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New NLRB and DOL Rules Will Help Unions Organize

Employment Law Alert

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July 29, 2011

The National Labor Relations Board ("NLRB") and the U.S. Department of Labor ("DOL") published separate Notices of Proposed Rulemakings in the *Federal Register* in late June 2011 that would radically streamline union elections and limit employer efforts to combat union organizing. These new rules, which would shorten the election period and hamper management's ability to use labor persuaders, are an effort by the current administration to achieve pro-union goals via regulation that it failed to win through legislation when the Employee Free Choice Act ("EFCA") stalled in Congress.

Proposed NLRB Rules Would Streamline Union Election Procedures

On June 22, 2011, the NLRB published its Notice of Proposed Rulemaking in the *Federal Register*. If adopted as final rules following the public notice and comment process, the new NLRB regulations would:

- Permit electronic filing of case documents, including election petitions, election notices, and voter lists. Current regulations do not allow for electronic filing of important representation case documents.
- Require the NLRB Regional Director to set a pre-election hearing seven days after the filing of a petition (absent special circumstances) and a post-election hearing 14 days after the ballots are tallied (or at the earliest date practicable). Current pre or post-election hearing dates vary by NLRB Region.
- Require parties to file a Statement of Position form no later than at the start of the hearing. The Statement must set forth the employer's position on the underlying legal issues. Employers do not now need to formulate their positions until during the pre-election hearing.
- Require employers to provide unions, within seven days of the filing of a petition, a list of employee names, work locations, shifts, and job classifications and to provide unions, within two days of a direction of election, a final voter list including employee home addresses, telephone numbers, and e-mail addresses, where available. Employers do not now have to provide any list of employees until seven days after the direction of election. Management also does not now need to produce telephone numbers and e-mail addresses.
- Significantly limit pre-election litigation. The scope of issues and type of evidence that may be litigated at an NLRB hearing before an election, including most eligibility issues raised by the parties involving less than 20 percent of the bargaining unit, can be deferred until post-election hearings 14 days after ballots are tallied.

- Permit NLRB discretion in denying review of Regional Directors' decisions. All election-related appeals will be consolidated into a single post-election appeals process. The proposed amendments will also eliminate pre-election requests for review.

- Consolidate all representation case procedures into a single part of the NLRB regulations. Currently, representation case procedures are outlined in three different parts of the regulations.

In 2008, the median time from the filing of a petition for an election to the actual balloting was 38 days. We expect the proposed amendments generally to condense the time frame to between 18 and 23 days. One NLRB Member, Brian E. Hayes, dissented from the proposed rulemaking. In his dissent, Member Hayes criticized the NLRB majority's position, stating "the Board and General Counsel are consistently meeting their publicly-stated performance goals under the current representation election process, providing an expeditious *and fair* resolution to parties in the vast majority of cases, less than 10 percent of which involve contested pre-election issues." Continuing, Hayes observed that "by administrative fiat in lieu of Congressional action, the Board will impose organized labor's much sought-after 'quickie election' option, a procedure under which elections will be held in 10 to 21 days from the filing of the petition. Make no mistake, the principal purpose for this radical manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining."

Proposed DOL Amendments to Regulations Would Radically Expand Definition of Persuader

The DOL's Office of Labor-Management Services published its Notice of Proposed Rulemaking in the *Federal Register* on June 21, 2011. The proposed amendments dramatically expand the definition of "persuader" in the DOL regulations that concern section 203 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA").

The "persuader" regulations require employers and labor relations consultants (including attorneys) to file publicly available reports with the DOL regarding any activities that consultants undertake for the purpose of persuading employees to reject labor union representation. Section 203 of the LMRDA states:

> "Every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly--(1) to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing . . . shall file within thirty days after entering into such agreement or arrangement a report with the Secretary . . . containing . . . a detailed statement of the terms and conditions of such agreement or arrangement."

Currently, employers and consultants advising them in preventing or defeating union organizing are generally exempted from these reporting requirements under the "advice" exception in section 203(c). This "advice" exemption provides that no employer or consultant has to file a report covering the services of a consultant who only gives advice, or agrees to give advice, to the employer.

The proposed rules, however, revise the interpretation of the "advice" exemption to the persuader reporting requirements. Under the proposed regulations, the exception will be narrowed to exclude

activities such as the producing or revising of written material, drafting or writing of speeches to be given to employees, drafting or revising audio-visual materials or websites, creating and implementing employee surveys, and coordinating the activities and training of an employer's managers and supervisors. New reporting rules will also require detailed payment accounts for union-related advice and services. Furthermore, employers will be required to report internal costs – including the wages paid to the employers' managers and employees – for activities such as the planning of employee meetings, drafting of employment policies, practices, and handbook guidelines, and other internal matters that have the potential to persuade employees regarding union representation.

The proposed revisions will require a consultant or law firm engaging in the newly-interpreted persuader activities to file a Form LM-20 Agreements and Activities Report within 30 days from entering into the engagement. Employers paying for persuader services are required to file Form LM-10 Employer Reports within 90 days of the close of their fiscal year. In addition, consultants and law firms who have engaged in any persuader activity would need to file a Form LM-21 Receipts and Disbursements Report, which requires the filer to report receipts for all labor relations counsel provided to all employers during the same year, regardless of whether that advice concerned persuader activities. Failure to comply may result in criminal prosecution, fines, or civil penalties.

Conclusion

These new NLRB and DOL rulemaking proposals, if made final, will speed union elections while limiting management's free speech rights and ability to campaign against union organizing. Having failed to pass EFCA, the administration is now advancing further its pro-labor agenda by these regulations and related administrative actions.

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