LABOR ISSUES

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NLRB Votes To Amend Its Secret Ballot Election Rules To Speed Representation Elections

Chamber Of Commerce Files Lawsuit To Enjoin Board

On June 21, 2011, the National Labor Relations Board ("NLRB" or "Board") proposed changes to its secret ballot election regulations ("Speedy Election Rules"). The Administrative Procedure Act ("APA") Notice and Comment period resulted in 65,000 public comments.

Next, after the NLRB held hearings of short duration with a limited number of speakers, on December 22, 2011, in anticipation of the Board losing its quorum, its members voted, 2 to 1, along party lines, to amend its regulations to expedite its union representation election process and enacted its Speedy Election Rules. These regulatory changes are to become effective April 30, 2012 (the same date the NLRB Employee Rights Poster Regulation is tentatively scheduled to go into effect). Simultaneous with the NLRB's approval of its Speedy Election Rules, the U.S. Chamber of Commerce filed suit in the United States District Court for the District of Columbia, seeking to have the Speedy Election Rules enjoined and declared unlawful. (NLRB Posting Rule remains in litigation in the same Court.)

The Speedy Election Rules are part of a continuing effort by the Obama Administration to amend the National Labor Relations Act ("NLRA") in favor of union organizing. The initial effort relied upon passage of the Employee Free Choice Act ("EFCA"). EFCA sought to radically alter the government machinery regulating union representation elections in the private sector and collective bargaining in favor of unions. In sum, EFCA sought to:

1. Provide an alternative to NLRB secret ballot elections by certifying union representation on the basis of a simple "card check" majority;
2. Replace initial contract negotiations with time restricted government imposed interest arbitration; and
3. Increase penalties for employers accused of unfair labor practices directed against pro-union employees during a union organizational drive.

EFCA legislation died in Congress. However, the activist majority of the NLRB has chosen to exercise the NLRB's seldom utilized regulatory and decision making authority to obtain indirectly what it was denied by the EFCA defeat.

First, the Democratic majority of the Board, began issuing case decisions which liberalized union organizing rights and restricted traditional employer efforts to maintain order in the workplace. These decisions weakened employer private rulemaking and

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the imposition of discipline, expanded the concept of concerted activity, and broadly restricted the employer's right to regulate new forms of communication, including social media, in the workplace.

Second, as previously mentioned, the NLRB promulgated its NLRB Employee Rights Poster Rule.

Next came the Speedy Election Rule which makes six principle changes to existing NLRB Election Rules:

1. The amended regulations state the sole purpose of the statutory NLRB pre-election representation hearing is strictly limited to a determination whether "a question concerning representation exists," e.g. whether the proposed bargaining unit is an appropriate unit, whether there is a sufficient showing of interest to obtain an election, or there is a statutory bar to an election. This rule, in its current form, likely precludes the pre-election litigation or the eligibility of persons whose inclusion in the bargaining is disputed or the status of persons who may be statutory supervisors. The inability of employers to obtain a pre-election NLRB determination of whether an individual is a "statutory supervisor" could have substantial impact on the conduct of representation elections and commission of unfair labor practices.
2. To enforce the foregoing limitation, the revised regulations empower NLRB Hearing Officers to exclude evidence unrelated to the narrow questions of representation outlined above. By so doing, employers will be unable to obtain a pre-election ruling on the supervisory status of their workers or voter eligibility creating the risk that the employer or these persons may commit unfair labor practices and denying statutory supervisors their full rights to communicate their views to fellow workers during the pre-election periods while exposing them to unfair labor practice charges.
3. In addition, the Speedy Election Rules permit Hearing Officers to reject the filing of post-hearing briefs unless they would assist the decision maker in resolving the limited issues in dispute.
4. Consistent with the above, the Speedy Election Rule eliminates the current Board rule prohibiting election dates sooner than 25 days from the date of filing of the union election petition. Apparently, there is no longer a minimum number of days during which an election can be held after the filing of a union petition.

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5. The Speedy Election Rules require "special" permission from the local Regional Director to appeal any pre-election ruling to the NLRB. The Speedy Election Rule will effectively bar intermediate appeals to the NLRB. Presently, if there is such an intermediate appeal, the time from filing a union petition to the election is approximately 62 days. Under the Speedy Election Rule, elections would be held within 25 days or less. Time is invaluable to an employer opposing unionization.
6. Further limiting appellate rights, the NLRB empowered itself to reject pre- or post-election appeals. Unless the employer wins the election, its sole appellate remedy may be to engage in a technical refusal to bargain with the union and take an appeal to a United States Court of Appeals.

In sum, these modifications, individually and collectively, deny employers their full First Amendment Rights to communicate with their employees regarding their individual and collective rights to vote for or against the labor organizations or to engage in or to refuse to engage in collective activity. Therefore, it is strongly recommended that rather than wait for the results of the Court's decision in the pending Chamber of Commerce Speedy Election Rule litigation, unrepresented employers or employers with units of non-union employees should train their managers (and employees) regarding the NLRA, employer and employee rights, unions, collective bargaining, and unfair labor practices. Remember, one size does not fit all businesses. A wise employer should develop a crisis management plan in anticipation of the filing of a union election petition. Absent such a plan, if the Speedy Election Rules are in effect, there may not be sufficient time to communicate with managerial and supervisory personnel and employees to successfully mount an effective employer response to a union representation petition. ■