NLRB Votes To Change Union Election Procedures (But Doesn't Go All The Way!)

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On November 30, 2011, by a vote of 2-1, a bitterly divided National Labor Relations Board (Board) resolved to move forward with some, but decidedly not all, of the procedural changes it had proposed on June 22. While the Board's Democratic majority referenced its desire to reduce "unnecessary, expensive, and time-consuming litigation for the Board and all parties," the dissenting Republican Member, and most observers, have more accurately described the measure as another effort to shorten the time from the filing of an election petition to the date of the election. This would make it more difficult for employers to communicate with employees prior to the vote, and make it easier for unions to win more elections (although unions are already winning elections at a historically high rate of around 70%!).

The Board's resolution will result in the drafting of a Final Rule, which will then have to be circulated to the Board Members for approval, and if passed (very likely given the November 30 resolution), will then be published in the Federal Register. So, despite considerable publicity given to the November 30 vote, the changes are not yet imminent.

The changes would apply to those cases where the employer and union are unable to agree on the terms of a voluntary election agreement, circumstances which then require the Board to conduct a hearing. One change would be to substantially limit the issues which can be litigated at the pre-election hearing, depriving the employer of the right to litigate issues related to voter eligibility prior to the election. Indeed, such issues would be relegated to the challenged ballot procedure, with resolution by the Board after the election has been held.

But suppose the voter eligibility issue involves the common question of who is to be excluded from voting on the basis of supervisory status?

If the employer will not know prior to the election which individuals may be excluded as supervisors, the employer may then be deprived of its ability to determine whom it may rely upon for purposes of conducting its election campaign. The employer would also be deprived of its ability to know in advance of the election specifically which employees will be eligible to vote, a markedly different process than the present status-quo!

Other changes would effectively eliminate the filing of post-hearing briefs, eliminate the right to seek pre-election review of a Regional Director's Decision by the Board, eliminate the current 25-day waiting period to conduct elections when a party has requested pre-election review by the Board, and greatly reduce a party's ability to obtain even post-election review of Regional Director Decisions by the Board.

The good news in all of this is what the Board did not do on November 30. It left for another day further deliberation on the more onerous provisions of the June 22 Proposed Rule, such as requiring that pre-election hearings be held within seven days from filing of petition, that voter eligibility lists must include email addresses and phone numbers, etc. For a more complete recitation of the June 22 Proposed Rule, see our blog post of June 28, 2011.

We would now expect the Board majority to implement this revised Final Rule before the end of this month, when one of the Board Member's recess appointment expires and the Board will be left without a quorum. The changes anticipated as a result of the November 30 resolution, though less onerous to employers than would have been the case if the original Proposed Rule had been fully enacted, nevertheless will further tilt the playing field toward unions as President Obama's appointees continue their zealous efforts to foster unionization.