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California Implements Significant Changes to the Agricultural Labor Relations Act

By John Skonberg and Michael Pedhirney

Effective January 1, 2012, California's Agricultural Labor Relations Act (ALRA) was amended in ways that will likely help unions to organize agricultural employees in California and obtain favorable labor contracts with agricultural employers. Specifically, the ALRA has been amended to: (1) permit the Agricultural Labor Relations Board (ALRB), if it finds that an agricultural employer committed significant misconduct affecting the result of a union election, to issue an order requiring the employer to recognize and bargain with a union even if a majority of the employees voted against union representation in the election; (2) require the ALRB to process election objections and challenged ballot disputes within an expedited timeframe; (3) enable the ALRB to obtain injunctive relief more easily; (4) shorten the time within which the ALRB may compel mandatory mediation/interest arbitration of a first collective bargaining agreement; and (5) prevent an employer's appeal to an appellate court from stopping commencement of the ALRA's mandatory mediation process. These changes place significant new weapons in the hands of unions seeking to represent agricultural employees.

Overview

SB 126 was sponsored by Senate President pro Tempore Darrell Steinberg (D-Sacramento) – the same legislator who sponsored SB104, which would have required an agricultural employer to recognize a union solely on the basis of a "card check." After Governor Jerry Brown vetoed SB 104, Steinberg introduced SB 126 as a "compromise" to the card check legislation. Governor Brown signed SB126 on October 9, 2011.

SB 126 includes several changes to the ALRA. Specifically, SB 126 contains the following amendments.

Bargaining Orders. SB 126 amends the ALRA to provide that if the ALRB refuses to certify a union's loss of an election because of employer misconduct that, in addition to affecting the results of an election, would "render slight the chances of a new election reflecting the free and fair choice of employees," the union will be certified as the bargaining representative of the employees. In other words, if an employer engages in misconduct that the ALRB concludes taints the possibility of a fair re-run election, SB 126 compels the ALRB to certify the union as the bargaining representative even if a majority of the employees casting ballots have voted against union representation.

Election Objections and Challenged Ballots. SB 126 includes a provision setting forth new time limits applicable to the ALRB's procedures and processes regarding the resolution of election objections and challenged ballots. Specifically, the legislation provides that: (1) within 21 days of the filing of objections or the submission of evidence concerning challenged ballots, the ALRB must make a decision whether to set a hearing on those issues; (2) within 28 days of the date of the ALRB's decision to set a hearing, the hearing on the objections and/or challenged ballots must be scheduled; (3) within 60 days of the close of the hearing (unless the parties mutually agree to extend the time period an additional 30 days), the investigative hearing officer who is responsible for conducting the hearing must issue a recommended decision on the issues presented at the hearing; and (4) within 45 days of its receipt of any exceptions to the hearing officer's decision, the ALRB must issue a decision regarding the objections and/or challenged ballots. SB 126 permits the ALRB to grant an extension on these time limits upon a showing of good cause or a stipulation of all of the affected parties to the election.[1]

Injunctive Relief. SB 126 also sets forth less stringent standards that the ALRB must meet before it can obtain injunctive relief against a party that allegedly commits an unfair labor practice in the midst of an organizing drive. Pursuant to the new legislation, if the ALRB can establish that a party's alleged unfair labor practice is so egregious that it naturally "interferes with the free choice of employees to choose or not choose an exclusive bargaining representative," a court must issue temporary relief or a restraining order on a showing that "reasonable cause exists to believe that an unfair labor practice has occurred."

The ALRA previously permitted the ALRB to seek such relief only after the ALRB had issued a complaint regarding the unfair labor practice charge. After SB 126, the ALRA no longer requires that the ALRB issue a complaint prior to seeking such relief; rather, the ALRB need only find that there is "reasonable cause to believe that any person has engaged in or is engaging in an unfair labor practice" before seeking injunctive relief. Post-SB 126, a court's issuance of temporary relief or a restraining order may not be stayed even if there is an appeal of the court's decision pending.

SB 126 further requires that any order issued by a court granting temporary relief or a restraining order remain in effect until an election is held or for 30 days, whichever occurs first. Upon the expiration of the order, a court may issue a preliminary injunction if such an injunction is "shown to be just and proper."

