

ZINSERGRAM AKA LEGAL UPDATE



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NLRB ADOPTS “QUICKIE” ELECTION RULES

Background

On June 22, 2011, the National Labor Relations Board published a “Notice of Proposed Rulemaking” that included drastic changes to how the Board would handle representation cases. This proposal was published in the Federal Register the following day. Over 65,000 comments were submitted in response to the proposed rules during the two-month comment period. As expected, employers and trade groups around the country criticized the proposed rules as unnecessary, pro-union, and unlawful. These comments were reiterated during a two-day hearing held by the Board in July 18-19, 2011. For months, there has been speculation about when how much of the proposed rulemaking would be adopted. On November 18, 2011, Board Chairman Mark Gaston Pearce directed that an “open meeting” be held on November 30, 2011 to vote on the resolution he drafted, which addressed only a portion of the proposed rule changes. There was rampant speculation that the lone Republican on the Board, Member Brian Hayes, would resign prior to the meeting. Member Hayes did not resign, and the Board voted 2-1 (Hayes dissenting) in favor of the resolution. During the meeting, Chairman Pearce promised to get a final rule based on this resolution in place prior to the end of controversial recess appointment Member Craig Becker’s term, which is set to expire at the end of this session of Congress. On December 21, 2011, the Board issued a press release concerning the Board’s adoption of a final rule concerning changes to election procedures. The final rule was published in the Federal Register on December 22, 2011, and will go into effect on April 30, 2012.

I. The New Rule

These new rules will dramatically impact an employer’s ability to counter an organizing effort. Simply put, the Board wants to increase unionization in the workplace. These changes affect the issues to be litigated in a hearing, post-hearing briefs, pre- and post-election review of Regional Director decisions and outcomes, as well requests for special permissions to appeal. Under these new rules, the odds are further stacked in favor of organized labor. Such changes are indicative of the Board’s pro-union bias.

The new rule amends current rule §102.64 to “expressly construe Section 9(c) of the Act and to state that the statutory purpose of a pre-election hearing is to determine if a question of representation exists.” It also amends current rule §102.66(a) and eliminates current rule §101.20(c) (along with all of Part 101, Subpart C) “to ensure that hearing officers presiding over pre-election hearings have the authority to limit the presentation

of evidence to that which supports a party's contentions and is relevant to the existence of a question concerning representation." What these changes mean for you is that the Board has limited not only the issues you could raise at a hearing, but even whether a hearing should occur. Under the new rules, you will no longer be able to challenge the scope of the unit or dispute whether an employee should be excluded due to supervisor status. These and other issues will have to be raised after the election. This is a bad policy decision by the Board as it unnecessarily muddies the waters, forcing employers to make tough choices when devising a counter-campaign and selecting the personnel best equipped to spread the Company's message. You may no longer be able to rely on certain disputed supervisors because they may be considered unit employees prior to the election. This was intended: it is designed to limit the First Amendment free speech rights of employers.

The Board also amended current rule §102.66(d) to give hearing officers discretion over the filing of post-hearing briefs, including discretion concerning the subjects to be addressed and the time for filing. This change was made in an effort to speed up the election process. In a shocking admission, the Board has stated publicly that it has found little value in such briefs. However, employers have frequently relied on post-hearing briefs to further augment its position on the propriety of a unit, or whether an employee is a supervisor or potential unit employee eligible to vote. Presumably, hearing officers will deny employers the opportunity to supplement their position with post-hearing briefs under these new rules.

Another change involved the amendment of current rules §§102.67 and 102.69 to eliminate the parties' right to file a pre-election request for review of a Regional Director's decision and direction of election! Now, such requests for Board review will be deferred until after the election. This means you will now combine your request for review of the Regional Director's decision along with a request for review of any post-election outcome or campaign conduct objections. The Board's efforts here are a major blow to an employer's right to due process. The Board's decision to "punt" review until after the election has taken place also has the potential for employers to simply not continue fighting if the union wins in a landslide.

The Board has also eliminated the language in current rule §101.21(d) recommending that a Regional Director should ordinarily not schedule an election sooner than 25 days after the decision and direction of election in order to give the Board an opportunity to rule on pre-election requests for review. This is because the right to request review was also eliminated. Now an election could be ordered much sooner, impacting your ability to communicate your message to your employees. The NLRB will be able to conduct "quickie" elections in as little as 12 days from petition filing. Depending on when an election is scheduled, along with the size and location of the unit at issue, you may have difficulty preparing a strategy and implementing it like you would do now. This change is clearly designed to give the unions an advantage and, again, to limit the First Amendment free speech rights of employers to communicate to employees.

