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NLRB = Never Let Rules Be

The National Labor Relations Board has been a flurry of activity for the past two years and the last few months have been no exception. Here are three situations that all employers should be cognizant.

Employers Hold On to Your Posters...For Now! The 11-by-17-inch notice / poster required to be posted by most private-sector employers informing employees of their various rights under the National Labor Relations Act has been delayed. The notice which was suppose to be posted in November, but was postponed to January 31st, has again been postponed by the NLRB until April 30, 2012. The NLRB announced this postponement following a request by a federal court judge in Washington D.C. who was considering a lawsuit challenging this regulation. In addition, there is proposed legislation pending in Congress that would rescind this "notice rule" completely. If the rule is not overturned, there is currently no NLRB rule that prohibits an employer from providing its employees "the other side of the story" from the employer's perspective. Thus, employers may be permitted to inform their employees that they have the right NOT to form or join a union and that they have the right to deal directly with their employer when no union is involved.

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Becker Gone, Obama Fills Board with Recess Appointments. In April 2010, President Obama used a recess appointment to put Craig Becker on the NLRB, after he was unable to obtain Senate approval. Becker's term on the NLRB expired January 3, 2012. With his departure, the NLRB was reduced to two members, Mark Pearce, a Democrat, and Brian Hayes, a Republican. The U.S. Supreme Court previously ruled that the NLRB, which has five seats, must have a quorum of at least three members to make decisions that affect federal labor laws. With only two members, the Board would be incapacitated. President Obama announced on January 4, 2012 that he was once again using his "recess appointment" power and was appointing three individuals to the NLRB. The President appointed Democrats Sharon Block and Richard Griffin along with Republican Terence Flynn. The two Democrats were just nominated on December 14, 2011, while the sole Republican was nominated earlier in the year. It is expected that these appointments will be challenged. Some argue that because the Senate has been holding *pro forma* sessions – where it convenes every few days but carries out no substantive work – that the President is prohibited from making recess appointments.

Quickie Elections, Effective April 30, 2012. Just 10 days prior to Becker's departure, Becker and Pearce voted to approve the final rule that allows for "quickie" or "ambush" union elections. Hayes, who has indicated he opposes the rule changes, has not yet cast his vote. He can cast his vote and issue a dissenting opinion any time before the final rule takes effect on April 30, 2012. Previously, if a union and an employer disagreed about the eligibility of certain employees and the setting of an election schedule, the two parties would have the benefit of having the disagreement determined in a hearing before a NLRB regional director. Statistics have shown that of the 10 percent of cases utilizing this hearing process, the election is typically held approximately 100 days after the union representation petitions were filed. A little over three months does not appear to be an unreasonable amount of time between filing of petition and election, but the NLRB felt differently.

As of April 30th, when the final rule takes effect, these regional hearings will be limited to issues concerning only whether an election should be held. Hearing officers will have broad authority as to what issues will be heard and how information will be presented. Any appeal of a regional director's ruling will basically have to wait until after the election. Previously, parties could appeal regional director decisions to the NLRB at multiple stages in the process. Moreover, this new rule indicates that it is at the NLRB's discretion whether to even review a regional office decision. This means that the regional directors will likely have the final say on most issues. There has been some significant fall out with the NLRB's rush to pass this final rule to allow for quickie elections. One Senator has vowed to use the Congressional Review Act to attempt to overturn the rule. This process requires 60 votes in the Senate. The U.S. Chamber of Commerce joined the Coalition for a Democratic Workplace in filing a lawsuit challenging this new rule. This lawsuit, and potentially others, will be critical for employers to follow to determine whether or not these quickie election rules remain the law.

There are eight significant changes contained in the final rule. If summarized in one broad statement, an employer must now either accept the bargaining unit as described in the petition, regardless of whether it is appropriate, or face an election on a much shorter timeframe which nearly eliminates the employer's campaign against the union. Thanks to the NLRB's decision in *Specialty Healthcare* this past summer, employers must now show an "overwhelming community of interest" in order to seek a different bargaining unit description than that suggested by the union. The new rules allow the regional director to determine, even without a hearing, that the employer's objections to the unit do not meet the "overwhelming community of interest" standard. The real "quickness" of elections under the final rules is evident with the elimination of the requirement that the regional director not schedule an election sooner than 25 days after a decision directing an election. By eliminating this time frame and the ability of a party to appeal a regional director's decision, the Board has indicated that it does not intend to get involved until after an election has been held.

Essentially, if an employer challenges the unit as stated in the petition, rather than entering into a stipulated election agreement, the Regional Director could punish the employer by setting an election much sooner. Instead of seeking a unit that makes sense within the employer's business structure, employers will be forced to accept the proposed unit as a compromise in order to obtain more time to communicate with employees about the union. This penalty for challenging the appropriateness of a unit means that unions could potentially petition for a small unit (i.e. the three receptionists, the five maintenance employees, the two custodians, the nurses on the second floor, etc.) and be guaranteed to get a vote even if the unit does not make sense in the employer's structure. Thus, an employer may be faced with multiple bargaining units despite the integration of its workforce.

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