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CLIENT ALERT

NLRB Scales Back -- But Not By Much -- The New "Quickie" Election Rules it Proposed on June 22, 2011

December 6, 2011

In a public meeting held on November 30, 2011, the National Labor Relations Board ("Board") adopted a "Resolution" which ostensibly scales back the new "quickie" union representation election rules it proposed on June 22, 2011. By operation of the procedural changes contained in this "Resolution," however, elections would still be expedited, and conducted much more swiftly than under the Board's current rules and procedures.

The new rules proposed by the Board on June 22 would have drastically changed the Board's procedures in union representation elections. They would have eliminated the Board's current requirement of conducting elections within forty-two days of the filing of the petition for an election, and, except in the rarest of circumstances, would have required that elections take place within ten to twenty-one days from the filing date.

At the time that the new rules were proposed, the NLRB was comprised of only four members, one member short of the standard complement. The three Democrats -- then-Chairman Wilma Liebman, Mark Gaston Pearce and Craig Becker -- strongly supported the proposed new rules. The sole Republican, Brian Hayes, strongly opposed them. The goal of Chairman Liebman and Members Pearce and Becker was to complete the rule-making process and gain approval of the new rules by a majority of the Board before the end of 2011. But, by December 31, through attrition, the Board will lose the three-member quorum necessary for Board action.

It became evident during the rule-making process that the new rules proposed on June 22 would not be approved by a Board majority (two out of the three remaining members) by the end of the year. This prospect compelled the Board's November 30 public meeting, and the approval of the "Resolution" by current Chairman Pearce and Member Becker, over the strong opposition of Member Hayes.

Significantly, the "Resolution" did not contain the final rule, but only "resolved" that a final rule would be prepared, for approval by a majority of a three-member Board, and implemented immediately upon Board approval. Also importantly, Chairman Pearce expressly represented that he, and Member Becker during the remainder of his term, would continue to push for approval and implementation of all changes contained in the original June 22 proposal.

The "Resolution," while not containing the final rule, described the changes that will be contained in the final rule. Although there are substantial differences between these revisions and the original proposed rules, the vast majority of representation elections will still be conducted much sooner after the filing of the petition than under current Board procedures. Because a final rule has not yet issued, the specific time frame to be required for conducting an election has not been definitively stated -- "the devil is in the details". It is obvious, however, that under the rule changes described in the "Resolution," an election will be required, except in the rarest of circumstances, between twenty-one and thirty days after the filing of the petition. In response to certain actions by the union, moreover, the election could conceivably be conducted as soon as fifteen days after the filing.

"Quickie" elections are, of course, strictly for the benefit of unions. Such elections reduce the time period within which an employer may discuss the issues with its employees and communicate its position regarding union representation, thereby making it much more likely that the union will win the election. That explains the Board's urgency in implementing its proposed changes in the representative election rules. For any of Board's new election rule changes to become effective, however, either those proposed on June 22 or those contained in its November 30 "Resolution," those revisions must be approved by a majority of at least three Board members. As a result, any such action must take place before the end of the year. Otherwise, the current rules will continue in force and effect, unchanged. Chairman Liebman's term expired, and she left the Board, on August 27, 2011, reducing the Board to three members – Chairman Pearce and Members Becker and Hayes. Member Becker's interim appointment expires on December 31, 2011, which will reduce the Board to but two members. The U.S. Supreme Court has held that the Board has no authority to act, either to decide cases or change any rules, absent a three-member quorum.

Member Hayes has vehemently opposed any changes in the election rules. Indeed, he even threatened to boycott the November 30 meeting and resign from the Board, so as to preclude the required three-member quorum necessary for the Board to act, and virtually "shut down" the Board. This threat aroused the ire of Congressman George Miller, senior Democrat on the Committee on Education and the Workforce who, by letter to Member Hayes, implicitly, if not explicitly, accused him of "objectionable motives or improper influence," including "enticements" and "offers regarding future employment" from the private sector. Congressman Miller also requested all of Member Hayes' personal documents "regarding [his] resignation from the Board or future employment." Member Hayes, asserting to be acting "for the good of the NLRB," reversed himself, attended the November 30 meeting and retracted his threat to resign from the Board. Nevertheless, he remains firmly opposed to the proposed changes.

It should be noted that on November 30, the House of Representatives passed a bill titled "The Workforce Democracy and Fairness Act," designed to prevent the Board from going through with any new election rules. Among its other provisions, this bill mandates that no election be held in fewer than thirty-five days, restricts which employees can vote in union elections, requires a two-week waiting period between a petition filing and the first hearing on the matter, and restricts the manner in which a union may contact prospective voters. By all accounts, this bill is "dead on arrival" in the Senate.

In related activity pertaining to decertification, on December 1, Congressman John Mica (R-Fla.), Chairman of the House Transportation and Infrastructure Committee, introduced legislation to ease the decertification of unions at airlines and railroads under the Railway Labor Act ("RLA"). Just last year, the National Mediation Board ("NMB") abandoned 75 years of precedent to lower the threshold for unions to win representation elections and obtain NMB certification as the employees' bargaining representative. Before that change, to win an election a union had to obtain an affirmative vote from a majority of the total number of employees in a system-wide craft or class unit, even if fewer than half of the employees in the unit actually voted. Accordingly, an employee's failure to vote was effectively a vote against representation. Under the new rule implemented last year, in order to win the election and be certified, a union needs only the affirmative vote of a majority of those employees who actually vote (which is the same as under the National Labor Relations Act). That revision, however, left in place the existing rule relating to the decertification of a union. As a result, the outcome of a decertification election is still determined by a majority of the total number of employees in the unit, whether they vote or not. The legislation just introduced by Congressman Mica would apply the same standards to decertify a union as now apply to certification under the RLA and, according to Congressman Mica, will "restore fairness and equality to the union election and decertification process."

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