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NLRB Procedural Amendments + New Notice Requirements = Increased Risks & Decreased Opportunities for Employers

Effective April 30, 2012, the National Labor Relations Board (NLRB or Board) notice posting obligations and new election procedure rules will take effect, increasing the likelihood of union formation, and greatly reducing the time period between a petition for election and the election itself.

The NLRB's posting requirement, originally set to take effect in November 2011, requires conspicuous posting of employee's union formation rights. The effective date was delayed twice pending court challenges on whether Board exceeded its authority in implementing the rule. The requirement was recently upheld, however, by a federal district judge in the D.C. Circuit (Nat'l Ass'n of Mfrs. V. NLRB, D.D.C., No. 11-cv-1629). In short, the judge, Amy Berman Jackson, agreed with the NLRB that the broad rulemaking authority under the National Labor Relations Act (Act) provides authority for this rule. Judge Jackson held, however, that the Board exceeded its authority by deeming a failure to post the notice as necessarily an unfair labor practice; and that its equitable tolling provisions are unenforceable. Appeals to this ruling are underway.

Pending appeal rulings, most employers must comply with the posting requirement as of April 30, 2012. The essential concern regarding the posting requirement is that disgruntled employees may be more likely to initiate union organizational activity.

Regarding the election procedure amendments, the NLRB's stated goal was to reduce unnecessary litigation and delays. For example, absent an agreement on the petition, parties may currently litigate over whether the employees covered by the election petition are the appropriate voting group. This can delay the election by up to a month pending Board review. Also, parties may seek a review of a regional director's ruling before an election is held. Further, the NLRB argued that current procedures do not provide an efficient means to identify the most pertinent issues of dispute – thereby encouraging what the Board considered wasteful litigation. Accordingly, the new rules will bring the following essential changes:

- Pre-election regional hearings will be limited to issues relevant to the question of whether an election should be conducted. Accordingly, during such hearings, the hearing officers may limit the presentation of evidence regarding individual eligibility issue.
- The elimination of the parties' right to file a pre-election request for a review of a regional director's decision or direction of an election. Such requests must be consolidated with any post-election requests to review the Regional Director's rulings on challenges and objections.
- Hearing officers will have discretion to prohibit post-hearing briefs or limit their subject matter or the time for filing them.
- The NLRB will have discretion over the current right to appeal a regional director's post-election rulings on potentially outcome-determinative challenges and objections.
- The 25-day recommended waiting period between a regional director's direction of an election and the election itself will be eliminated.

- Special appeals from the hearing officer or Regional Director's rulings will be limited to "extraordinary circumstances where it appears that the issue will otherwise evade review."

The most obvious effect of the procedural amendments is that employers will have a very short window to implement a union avoidance campaign. In short, the old rules, with their allowance of various pre-election challenges, effectively gave employers at least a 42-day window between the filing of an election petition and the election itself. Employers generally used this time to plan and implement a vigorous campaign against union formation. Now, assuming that a pre-election hearing will occur – which would typically be scheduled within seven days after filing; an election could occur in as little as fourteen days after the petition filing. This, of course, could leave employers in a haste to plan and implement their campaigns. Moreover, the statistical evidence establishes that a shorter campaign window leads to increased success by unions in election campaigns.

As with the notice requirement, there are court and legislative challenges to the new procedure rules pending. The Coalition for a Democratic Workplace and the U.S. Chamber of Commerce, challenged the rules in a December 20, 2011 lawsuit, alleging that employers will be improperly denied an opportunity to address their employees on the consequences of unionizing. (Case No. 1:11-cv-02262 , U.S. District Court, D.C. Circuit). The U.S. House of Representatives passed the Workforce Democracy and Fairness Act (H.R. 3094) on November 30, 2011, to require, in pertinent part, a 35-day waiting period between the election petition and the election; and would require a two-week window between the petition and a hearing on that petition.

Challenges aside, however, employers seeking to maintain a union-free status should start planning now to be more proactive and more diligent in their union avoidance campaigns. For example, employers can no longer wait for a petition to be filed prior to implementing union avoidance strategies. It is going to be more effective to assess/reassess employee education and training now to reiterate the positives of a union-free environment, rather than risk waiting for overt organizational activity or a petition to be filed.