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NLRB In Transition as Year Draws to a Close

By David Phippen
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The NLRB has been in the news as the year draws to an end. Just a few weeks ago the National Labor Relations Board approved a **Resolution** to move forward with some earlier-proposed changes of rules for union representation election procedures. Within the last two weeks, the Board dismissed the Boeing unfair labor practice complaint, and now, the Board has issued new rules to maintain some semblance of normal operation when the Board loses a three-member quorum, as is about to happen when Congress again goes on recess and the recess appointment of Member Craig Becker (D) ends. With this backdrop, President Obama nominated two members to the Board, but their confirmation by the Senate appears unlikely given the current political environment in Washington.

Election Rule Changes -- Key Aspects

The proposed election rule changes would streamline election hearing and appeal procedures and speed up the election process, a result that would shorten the period for employers to communicate with employees in representation case campaigns and permit elections in bargaining units that could be dramatically affected by post-election appeals. The Resolution expressly provides that “no final rule shall be published until it has been circulated among the members of the Board and approved by a majority of the Board” and that the Board will continue “to deliberate on the remainder of the amendments proposed in the [earlier-proposed rulemaking].” Final rules have not yet been published.

Key aspects of the proposed rules involve hearings and appeals at the outset of a representation election case. These proposed changes will, among other things,

- (1) eliminate the right of parties to file post-hearing briefs in contested election cases, potentially shortening by 7 to 14 days the time between the filing of an election petition with the Board and an election, and
- (2) give a Board Region’s Hearing Officer power to allow post-hearing briefs and set a time period for any such briefs and “to limit the evidence introduced at the hearing to that [which is] relevant to a genuine issue of fact material to [the question of] whether a question of representation exists.”

For appeals, the proposed changes will eliminate the right of a party to file a pre-election appeal after the post-hearing decision in a contested representation case. Instead, any appeal to the Board will be discretionary, not a matter of right. This will

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December 20, 2011

eliminate the need for the Board's current practice of scheduling elections no sooner than at least 25 days after a hearing decision and direction of election to allow time for review of a pre-election appeal to the Board. The result of the changes, if adopted, will mean that an election could be held less than 25 days after a petition is filed.

The practical impact of the proposed changes may include the following:

- Hearing Officers of a Board Region will have substantial discretion to limit hearing issues. Issues related to voter eligibility, supervisory status, and unit scope probably will not be heard pre-election because the Regions are likely to decide that those issues can be addressed by the challenged ballot procedure or be raised in a post-election appeal. Thus, campaigns and elections will be held even though uncertainty exists as to the scope of the unit, who is or is not in the unit, and who is or is not a supervisor. Employees will not know for sure who is in their unit when they vote. Employers will not know for sure who is or is not a supervisor for purposes of campaigning. An increase in the number of unfair labor practice charges related to alleged supervisory conduct may be the ultimate consequence of limiting hearing issues.
- An employer's leverage in getting a date the employer deems acceptable for an election will be gone because the employer cannot bargain away some or all of the hearing issues in order to get the election date it wants. Under current rules, insisting on a hearing effectively ensures an employer of at least 32 days to communicate its message to employees once an election is set. As a practical matter, many employers bargain away the hearing issues to get an election date deemed fair. Under the proposed rules, an election could be set for a date very soon after a hearing, even as little as 10 days. Regional Directors can be expected to attempt to schedule elections as soon as reasonably possible, probably between 21 and 25 days after the filing of the petition. It is possible that elections might be scheduled even sooner. The bottom line – labor will be getting a key goal in its agenda, a shorter campaign and election cycle to make it harder for an employer to communicate a message to employees..

New Rules to Keep the Agency Functioning with Loss of a Quorum

On December 13 the Board issued new rules that became effective December 14 which allow it to function after it is left with only two members, Chairman Mark Gaston Pearce (D) and Member Brian Hayes (R). This will happen when Member Becker (D) leaves this month. The new rules allow the Chief Administrative Law Judge and Executive Secretary of the Board to decide certain motions and requests made in unfair labor practice and representation cases whenever the Board lacks a three-member quorum needed to function. Under the new rules, whenever these rules come into play, the decision of the Chief Administrative Law Judge or the Executive Secretary is not appealable immediately to the Board, but instead, the decision would be considered by the Board when the quorum is restored.

New Nominations to the Board

On December 14, seeking to fill open seats on the Board with nominees of his choice, a majority Democrats, President Obama announced two appointments to the Board that now proceed to the Senate for a possible hearing and confirmation.

For one seat, President Obama nominated Sharon Block, currently Deputy Assistant for Congressional Affairs at the U.S. Department of Labor. Press reports indicate that before her current position, she was a law firm attorney, an attorney at the Board, Assistant General Counsel at the National Endowment for the Humanities, and Senior Labor and Employment Counsel for the Senate Health, Education, Labor, and Pensions Committee, working for now-deceased Sen. Edward M. Kennedy (D).

December 20, 2011

For the other seat, President Obama nominated Richard Griffin, current General Counsel of the International Union of Operating Engineers (I.U.O.E.) and a member of the AFL-CIO Lawyers Coordinating Committee. Before his lengthy career with the I.U.O.E., he served two years as a lawyer at the Board.

Whether these nominations, and the nomination of stalled nomination of Terence Flynn (R) on January 5, 2011, will get to a confirmation vote in the Senate is in question. Sen. Lindsey Graham (R – SC) has vowed to block all nominations to the Board until he has a full accounting of what took place at the Board in connection with the recently withdrawn Boeing complaint, which drew much attention in the press. In a December 13 press release, Sen. Graham said, “Given its recent actions, the NLRB as inoperable could be considered progress.” Stay tuned for further developments as they happen.

If you have any questions about these proposed changes, please contact any member of Constangy’s **Labor Relations Practice Group**, or the Constangy attorney of your choice.

About Constangy, Brooks & Smith, LLP

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