The Board's proposed modifications to the voter list requirements established in the 2014 amendments and procedures regarding representation voting procedures for employees on military leave are of particular interest to SHRM. Our members have a strong interest in protecting the privacy rights of all employees. Additionally, we must ensure that no employee forfeits their right to have a voice in selecting (or not selecting) union representation while serving their country on military leave.

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<sup>1</sup> SHRM incorporates, by reference, the hearing position statements, testimony, and comments which they previously submitted in response to the Board's 2011 Notice of Proposed Rulemaking, Representation-Case Procedures, 76 Fed. Reg. 36,812, the Board's 2014 Notice of Proposed Rulemaking, Representation-Case Procedures, 79 Fed. Reg. 7,318 and the Board's 2017 Notice of Proposed Rulemaking, Representation-Case Procedures, 82 Fed. Reg. 58783.

We appreciate the Board's efforts to protect the rights of all employees, especially those in military service to our country. As such, the following comments intend to provide reasons favoring adoption of the Proposed Rule.

## **I. Summary of Comments**

SHRM supports the Board's proposed revision to the Board representation election procedures to protect employee statutory voting rights while on military duty and to safeguard employee privacy. Further, SHRM asserts the following:

- The Board has the appropriate authority to promulgate the Proposed Rule;
- Employers' ability to protect the privacy of private employee contact information is paramount, especially in an age rife with identify theft, phishing, hacking, and other criminal schemes that feed on the use of such information; and
- Ensuring the rights of employees engaged in military service or otherwise on military leave to participate in representation elections at their workplaces is long overdue.

## **II. Authority to Enact the Proposed Rule**

The Taft-Hartley amendment gives the NLRB legal authority to develop rules and regulations which may be necessary to carry out the Board's primary purposes—to encourage the practice and procedure of collective bargaining, to promote the full flow of commerce, and to prescribe the legitimate rights of both employees and employers in their relations with each other. 29 U.S.C. §§ 141; 151. Each of these purposes is served by enacting modifications to the election rules to protect employees' private personal information and to ensure that employees on military leave do not forfeit their right to vote in representation elections while serving their country. Thus, present circumstances clearly present a logical and appropriate time for the Board to exercise its rulemaking authority, regardless of whether the Board has chosen in the past to utilize that authority sparingly.

## **III Voter List Contact Information**

### **1. Historic Overview**

In 1966, the NLRB established a requirement that employers must file an election eligibility list containing the names and home addresses of all eligible voters within seven calendar days after approval of an election agreement or issuance of a decision and direction of election. *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1239-40 (1966). The Board justified this requirement and the privacy risks associated with it because it was necessary to “maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation” and would also “eliminate the necessity for challenges based solely on lack of knowledge as to the voter's identity,” thus furthering the public interest in “the speedy resolution of questions of representation.” *Id.* at 1241, 1243.

## 2. The 2014 Amendments

The *Excelsior* requirement, as it became known, was left unchanged until 2014, when a Board majority adopted amendments to its representation case procedures, including, in relevant part, changes to the election eligibility list, which was renamed the “voter list.”<sup>2</sup> The 2014 amendments modified the requirement to mandate that employers also disclose employees’ personal email addresses as well as personal home and cellular telephone numbers to the union, citing the change in the nature of communications since 1966. 79 Fed. Reg. 74340, 74338-74339 (specifically noting the universal availability of telephones the development of voicemail and text messaging, the emergence of cellular and smartphones, and the fact that some employers may contact their employees exclusively via telephone).

Dissenting Board Members Miscimarra and Johnson criticized the 2014 amendments for failing to adequately address privacy concerns--specifically, that the 2014 amendments did not and could not provide specific appropriate restrictions on use, and remedies for misuse, of the information, citing the prevalence of hacking, identity theft, phishing scams, and related ills. Additionally, they emphasized that employees who have provided personal email addresses and phone numbers to their employer may have good reasons for not wanting to share them with third parties they do not know and trust. Members Miscimarra and Johnson distinguished between a home address, which is a “fixed, readily identifiable point the public can visit independent of disclosure of the address,” and a personal email address, which is entirely created by the employee and is typically not identifiable at all without the employee’s consent. Similarly, personal phone numbers are created in part by employees, who have the right to determine whether they are publicly listed. Accordingly, the dissent asserted that employees have a greater privacy interest in personal email addresses and telephone numbers than they do in their physical addresses. *See* 79 Fed. Reg. 74452-74454. SHRM shared the concerns of Members Miscimarra and Johnson then in its comments to the 2014 amendments.

