# CLIENT ALERT

## NLRB Flexes Its Muscles by Opposing State Constitutional Amendments Requiring the Use of Secret Ballot Elections for Union Representation Purposes and Limiting Deferral to Arbitration

**Jan.26.2011**

The National Labor Relations Board ("NLRB" or "Board") has recently taken the position that state constitutional amendments mandating the use of secret ballot union representation elections for representation purposes violate the National Labor Relations Act ("NLRA"). Fueled by the desire to prevent intimidation and coercion by unions in the representation process, the voters of Arizona, South Dakota, South Carolina, and Utah have approved state constitutional amendments mandating that employees may choose union representation only through a secret ballot election. The NLRB, through its Acting General Counsel, Lafe Solomon, asserts that these amendments foreclose federally protected rights, and has requested that the four state Attorneys General work to prevent the amendments from taking effect. Mr. Solomon, who has been nominated for a four-year term as NLRB General Counsel, has indicated that the NLRB will take legal action against any state that enforces the secret ballot requirement.

Under the NLRA, employees seeking union representation may sign authorization forms, or "cards," that labor organizations then submit to the NLRB. If valid cards are submitted on behalf of at least 30 percent of eligible employees in an appropriate bargaining unit, the NLRB will hold a secret ballot representation election. A majority vote in this election is required for the NLRB to certify the labor organization as the exclusive bargaining agent for that bargaining unit. If at least 50 percent of employees submit such cards, the employer can consider that submission to be convincing evidence of majority support, and choose to recognize the union without an election.

The actions of these states must be viewed in light of the efforts to enact the Employee Free Choice Act ("EFCA"), which would *require* an employer to recognize a union if authorization cards are submitted on behalf of a majority of its employees in the unit. The state amendments reflect an attempt to keep the secret ballot process intact, and prevent future erosion of the process under the EFCA. Supporters of the amendments argue that pressures applied by union organizers on employees to sign authorization cards create an inaccurate picture of the employees' true views on union representation.

The NLRB's position, expressed in Mr. Solomon's letters to the Attorneys General of the four states at issue, is based on language in the NLRA and Supreme Court decisions that, he contends, protects the right to union representation without requiring that an election take place. These letters state that the NLRA guarantees employees the right "to organize and select their own bargaining representatives," which they can accomplish through "a Board-conducted secret ballot election *or* voluntary recognition based on other convincing evidence of majority support." Mr. Solomon warns that limitations on the manner in which employees organize creates an actual conflict with the NLRA, resulting in preemption by federal law. The NLRB has the right to issue a bargaining order where majority support has been ascertained through authorization cards.

While seeking "a judicially sanctioned stipulation" concerning the alleged unconstitutionality of the amendments, Mr. Solomon expressed the NLRB's intention to seek judicial action invalidating the state amendments. The state Attorneys General do not appear to be deterred by this threat of legal action. For example, Utah Attorney General Mark Shurtleff has reportedly told Mr.

Solomon to "bring it on." In Mr. Shurtleff's view, allowing representation without an election violates constitutional protections. Pro-union groups have argued, on the other hand, that the states' actions are really worker *restrictions* disguised as worker protection. Mr. Solomon's letters gave the states two weeks to respond before the NLRB initiates civil actions to invalidate the amendments.

Mr. Solomon has also recently recommended to the Board, through its Office of the General Counsel, the institution of a new framework for deferral to arbitration in challenges to discharge and discipline under Sections 8(a)(1) and 8(a)(3) of the NLRA, and other Section 8(a)(1) charges involving protected conduct. In Memorandum GC 11-05 to the NLRB's Regional Offices, dated January 20, 2011 ("Memorandum GC 11-05"), Mr. Solomon expressed his dissatisfaction with the agency's tendency to defer to the decisions of arbitrators, even when those decisions "differ significantly from those that the Board itself would reach." The NLRB would not defer to arbitration decisions, under Memorandum GC 11-05, unless the party seeking deferral meets its burden of showing that "statutory rights have adequately been considered by the arbitrator." More specifically, the requesting party would be required to show that (1) the statutory right was incorporated in the collective bargaining agreement or the parties presented the statutory issue to the arbitrator and (2) the arbitrator correctly enunciated and in fact applied the applicable NLRA principles in deciding the dispute. Memorandum GC 11-05 further urges the Board to give no effect to pre-arbitral grievance settlements "unless the evidence demonstrates that the parties intended to settle the unfair labor practice charge as well as the grievance." If this proposed framework is adopted, it would represent a strategic shift in the NLRB's decision making process.

The actions appear to portend that the NLRB will continue to take proactive steps to initiate labor law reform through regulatory action. We will continue to keep you updated as this issue develops. For more information, please contact the attorneys listed below or your regular Crowell & Moring contact.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

**Ira M. Saxe**
Partner – New York
Phone: +1 212.895.4230
Email: isaxe@crowell.com

**Thomas P. Gies**
Partner – Washington, D.C.
Phone: +1 202.624.2690
Email: tgies@crowell.com

**Kris D. Meade**
Partner – Washington, D.C.
Phone: +1 202.624.2854
Email: kmeade@crowell.com