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Pro-Union NLRB Presents Challenges to Employers: Employment Law Update - October 2011

October 12, 2011

The National Labor Relations Board (NLRB) regulates union and management rights in the workplace. Currently under the Obama Administration, the board has two Democrats, one Republican and two vacancies. Recent pro-union cases and proposed rules by the NLRB pose some challenges ahead for employers.

New Proposed Union Election Rules

In June 2011, the NLRB proposed new rules governing procedures in union representation cases, making it easier for workers to unionize. Although the NLRB contends that the rules "would remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation," the proposed rules would significantly shorten union elections, thus limiting an employer's ability to communicate with its employees.

Under the proposed rules, a pre-election hearing could begin seven days after a hearing notice is served, with a post-election hearing 14 days after the tally of ballots. The proposed rules would result in a union election being held as soon as 10 to 21 days after an election petition was filed, compared with the median 38 days for initial elections in 2010. Employers would be required to submit a statement of position, no later than the day of the hearing, identifying all issues to be addressed in the pre-election hearing. Failure to do so would preclude employers from subsequently raising certain issues and participating in litigation. Challenges to voter eligibility generally would be deferred until after the election.

Increased Reporting for Employers of "Persuader Activity"

The U.S. Department of Labor (DOL) also proposed union-friendly changes under the reporting requirements of Section 203 of the Labor Management Reporting and Disclosure Act (LMRDA). These revisions would substantially expand current reporting and disclosure requirements for employers and their labor relations consultants.

The LMRDA requires employers and their labor relations consultants to report annually what is known as "persuader activity." Specifically, employers must disclose arrangements with labor relations consultants if the consultant is used to persuade, either directly or indirectly, employees about exercising their rights to organize and bargain collectively. However, employers and their consultants (including attorneys) are currently not required to file a report if the consultant is merely advising the employer.

Under the proposed rules, the DOL would narrow the "advice" exception, limiting the scope of advice and services now protected by the exception. Human resources training, surveys and

communication could fall outside the narrow definition of "advice" and be exposed to unnecessary government red tape and union propaganda. Essentially, employers would have to provide the government the amounts they paid to consultants related to training employees and remaining union-free, chilling employers' ability to exercise their legal right to speak out against unionization.

New Pro-Union Poster

As of January 31, 2012, employers covered by the National Labor Relations Act (NLRA) must publish an 11-inch by 7-inch poster describing employee rights to unionize. Employers who fail to satisfy the notice posting requirement will be subject to liability for committing an unfair labor practice under Section 8(a)(1) of the NLRA, and may face a tolling of the six-month statute of limitations for filing an unfair labor practice charge.

New NLRB Rulings Challenge Existing Precedent

The NLRB has also issued several controversial decisions changing well-settled precedent, including what constitutes a collective bargaining unit. Overturning more than 20 years of precedent, the NLRB recently ruled that the "community-in-interest" standard was appropriate for a nursing home and found that 53 certified nursing assistants may comprise an appropriate bargaining unit without including all other non-professional employees. As a result of this decision, non-acute health care facilities, including nursing homes and rehabilitation centers, are subject to being unionized without a vote by all employees and with limited ability to challenge the proposed bargaining unit. The ruling's long-term effects may increase the potential for smaller bargaining units or "micro-unions" in other industries, making it easier for unions to fragment a company's workforce.

In another decision overruling prior precedent, the NLRB reversed the Dana Corp. decision, which had allowed for an immediate challenge to a union's status by 30 percent of employees or a rival union. Dana established a 45-day "window period" during which employees may file a decertification petition supported by a 30 percent showing of interest by employees. Rather than allowing challenges after 45 days, the NLRB's new decision defines a reasonable period of bargaining as no less than six months.

NLRB's Future Under the Current Administration

The future of the NLRB under the Obama Administration remains uncertain. Chairperson Wilma Liebman's tenure ended August 27, 2011, reducing the NLRB to only three members. The term of Democratic appointee Craig Becker will expire in January, leaving only two members. The current board will likely continue pushing pro-union changes, especially between now and the end of 2011. After that, the NLRB may be down to two members, making major changes difficult before the presidential election. In the meantime, employers should continue to monitor the upcoming changes closely.