Make Your Voice Heard on NLRB's Proposed New Rules to Aid Union Organizing

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In 2008 and 2009, employers played a critical role in defeating the Employee Free Choice Act. Now, employers need to quickly step up again and voice their opposition to the National Labor Relations Board's recently proposed changes to the rules regarding the Board's election process. Comments from employers and other interested parties in response to the proposed rule changes must be submitted no later than August 22.

The NLRB's proposed new rule for "quickie" union elections and other changes could dramatically tilt the playing field in favor of unions. As we discussed in a recent Client Bulletin, NLRB elections could be held within 10 to 21 days after the union files a petition with the NLRB.

In addition to quick elections, the NLRB's proposed rule changes would require employers to electronically provide the NLRB *and the union* the following information about employees: names, addresses, email addresses, telephone numbers, job classifications, work locations, and shifts. This is significantly more information than employers must currently provide to the NLRB and unions. An employer's failure to timely provide the information would be grounds for setting aside the election if the union does not win the election.

Under the Obama Board's proposed rules, the representation hearing would be set for seven days after the employer's receipt of the petition. Either before or at the beginning of the representation hearing, the employer would be required to submit its "statement of position" setting forth all of the issues the employer intended to raise in the representation hearing, plus the employer's proposed bargaining unit for purposes of an election. The NLRB states that the submission of a position statement by the employer is "mandatory only insofar as failure to state a position would preclude a party from raising certain issues and participating in their litigation." In other words, if you ever wish to raise an issue, it is mandatory.

Even if the employer is able to comply with the new rules and provide the detailed information required in the proposed rules in a timely manner, there is no assurance that the NLRB will conduct a representation hearing. The proposed changes provide that the Regional Director would have the discretion to defer the representation hearing until *after* the NLRB election. As a result, employees who may not ultimately be in the bargaining unit could be voting in the election.

The Obama Board's agenda is patently obvious. The Board is seeking to create a labor relations environment in which unions can significantly increase union membership in the United States. These proposed changes in the rules regarding NLRB elections are one giant step toward this objective.

Constangy is preparing a detailed response to the NLRB's proposed rule changes that we will submit to the NLRB on our firm's behalf. In addition, we are also preparing and will distribute soon a draft response that our clients can submit on behalf of themselves, either with or without modifications to address their more specific concerns. We encourage every employer who is concerned to submit comments opposing the proposed rules.

As Board Member Brian Hayes recognized in his dissent to the proposed rules, it is clear that the NLRB intends to ram the new rules through as quickly as possible. Unless there is legislative action in Congress within the coming months, the only deterrent to implementation of the proposed rules is an overwhelming tide of opposition expressed through the comment process.

Even if the Board ignores employer responses and adopts the proposed rules, the comments expressing concerns are important. Congress may be more interested in halting the NLRB's pro-union agenda through legislation if there is an overwhelming response by employers. In that regard, it is not too soon to begin contacting your Senators and representatives in Congress to express your concern and ask for their assistance.

Finally, every employer's relationship with employees is unique, but we encourage you to consider whether this is an appropriate time to again discuss with employees your position on unions and the possible impact on your employment environment of these rule changes. Many of our clients took the opportunity in 2008 and 2009 to talk with their employees regarding the possible impact of the Employee Free Choice Act. Some employers suggested to their employees that they could contact their representatives in Washington, and many provided letters for employees to sign and mail.

Of course, employees are also "interested parties" and can submit comments to the NLRB. The NLRB must review all of the comments submitted, and it will publish the number of comments received. The more comments in opposition to the proposed the changes, the better the chance of stopping implementation of the new rules.