Expedited Timeframes for Compelling Mediation/Interest Arbitration. Prior to SB 126, the ALRA included mandatory mediation provisions that agricultural employers and unions could utilize in the event that a first collective bargaining agreement could not be reached within a specific timeframe. While the ALRA refers to these procedures as "mediation," the procedures are more commonly referred to as "interest arbitration" because, under the ALRA, a mediator has the authority to establish unilaterally the terms of the parties' collective bargaining agreement and the parties are bound by the terms imposed by the "mediator" unless either the agricultural employer or the union successfully challenges the mediator's final contract terms with the ALRB.

SB 126 expedites the mandatory mediation processes in virtually all respects. Previously, the ALRA permitted a party negotiating a first collective bargaining agreement to compel mandatory mediation in order to resolve open negotiating items at any time after the passage of 180 days following the initial request to bargain by an agricultural employer or a union certified as a bargaining representative. SB 126 now permits parties to compel mandatory mediation: (1) 90 days after an initial demand to bargain for a first contract by an agricultural employer or a union certified as a bargaining representative (instead of 180 days); (2) 60 days after the ALRB has issued a bargaining order upon its determination that an employer's misconduct was so serious that the chances of a free and fair election are slight; and (3) 60 days after the ALRB has dismissed a decertification petition upon a finding that an employer has unlawfully "initiated, supported, sponsored, or assisted in the filing of a decertification petition."[2]

Requests for Review. SB 126 requires the ALRB to compel mandatory mediation/interest arbitration even if an employer or union files a petition for review of the underlying unfair labor practice determination reached by the ALRB. After SB 126, the filing of a petition for review with an appellate court challenging the grounds under which the ALRB reached its decision on the unfair labor practice charge may not serve as grounds for staying mandatory mediation/interest arbitration procedures.

Analysis

The impact of SB 126 remains to be seen, although the statute appears generally more favorable to unions.

For example, the expedited mandatory mediation procedures place agricultural employers at a severe disadvantage compared to agricultural unions. Under the post-SB 126 ALRA, an employer whose agricultural employees have voted in favor of unionization is required to reach a collective bargaining agreement within 90 days or else be subject to mandatory mediation in which a mediator has the authority to impose the terms of a first labor contract if the agricultural employer and the agricultural union cannot reach an agreement within 30 days after mediation begins. Practically speaking, given the number of issues that need to be negotiated as part of a first collective bargaining agreement, it is extremely difficult for parties to successfully negotiate a complete first contract within 90 days, even if both the employer and the union diligently negotiate in good faith. Negotiating a complete initial collective bargaining agreement within such a short time period is rare. With the short timeframes under which agricultural employers are required to reach a contract or else be subject to interest arbitration under the ALRA, an agricultural union has every incentive to bargain aggressively and make onerous demands on an agricultural employer because the union is assured that a first contract will be imposed on the employer even if the parties cannot reach an agreement. Under such circumstances, an agricultural employer at the bargaining table may be faced with the difficult choice of either capitulating to the union's bargaining demands or risking the possibility that a mediator will impose similar (or worse) contract terms on the employer.

Moreover, SB 126's institution of a bargaining order remedy presents additional challenges for agricultural employers. SB 126's bargaining order remedy is, in some ways, consistent with federal law.[3] However, the consequences of a bargaining order under the ALRA (known as a "certification order") are much more severe because the statute's mandatory mediation procedures can result in the terms of a collective bargaining agreement being imposed on an employer without the employer's consent. SB 126 prohibits California appellate courts or the ALRB from staying mandatory mediation.[4] Consequently, if the ALRB were to issue a certification order in accordance with its newly obtained authority to do so under the ALRA, an employer's request for review of the ALRB's determination could not prevent the ALRB from ordering mandatory mediation even while the request for review is pending. Consequently, an employer challenging the propriety of the ALRB's determination would be denied the opportunity to have a court review the Board's decision prior to the imposition of the ALRB's compulsory mediation processes under which a mediator may impose the terms of a contract on an employer. This change in the ALRA could potentially be subject to a constitutional challenge on the basis that it strips an agricultural employer of the right to judicial review of the ALRB's bargaining order prior to the ALRB's imposition of the terms of a collective bargaining agreement upon the employer. However, given that California courts have previously rejected arguments objecting to the ALRA's mandatory mediation procedures on constitutional grounds,[5] there is no certainty that a constitutional challenge would be successful.

