ARE YOU READY FOR THAT ELECTION? TOO BAD!

22. June 2011 By Steve Palazzolo

All three of you who read this blog know that, from time to time, we have discussed how the National Labor Relations Board (NLRB) might react to the utter failure of Congress to pass the Employee Free Choice Act. Don't remember? You can see my posts here, here and here.

Well, no more guessing. Yesterday, we found out what the Board was going to do — and we found out in a big way. The NLRB announced that today it would publish in the Federal Register new proposed rules for conducting union elections.

In making this announcement, NLRB Chairperson Wilma B. Liebman said: "One of the most important duties of the NLRB is conducting secret-ballot elections to determine whether employees want to be represented by a labor union . . . . Resolving representation questions quickly, fairly, and accurately has been an overriding goal of American labor law for more than 75 years."

You can see Chairperson Liebman's full statement here.

So what exactly is the NLRB proposing, you ask? Well, if you read the announcement, it seems like it includes just a few changes to make the process fair, such as:

- Allowing for electronic filing of election petitions and other documents
- Ensuring that employees, employers and unions receive and exchange in a timely manner the information they need to understand and participate in the representation case process
- Standardizing timeframes for parties to resolve or litigate issues before and after elections
- Requiring parties to identify issues and describe evidence soon after an election petition is filed to facilitate resolution and eliminate unnecessary litigation
- Deferring litigation of most voter eligibility issues until after the election
- Requiring employers to provide a final voter list in electronic form soon after the scheduling of an election, including voters' telephone numbers and e-mail addresses, when available
- Consolidating all election-related appeals to the Board into a single, post-election appeals process and thereby eliminating delay in holding elections currently attributable to the possibility of pre-election appeals
- Making Board review of post-election decisions discretionary rather than mandatory

That does not seem so bad, does it? But look closer. At least one member of the NLRB thinks none of this is a very good idea. Want to guess which one? That's right, Brian E. Hayes (who just happens to be the lone Republican member on the Board). Hayes went so far as to say in his dissent to the proposed rulemaking:

Today, my colleagues undertake an expedited rulemaking process in order to implement an expedited representation election process. Neither process is appropriate or necessary. **Both processes, however, share a common purpose: to stifle full debate on matters that demand it, in furtherance of a belief that employers should have little or no involvement in the resolution of questions concerning representation**. For my part at least, I can and do dissent.

You can see Hayes' full dissent here. And just so you know, I added the emphasis, although I'll bet he would have if he thought decorum would let him.

Oh, and just to top it all off, the Department of Labor (DOL) also announced proposed rulemaking. The DOL's proposed rules would revise the interpretation of "advice" as it pertains to the employer and labor relations consultant persuader reporting requirements of Section 203 of the Labor-Management Reporting and Disclosure Act (LMRDA).

The proposal adopts the plain meaning of "advice" as "an oral or written recommendation regarding a decision or course of conduct." In effect, under the proposed rules, any time an employer retains a consultant to engage in "persuader activities," the employer must report that activity.

In its announcement, the DOL goes on to say: "The LMRDA does not regulate the actual persuader activities or statements, and the proposed rule only focuses on whether the activities would have to be publicly disclosed. The current interpretation of "advice" has resulted in significant underreporting of employer and consultant persuader agreements. Better disclosure is critical to helping workers make informed decisions about their right to organize and bargain collectively."

Let me translate that for you: We want unions to know how much employers are spending on consultants so they can use that information when they are trying to convince employees to join the union.

So what does all this do? What does it mean from a practical point of view? It reinforces what we have been saying all along. Union avoidance must be an everyday endeavor.

If the NLRB rules are enacted, you are going to have less time after a petition is filed to give your employees the truth about unionization and you will have less opportunity to contest union tactics. And that is only part of the problem. Not only will you have to give the union more information, such as e-mail addresses, to help them organize your employees, you will have to report what you are doing and how much you are spending to tell your employees the truth. This is something the unions simply don't have to do.

The public has 60 days to comment regarding both sets of proposed rules. If you would like for us to do some commenting on your behalf, please give us a call . . . soon.