The Board amended current rules §§102.62(b) and 102.69 to create a uniform procedure for resolving election objections and potentially outcome-determinative challenges in stipulated and directed election cases. More importantly, under the new rules, the Board's review of Regional Directors' resolution of such disputes is *discretionary*! In other words, the Board could refuse to hear your appeal. Continuing along this anti-employer theme, the Board amended §102.65 to narrow the circumstances under which you could file a "request for special permission to appeal to the Board" and when such a request would be granted. These rule changes further reflect the Board's interest in avoiding dealing with representation issues. This is consistent with Member Becker's long-held view that employers should play no role in NLRB elections. Finally, the Board removed redundant language or unnecessary language based on these rule changes.

II. Responses to the New Rules

A. Workforce Democracy and Fairness Act (H.R. 3094)

Subsequent to the initial Notice of Proposed Rulemaking and prior to the November 30, 2011 open meeting where the Board voted in favor of Chairman Pearce's resolution, Rep. John Kline (R-MN) introduced the "Workforce Democracy and Fairness Act" (H.R. 3094). This legislation basically reverses the NLRB's June 2011 proposed rulemaking, the December 22, 2011 rule adopted by the Board, and requires the Board to (1) provide for a hearing no less than 14 days after the filing of a petition; (2) allow parties to raise any relevant and material pre-election issue; (3) direct an election by secret ballot as soon as practicable, but in any event *not before* 35 calendar days following the filing of an election petition, in cases where a question of representation exists; and (4) acquire, at least 7 days after its final determination of the appropriate bargaining unit, a list of all eligible voters (including certain informational data) from the employer and make it available to all parties. The House passed this bill by a vote of 235-188 on November 30, 2011 and was transferred to the Senate.

B. Congressional Review Act Action

On December 21, 2011, Senator Mike Enzi (R-WY), the ranking member on the Senate's Health, Education, Labor and Pensions (HELP) Committee, announced his intention to use the Congressional Review Act (CRA) to challenge the Board's new rules. Under the CRA, the Senate or House can introduce a joint "resolution of disapproval" that has the full force of law to stop a federal agency from implementing a recent rule or regulation. Such resolution *cannot be filibustered and only requires a simple majority in the Senate to pass* if it is acted upon during a 60-day window. With all of the negative reaction the Board has received this year, and coupled with the upcoming 2012 elections, there is a chance vulnerable Democrats will cross over and support such a resolution.

C. U.S. Chamber of Commerce Files Suit to Enjoin NLRB Rule

The U.S. Chamber of Commerce and Coalition for a Democratic Workplace fired a pre-emptive shot against the Board and filed suit in the District Court for the District of Columbia on December 20, 2011. Their suit seeks declaratory and injunctive relief in order to block the Board from implementing the new rules. The Chamber and Coalition believe that the Board's promulgation of these new rules is contrary to the National Labor Relations Act, violates the Administrative Procedures Act, the Regulatory Flexibility Act, and the First and Fifth Amendments to the U.S. Constitution. Specifically, they have argued that: (1) the rule substantially curtails the statutorily mandated pre-election hearing; (2) the rule violates the Fifth Amendment's guarantee of due process of law by curtailing pre-election hearings and eliminating pre-election requests for Board review; (3) the rule prevents employers from exercising their Section 8(c) right and the First Amendment to communicate their views through their supervisory agents by curtailing an employer's right to communicate with its employees by substantially shortening the election period; (4) reflects the Board contravening (without a rational basis) its longstanding tradition of overruling existing Board precedent only by the affirmative vote of three members of the Board, by authorizing the hearing officer to reject evidence and defer ruling on the supervisory status of certain employees; and that (5) the Board failed to provide an adequate factual basis and understated the impact the Rule would have on small businesses as required by the RFA (which requires an agency to "prepare and make available for public comment an initial regulatory flexibility analysis" describing, among other things, "the impact of the proposed rule on small entities."). Based on these assertions, the

Chamber and Coalition have argued that the Board's actions are arbitrary, capricious, an abuse of discretion, and failed to comply with the various procedures required by law. This case is still pending before the court.

III. Conclusion

With these changes, the Board has said that you cannot file an appeal on the Regional Director's decision until after the election, you cannot litigate something as important as supervisor status until after an election, you will have a much harder time getting a request for special permission to appeal granted, and most importantly, the Board now has the discretion to not hear your appeal! Potentially, the Board may not ever get involved in your representation case, which reflects an abandonment of its responsibilities under the Act. We urge you to contact your trade associations and elected representatives to oppose the Board's actions. We will continue to monitor the situation and update you on important developments.