NLRB Announces Proposed Rule Changes That Will Greatly Assist Union Organizing

By Adam Santucci

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On June 22, 2011, the National Labor Relations Board (Board) published a Notice of Proposed Rulemaking that, if finalized, would significantly change the union representation election process. According to a Board "Fact Sheet," the changes are designed to "reduce unnecessary litigation, streamline pre- and post-election procedures and facilitate the use of electronic communication and document filing." But the lone Republican Board Member, Brian E. Hayes, in a stinging dissent, seems to have more accurately characterized the proposed rule change as an "administrative fiat" which 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." Hayes further described the proposal as an effort "to eviscerate an employer's legitimate opportunity to express its views about collective bargaining."

The time between the date the petition is filed and the date of the election is critical for employers, because it is often the only time the employer will have to express its views regarding unionization. Often an organizing effort may have been ongoing for weeks or months without the employer's knowledge, and the employer only learns of the campaign when the election petition is filed with the Board. This means that the employees are only getting one side of the story, the union's side, prior to the filing of the petition. A shorter time between the filing of the petition and the election date will deprive employers of the time necessary to fairly present both sides of the representation question to employees.

Currently, the Board's operational goal is 42 days between the filing of the petition and the election, with the median time actually being only 38 days. Under the proposed rules, this time would be shortened significantly. The changes would require a pre-election hearing within seven (7) days of the filing of the petition and would defer rulings on any election issues until after the election, unless the issues would impact at least 20 percent of eligible voters. After an election has been directed, the employer would have only two (2) days to produce a list of eligible voters (not the current seven (7) days), which must include the names, home addresses, phone numbers, and if available, email addresses of these individuals. Currently, only names and addresses are

required. In addition, the Board would have discretion to decline to review Regional Director rulings on post-election challenges.

These proposed rule changes, which also include the implementation of electronic filing of petitions, may not be quite as drastic as the changes that would have been wrought by the failed Employee Free Choice Act (EFCA). Nonetheless, the proposed changes have been highly applauded by unions (which are already winning NLRB elections - 69% of elections held in 2009 and 68% of elections held in 2010). EFCA would have eliminated secret ballot elections, required arbitration over the terms of a first collective bargaining agreement if the parties were unable to reach agreement, and increased penalties for employers that engaged in unfair labor practices. EFCA has stalled since the November 2008 elections, and it seems that the Board's real motivation in proposing the election changes is to enable organized labor to increase its representation in the private sector workforce, where only 7% of employees are currently unionized.

In other recent developments, the activist Obama Board has also filed a lawsuit against Boeing Co., over Boeing's decision to perform manufacturing work at a non-union facility in South Carolina. The Board has also been highly active in protecting and advocating the use of social media for employees and unions. And, in December 2010, the Board announced a Notice of Proposed Rulemaking that would require virtually all private sector employers to post a notice to employees regarding their rights to organize under the National Labor Relations Act. In addition, the Department of Labor has announced a Notice of Proposed Rulemaking that would require further disclosure of employer use of consultants during union organizing campaigns, in an obvious effort to discourage the use of such consultants.

These developments send a loud and clear message that the current administration emphatically supports union organizing efforts. Employers must be aware that if the Board's proposed rules become final, employers will be significantly restricted in their ability to respond to union organizing campaigns. Therefore, employers must become more proactive than ever in addressing employee relations issues now and conducting union avoidance training for their supervisors and managers.