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NLRB says Ba-Humbug to Employer's Due Process Rights

On Wednesday, November 30, 2011, the NLRB approved a proposed rule that would dramatically speed up unionization elections, leaving employers with as little as 10 days between the time a petition is filed and the date an election is held. To put things in perspective, elections have typically occurred within five to six weeks of the filing of a petition. By shortening the time between the filing of a petition and an election, the rule significantly inhibits the employer's ability to educate its workforce about the perils of unionization and dramatically increases a union's ability to win an election. The shortened time frame puts unions at a distinct advantage because, by the time a petition is filed, their organizing campaign has long been underway. In the end, employees may have the most to lose – the rule may force them to make decisions about their financial well-being without hearing both sides of the story.

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The proposed rule also seeks to prevent employers from challenging voter eligibility issues prior to an election. This presents a significant challenge for employers, particularly when dealing with the issue of supervisors. As most employers well know, the conversations an employer can lawfully have with a supervisor are far different than those an employer can lawfully hold with an eligible voter. Thus, under certain circumstances, employers may be deprived of using their supervisors to help educate the workforce. On the other hand, if an individual whom the employer does not consider to be a supervisor is later declared to serve in a supervisory capacity, the employer is liable for all of the supervisor's statements/comments made during the organizing campaign. Under the proposed rule, challenges to voter eligibility, which could often delay a vote for several weeks, will not be heard until after the election has already taken place, and then, the Board will only hear those issues which were not rendered moot by the election.

The proposed rule was voted into effect by the two democratic members of the current three-person Board. The sole opposition vote came from Brian E. Hayes, the lone Republican Board member, who previously threatened to resign in order to deny the Board the three-person quorum necessary to make a decision. Mr. Hayes ultimately decided not to resign because he felt it would cause further "harm and collateral damage to the reputation of this agency."

Immediately after the proposed rule was passed, the House of Representatives voted 235 to 188 on H.R. 3094, the "Workforce Democracy and Fairness Act," which would require a 35-day waiting period between the filing of a petition and an election. The Democratic-controlled Senate is not expected to approve this legislation.

Earlier drafts of the proposal had many changes that were not included in the version passed by the Board, including: the inclusion of email addresses and phone numbers on the voter list, electronic filing of petitions, shortening the time an employer has to file a voter list from seven to two days, requiring a statement of position filing, and requiring hearings to be set seven days after service of a notice of hearing. Because of the impending expiration of Democratic Board Member Becker's appointment in late December, which will strip the Board of quorum, the more controversial proposed changes were stripped out of the proposed rule.

While the proposed rule remains, at present, a proposal, employers should keep an eye on the NLRB this holiday season. In light of Board Member Becker's impending term expiration, the two Democratic Board members are expected to vote on the final rule before the end of the month. If a final rule is passed before Becker's term expires, employers may be looking at a not so happy new year.

(Thomas J. Gibney, Nicole Flynn, & Colleen L. Maloney; Eastman & Smith, Ltd.; 12/11)

EEOC Discusses Confidentiality of Medical Information

In an informal discussion letter, the Equal Employment Opportunity Commission (EEOC) provided suggestions on how federal agencies can safeguard the confidentiality of employees' medical information under the Rehabilitation Act when medical records custodians (MRCs) work in open cubicles surrounded by co-workers whose duties do not require access to such information. These principles can be applied to private employers under the Americans with Disabilities Act.

1. Remind all employees that medical information is confidential and that MRCs are authorized to have access to such information on a need-to-know basis.
2. Issue a memorandum informing all employees that anyone who discusses another employee's medical information with unauthorized persons or reads medical documents not intended for him/her will be disciplined.

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