The other recent amendments to the ALRA (*e.g.*, the expedited timeframes with regard to election objections and challenged ballots, the ALRB's authority to impose certification orders, the mandatory imposition of interest arbitration even in the face of a pending petition for review before a California appellate court, and the expanded circumstances under which the ALRB may obtain injunctive relief) expand the ALRB's authority and provide unions with more ammunition in their efforts to organize agricultural employees. Given these significant changes to the ALRA, it is reasonable to assume that unions that traditionally target agricultural employees, such as the United Farm Workers and United Food and Commercial Workers International Union, will attempt to revitalize organizing efforts among agricultural employees in California.

In light of SB 126, employers should be mindful of some of the peculiarities of the ALRA in order to prepare for the possibility of a union organizing campaign. For example, employers should be prepared for the possibility of a union requesting access to employer property. ALRA regulations permit unions to have such access to an agricultural employer's property for the purpose of meeting and talking with employees and soliciting their support. Employers are advised to become familiar with these access provisions and be prepared to respond to union requests for such access. Failure to provide the union with reasonable access rights could result in unfair labor practice charges that could have far-reaching impact (such as a certification order in certain circumstances).

Moreover, agricultural employers need to be mindful as to their working employee complement at all times. The ALRB may conduct a union election at any time when at least 50% of an employer's annual complement of agricultural employees is working. In calculating the size of an agricultural employer's workforce, the ALRB takes into consideration employees working for farm labor contractors utilized by an employer, as well as the employer's agricultural employees working at locations other than the employer's primary location. Under the ALRA, the ALRB is required to conduct secret ballot elections within seven days of the filing of a union's petition to represent employees. Given the quick election turnaround required under the ALRA, an agricultural employer caught off-guard by a union petition is put in an extremely difficult position with regard to preparing for an election and permissibly persuading employees regarding the disadvantages of becoming unionized. In order to avoid being caught completely unprepared for a union petition (and a union election shortly thereafter), it behooves agricultural employers

to keep track of how many of its agricultural employees are actively working and be especially vigilant for organizing activity when at least 50% of its annual complement is working.

In light of the challenges imposed on agricultural employers by the ALRA post-SB 126 and the nuances of the law, agricultural employers should consult with legal counsel in the event that a union petition is filed to ensure compliance with the statute's strict and unique requirements.

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[1] In light of these changes, on February 1, 2012, the ALRB adopted regulations streamlining the review process with respect to objections and challenged ballots to ensure that the ALRB can meet the timelines imposed by the new statute. The regulations will be submitted to California's Office of Administrative Law, which is responsible for reviewing, approving, and publishing proposed regulations.

2 SB 126 did not change the effective mandatory mediation timeframe for bargaining units certified prior to January 1, 2003, that have yet to be covered under a collective bargaining agreement. After SB 126, parties can compel interest arbitration 90 days after a renewed demand to bargain for a first contract by an agricultural employer or a union certified as a bargaining representative before January 1, 2003.

[3] The National Labor Relations Act (NLRA) is the ALRA's federal counterpart that governs relationships between private employers and unions in non-agricultural settings. The National Labor Relations Board (NLRB), the federal agency responsible for enforcing the NLRA, also has the authority to issue bargaining orders even in the absence of an election in which a majority of the employees casting ballots express a desire to be represented by a union.

[4] This is not the case under federal law. Under the NLRA, an employer may challenge the NLRB's certification of a union as a collective bargaining representative by refusing to bargain with the union and appealing any unfair labor practice charge stemming from the employer's refusal to bargain to a federal court of appeals on the basis that the NLRB's certification was improper. Consequently, the NLRA preserves an employer's right to challenge the NLRB's determination before a court of law.

[5] *See, e.g., Hess v. Agricultural Labor Relations Board*, 140 Cal. App. 4th 1584 (2006).