

## CLIENT ALERT

### NLRB Sues Arizona in Federal Court over Constitutional Amendment Requiring Secret Ballot Elections for Union Representation

May 18, 2011

As [previously reported](#), the National Labor Relations Board ("NLRB" or "Board") has taken the position that states cannot enact laws requiring that private sector employees participate in secret ballot elections in order to unionize. The NLRB had threatened to file suit against those states that have enacted such laws. Following up on that threat, the NLRB recently filed suit against the State of Arizona seeking to invalidate a state constitutional amendment recently taking effect, requiring secret-ballot elections for union representation. In its Complaint, the NLRB asked the U.S. District Court for the District of Arizona to declare that the provision is preempted by the National Labor Relations Act ("NLRA") to the extent that it applies to private sector employees covered by the NLRA.

The NLRB contends that the Arizona law, which is similar to constitutional amendments that have taken effect in South Dakota, South Carolina, and Utah, is preempted. It argues that the law creates an "actual conflict" with federal law by prohibiting "alternative routes to union representation that are authorized and protected by the NLRA," requiring elections where federal law does not. Under the NLRA, private sector employees can unionize in two ways. First, employees can vote in a secret ballot election that is overseen by the Board to ensure the accuracy of the vote. Alternatively, employees can sign union authorization cards, indicating a desire to be represented. If a union obtains signed union cards from at least 50 percent of the relevant employees in the appropriate bargaining unit, it can present those cards to the employer and try to persuade the employer to recognize it voluntarily without an election. The NLRB claims the amendment is preempted because it would prohibit unions from gaining recognition under the alternative "card check" method. The NLRB further argues that even if the Arizona law could be construed to enforce only the NLRB's secret ballot election process, the amendment is nonetheless preempted "insofar as it creates a parallel state enforcement mechanism protecting employee representation rights . . . ."

The federal court Complaint is an outgrowth of failed negotiations between the NLRB and the attorneys general from Arizona, South Dakota, South Carolina, and Utah, after the NLRB first warned them of its position in January 2011. Voters in the four states passed amendments requiring or guaranteeing secret ballot elections for workers in November 2010. Because South Dakota's provision, like the Arizona amendment, requires a secret ballot election whenever an election for employee representation is permitted by state or federal law, the NLRB has indicated that it will file a suit in South Dakota in the coming weeks.

Supporters of the recent amendments argue that the measures guard a constitutionally protected right to a secret ballot, and cite a desire to prevent union intimidation and coercion in the representation process. The NLRB has countered that the amendments place employers "under direct state law pressure" to refuse to recognize any labor organization lacking an election victory. By bringing the fight to federal court, the Board has sent a strong signal that it will take whatever actions are necessary to ensure that states do not enact what the Board perceives to be anti-union legislation that might interfere with employees' ability to unionize.

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

**Kris D. Meade**

Partner – Washington, D.C.  
Phone: +1.202.624.2854  
Email: [kmeade@crowell.com](mailto:kmeade@crowell.com)

**Thomas P. Gies**

Partner – Washington, D.C.  
Phone: +1.202.624.2690  
Email: [tgies@crowell.com](mailto:tgies@crowell.com)

**Glenn D. Grant**

Senior Counsel – Washington, D.C.  
Phone: +1.202.624.2852  
Email: [ggrant@crowell.com](mailto:ggrant@crowell.com)

**Ira M. Saxe**

Partner – New York  
Phone: +1.212.895.4230  
Email: [isaxe@crowell.com](mailto:isaxe@crowell.com)