## 3. The Proposed Rule Protects Employee Privacy

The privacy and security issues associated with requiring the disclosure of employees’ personal contact information without adequate safeguards have grown significantly since Members Miscimarra and Johnson voiced their opposition to the 2014 amendments. In fact, the United States Council of Economic Advisers estimates that malicious cyber activity cost the United States economy up to \$109 billion dollars in 2016 alone—a number which has likely increased significantly since then.<sup>3</sup> In addition, phishing attacks have been on the rise as well—increasing

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<sup>2</sup> These changes were made via notice-and-comment rulemaking. *See* 79 Fed. Reg. 7318. The 2014 amendments were adopted via a final rule issued on December 15, 2014, which became effective on April 14, 2015. 79 Fed. Reg. 74308. On December 18, 2019, the Board issued a final rule that modified the 2014 amendments in various respects; that rule (the 2019 amendments) was set to take effect on April 16, 2020, *see* 84 Fed. Reg. 69524, but the effective date was postponed until May 31, 2020, *see* 85 Fed. Reg. 17500.

<sup>3</sup> *See* Epstein, Hagan, *Cyber Hacks Cost Up to \$109 Billion in 2016, U.S. Estimates*, February 16, 2018 (<https://www.bloomberg.com/news/articles/2018-02-16/cyber-hacks-cost-as-much-as-109-billion-in-2016-u-s-estimates>) (accessed September 21, 2020).

350 percent between January 2020 and the beginning of the pandemic in March 2020.<sup>4</sup> As such, the need for the Proposed Rule’s reforms is even more urgent than in 2014 to protect individual employees’ personal privacy and the security and prosperity of the U.S. economy.

#### **4. The 2014 Amendments Fail to Achieve Their Aims**

Moreover, the 2014 modification simply does not achieve its intended end. The communications evolution referenced in the 2014 NPRM regarding the 2014 amendments has, if anything, *reduced* the need for unions to be given person-to-person addresses (and certainly email addresses and phone numbers) from their employers. Employees now have increasingly widespread access to union-sponsored web sites, and social media sites such as Facebook, Twitter and YouTube, for example, none of which require the involuntary disclosure of sensitive and personal employee contact information.<sup>5</sup> For example, as of February of 2020, there are over 152 million active daily Twitter users.<sup>6</sup> Facebook reported that in the first quarter of 2020, it had nearly 1.75 billion active daily users.<sup>7</sup> Unions are increasingly using social media as a means to organize employees, and communications using those sites are far more valuable than access to personal cell phone numbers and email addresses.

Furthermore, mandated employer disclosure of that personal information does not necessarily give unions effective access to all employees because employers rarely require the disclosure of this information, and many employees, if asked, refuse to provide it. Requiring disclosure of personal email addresses and phone numbers to the extent “available” produces, at best, information for an unpredictable sampling of bargaining unit employees.

#### **5. Employee Privacy Outweighs Marginal Gains in Union Access**

Even if disclosure of this information would achieve the ends intended in the 2014 modification, employee privacy interests constitute a much more fundamental reason not to require disclosure of personal phone numbers and email addresses. As stated above, given the growth of hacking, the potential for abuse, harassment, malicious security intrusions, and identity theft, the protection of employees’ personal contact information is as crucial as ever. 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.

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<sup>4</sup> See Jason Cohen, *Phishing Attacks Increase 350 Percent Amid COVID-19 Quarantine*, PCMag.com, March 30, 2020 (<https://www.pcmag.com/news/phishing-attacks-increase-350-percent-amid-covid-19-quarantine>) (accessed September 21, 2020).

<sup>5</sup> See 76 Fed. Reg. at 36,820 (referring to the “evolution . . . in pre-election campaign communication”).

<sup>6</sup> See Ingrid Lunden, *Twitter reports \$1.01B in Q4 revenue with 152M monetizable daily active users*, TechCrunch.com, February 6, 2020 (<https://techcrunch.com/2020/02/06/twitter-q4-earnings/>) (accessed September 21, 2020).

<sup>7</sup> *Facebook Reports First Quarter 2020 Results*, PR Newswire, April 29, 2020 (<https://www.prnewswire.com/news-releases/facebook-reports-first-quarter-2020-results-301049682.html>) (accessed September 21, 2020).

In short, the Proposed Rule will eliminate the unnecessary exposure of employees' private contact information caused by the 2014 amendments, the risks associated with which include but are not limited to hacking, phishing, and identity theft. As discussed above, with the rise of social media, access to employees' personal cell phone and email addresses is of limited utility to labor unions, and, in any case, the marginal benefit to them is grossly outweighed by the risks to employees' personal information.

#### **IV. Absentee Ballots for Employees on Military Leave**

##### **1. Historical Overview**

The Board intermittently allowed mail-in ballots for employees on military leave for brief periods during the 1940s. *See, e.g., Truscon Steel Co.*, 36 NLRB 983, 986 (1941) (25 employees in the military service supplied with absentee ballots); *South West Pennsylvania Pipe Lines*, 64 NLRB 1384 (1945). As of 1950, however, the Board had effectively discontinued the practice. *Link Belt Co.*, 91 NLRB 1143, 1144 (1950) (the Board refused to allow an employee on military leave to vote by absentee mail ballot despite the parties' agreement to permit that employee to do so because “[w]e have found . . . that mail balloting of employees on military leave is impracticable,” and “[f]rom Board administrative experience, we conclude that it will best effectuate the policies and purposes of the Act to declare eligible to vote only those employees in the military service who appear in person at the polls.”

