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The NLRB Issues New "Quickie Election" Rules

The National Labor Relations Board (NLRB) is continuing to pursue the agenda of administrative labor law reform that Congress failed to achieve when efforts to enact the Employee Free Choice Act (EFCA) were unsuccessful back in 2009.

In light of the upcoming expiration of Member Becker's recess appointment on December 31, 2011, which will reduce the Board to only two members, rendering it unable to act due to a lack of a quorum, the two Democratic appointees have voted to adopt new rules that will speed up the union election process. Specifically, the pertinent part of the rule proposals adopted yesterday provides:

- The National Labor Relations Act provides for a pre-election hearing to determine whether there exists a "question of representation" to be resolved by an election. Currently, parties can raise issues at this hearing that are not relevant to this specific question, which can result in time-consuming litigation. The first Board rules amendment accordingly gives Board hearing officers the authority to limit this pre-election hearing to matters relevant only to the question of whether an election should be held.

- Most Board cases involve only routine issues based on well-known principles of Board law. In such cases, NLRB regional directors can reach a fair and sound decision based on the record from pre-election hearings, including closing arguments made by both sides. Currently, both sides also can file briefs after each hearing, but this briefing typically adds little if anything to the regions' decision-making process in routine cases and substantially increases the parties' litigation costs. The second Board rules amendment thus authorizes Board hearing officers to decide whether or not to allow these post-hearing briefs based on whether each case presents issues which necessitate them.

- Current Board rules also require parties to file two separate appeals in order to seek Board review of (1) pre-election issues and (2) other issues concerning the conduct of the election, respectively. Appeals concerning pre-election issues must be filed before the election, and are often subsequently mooted by the results of the election. The third Board rules amendment reduces this unnecessary litigation by consolidating these two appeals into a single post-election procedure thereby eliminating altogether appeals of issues that ultimately become moot as a result of the election.

- The fourth amendment follows directly from the third, by ending the practice of delaying the scheduling of elections to permit time for a pre-election appeal. (Under the current rules, these appeals did not in fact delay elections in many cases because the Board already had the authority to order the election to proceed as scheduled with the added direction that the ballots be impounded while it considers the appeal.)

- In keeping with the effort to avoid multiple appeals in a single case, the fifth Board rules amendment narrows the circumstances in which a request for special permission to appeal to the Board will be granted. Such permission now will be granted only in extraordinary circumstances when it appears that the issue addressed in the appeal would otherwise evade review. (Board review will remain available following the election on all issues for which permission to appeal

was denied or not sought and which have not been rendered moot by the election itself.)

- The sixth amendment simplifies Board appeal procedures and avoids the litigation of appeals that do not present any serious issues for review by giving the Board discretion to hear and decide any appeal relating to the election process, regardless of whether it concerns pre- , during or post-election issues.

On their face, these changes appear to make “good common sense” as far as streamlining and thereby minimizing the amount of litigation which is related to the union election process. What this “streamlining” means to employers, however, is that the time between the filing of the petition which precipitates an election and the election itself will be substantially reduced. Accordingly, employers who wish to remain union-free will have to be proactive.

This means Company management, including all front-line supervisors, should be trained **now** to recognize the early warning signs of possible union activity and how to (legally!) respond to the same. Company work rules and policies need to be reviewed both for legality and fair implementation **before** a union comes knocking. Once a petition is filed, it will be too late to effectively take either of these steps, particularly given these new “quickie election” rules.

As the end of 2011 and the federal elections of 2012 draw near, we anticipate “more of the same” from the NLRB in the form of decisions in unfair labor practice cases that overrule prior employer-friendly precedent in favor of labor unions, aggressive use of discretionary injunctive procedures, enhanced remedial measures, and rule-making efforts such as those outlined above and the controversial notice-posting rule that was adopted earlier this year but has recently been delayed until January 31, 2012.

We are currently scheduling on-site union avoidance training and/or Company work rule and policy review sessions for December through March. If you would like more information concerning these proactive measures to remain union-free, please contact Bill Trumpeter at btrumpeter@millermartin.com or (800) 275-7303, ext. 318.

The opinions expressed in this bulletin are intended for general guidance only. They are not intended as recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance. Should you need assistance from a Miller & Martin attorney, please call 1-800-275-7303.

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