CLIENT ALERT

The NLRB and USDOL Issue Controversial Proposed Regulations To Aid Union Organizing

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The National Labor Relations Board (the "Board") last week proposed regulations that, if adopted, would radically overhaul the union representation election process, potentially affecting every private-sector employer in the United States. Currently, union elections typically occur within 45-60 days from the date an election petition is filed by a union. Under the proposed amendments, elections would now occur in as few as 10 days.

The Board's decision reflects the current political divide at the agency. The majority stated that the proposed rulemaking merely seeks to reduce unnecessary litigation and to minimize delay in the union election process. However, in a scathing dissent, Brian E. Hayes, the sole Republican Member, attributed very different motives to the decision: "[B]y administrative fiat in lieu of Congressional action, the Board will impose organized labor's much sought-after 'quickie election' option . . . . Make no mistake, the principal purpose for this radical manipulation of our election process is to [] effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining."

The proposed rules would seek to expedite union elections by, among other things, (i) allowing parties to file election petitions and related documents electronically; (ii) requiring that employers promptly disclose employees' contact information (including their telephone numbers and email addresses, if available), along with their work locations, shifts, and job classifications; (iii) delaying resolution of eligibility disputes to the post-election period; and (iv) limiting employers' ability to obtain Board review of contested issues (such as the appropriateness of bargaining units, voter eligibility and election misconduct) by making such review discretionary, rather than mandatory.

In what appeared to some critics as a coordinated, double-barrelled assault on employer free speech rights, the U.S. Department of Labor ("DOL") last week proposed changes to regulations implementing the Labor-Management Reporting and Disclosure Act (LMRDA). The regulations would require employers to make detailed disclosures of the financial terms of agreements or arrangements entered into with third-party labor consultants and attorneys who engage in "persuader activity" on behalf of employers. The LMRDA has for generations provided that such engagements do not trigger the statute's reporting obligations, provided the advisors do not *directly* attempt to persuade or influence employees concerning their rights under the National Labor Relations Act. The DOL's proposed rule would now substantially redefine "persuader activity" to include both direct and *indirect* efforts at employee persuasion, including the initial drafting of written communications often used by employers to communicate their views on unionization during union organizing campaigns.

The DOL's proposed rule would *not* require disclosure of an agreement where an attorney *exclusively* provides "advice" to an employer, such as counseling the employer on what it may lawfully say to employees, advising the employer on Board practice or precedent, or representing the employer before a court, administrative agency, or arbitration tribunal or in collective bargaining. However, where the attorney undertakes "persuader activities" as part of such an agreement, even if "advice" also is provided, the entire agreement would be subject to disclosure. If adopted, court challenges to this rule on the grounds that it violates the attorney-client privilege surely can be expected.

The Board's and DOL's proposed rule changes confirm the importance of a prompt and thoughtful response to union organizing activity. For example, under the Board's proposed rules, within a mere seven days of service of a union's petition for election, an employer would be required to complete a detailed Statement of Position setting forth its position on each of the following matters:

> the appropriateness of the petitioned-for unit; any proposed exclusions from the petitioned-for unit; the existence of any bar to the election; the type, dates, times, and location of the election; and any other issues that a party intends to raise at hearing. In those cases in which a party takes the position that the proposed unit is not an appropriate unit, the party would also be required to state the basis of the contention and identify the most similar unit it concedes is appropriate. In those cases in which a party intends to contest at the pre-election hearing the eligibility of individuals occupying classifications in the proposed unit, the party would be required to both identify the individuals (by name and classification) and state the basis of the proposed exclusion . . . .

Because the proposed rules prohibit an employer from offering evidence or cross-examining witnesses as to any issue not raised in its Statement of Position, or in response to the Statement of Position of another party--as Member Hayes noted in his dissent--"[i]n effect, a party must raise issues and state its basis for raising them in a maximum of 7 days or forfeit all legal right to pursue those issues." Under these circumstances, the need for effective labor counsel to assist an employer through this important (and highly accelerated) process cannot be overstated.

The Board's and DOL's proposed rulemaking are each subject to a 60 day comment period.

We will keep you updated on developments with these initiatives.

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

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