Since then, the Board has declined to provide absentee mail ballots, including for employees on military service or leave. *See, e.g., NLRB v. Cedar Tree Press, Inc.*, 169 F.3d 794 (3d Cir. 1999) (upholding Board's absentee ballot policy). This policy is articulated in the Board's Casehandling Manual (Part Two), section 11302.4, which states that where an election is conducted manually, “ballots for voting by mail should not be provided to, inter alia, those who are in the Armed Forces, ill at home or in a hospital, on vacation, or on leave of absence due to their own decision or condition.” Further, with specific reference to employees engaged in military service, Form NLRB-652—the template usually used for election agreements—provides that “[e]mployees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls.” Individual Board members have recently suggested that the Board should reconsider its policy in this area. For example, in *U.S. Foods, Inc.*, Case No. 15-RC-076271 (May 23, 2012) (not reported in Board volumes), Member Hayes stated his view that “at some point . . . the Board should reconsider its general policy of not providing mail ballots to employees who are unable to participate in a manual ballot election because they are in the military service.”

##### **2. The Board's Current Approach to Military Voters Is Inconsistent with the Uniformed Services Employment and Reemployment Rights Act (USERRA)**

Board policy prohibiting employees on military leave from voting via absentee mail-in ballot is contrary to the spirit of the Uniformed Services Employment and Reemployment Rights Act (USERRA), which protects employee rights while they are on military leave or engaged in military service, including their rights to vote in political elections. In fact, in *Tri-County Refuse Services, Inc. d/b/a Republic Services of Pinconning*, Case No. 07-RC-122650 (Sep. 9, 2014) (not reported in Board volumes), Member Johnson found merit in the Employer's argument that Board policies

in this area may run afoul of the spirit, if not the letter, of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301-4355 (1994), and other laws and public policies designed to protect the rights of service members to vote. Despite that, the Board including Member Johnson overruled the employer's objection contending that the voting period should have been extended to accommodate an employee who was out of state on military leave on the election date, but Member Johnson left the door open to revisiting the issue in a future case. Picking up where Member Johnson left off, the Board issued the Proposed Rule, which would remedy the injustice rendered in cases like *Tri-County Refuse Services, Inc.* and ensure that the voting rights of military service members are respected and protected.

### **3. Preserving Employees' Rights to Vote in Representation Elections While on Military Leave Is Sound Public Policy**

This country owes military service members a great debt of gratitude and should do everything possible to ensure that they are not penalized in any way for their military service. While the most visible service members in America's military are on active duty, nearly forty percent of military service members are in the Armed Forces' reserves.<sup>8</sup> Reserve members generally hold other employment, and their employment rights are just as important as their co-workers. It is almost unfathomable that, for the past approximately 70 years, the NLRB has prevented the brave men and women of our military from voting in union elections that directly impact their workplaces while they are on military leave. These citizens put their lives on the line, volunteering to make the ultimate sacrifice, if necessary, and yet they are deprived of their rights under the National Labor Relations Act because of questionable logistical challenges. As will be discussed below, such claims of logistical challenges are specious at best. Put simply, there is no public policy reason to justify impeding employees on military leave from voting in representation elections, and it is a shame that it has taken the Board nearly a lifetime to right this wrong.

### **4. The COVID-19 Pandemic Has Shown Logistics Are Not a Barrier**

The Board's historic objection to absentee ballots for employees on military leave has been logistics-based. Simply put, logistics have changed dramatically since the 1950s, especially when it comes to international mail and shipping. Although it is of course preferable for all employees to vote manually in representation elections, the pandemic has shown that mail-in ballot elections are an effective means to hold an election where extenuating circumstances exist. As such, mail-in ballots should be provided to employees who are unable to participate in manual ballot elections as a result of military service obligations that call them away from the workplace.

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<sup>8</sup> See Parker, Cilluffo, Stepler, *6 facts about the U.S. military and its changing demographics*, Pew Research Center, (<https://www.pewresearch.org/fact-tank/2017/04/13/6-facts-about-the-u-s-military-and-its-changing-demographics/#:~:text=In%20addition%2C%20the%20share%20of,branch%20of%20the%20U.S.%20military>) (accessed September 21, 2020).

## V. Conclusion

In sum, we believe that authority exists for the Board to promulgate the Proposed Rule, and that the Proposed Rule will serve the twin ends of safeguarding employees' personal contact information and preserving the statutory rights of employees on military leave to participate in representation elections at their workplace.

Sincerely,



Emily M. Dickens  
Chief of Staff, Head of Government Affairs &  
Corporate Secretary  
Society for Human Resource Management