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The Pendulum Continues to Swing in Favor of Organized Labor

By
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The Bureau of Labor Statistics reported in January of this year that union membership in the United States fell to a 70-year low in 2010. The number of private sector workers represented by unions fell to 6.9% of the work force. This would seem like good news for a private sector employer. But, as unionization rates fall to historic lows, two federal agencies have stepped in with proposed rules that will greatly assist unions during union organizing campaigns.

On June 21, 2011, the U.S. Department of Labor's Office of Labor Management Standards ("OLMS") published a notice of proposed rule making ("NPRM") that would significantly expand reporting requirements under the Labor Management Reporting and Disclosure Act ("LMRDA"). This rule could trigger reporting requirements for a broad range of activities that currently do not need to be reported including the provision of legal advice regarding the scope of lawful employer communications to employees during a union campaign.

The very next day, the National Labor Relations Board ("NLRB" or "Board") published its own NPRM that would, among other things, accelerate union representation election proceedings and defer until after an election many disputes concerning who should and should not be in the bargaining unit and be eligible to vote.

The Proposed Department of Labor Rule

Section 203 of the LMRDA requires the disclosure of any relationship between an employer and a labor relations consultant, including the employer's lawyer, the purpose of which is to "persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing, or undertakes to supply such employer with information concerning

the activities of employees or a labor organization in connection with a labor dispute involving such employer."

If a labor consultant, including the employer's attorney, engages in "persuader" activity, then both the employer and the labor relations consultant are required to disclose the existence of the relationship and the fees paid for such persuader services on forms that must be filed with the Department of Labor. Section 203 of the LMRDA currently contains an exception for labor relations consultants whose relationship is restricted to providing "advice." The term "advice" has been interpreted broadly in the past so that Section 203's recording requirements were only triggered if the consultant had direct contact with employees. Now, however, the OLMS seeks to narrowly construe the "advice" exception through its new rule and would redefine labor activities so that they would cover much of the advice attorneys provide during the union organizing campaign such as providing suggestions for the contents of campaign materials.

The new narrow definition of advice and the consequently broader definition of persuader activity thus means that reporting would now be required in any case in which the relationship with the client calls for the labor consultant to engage in persuader activities regardless of whether advice is also given.

The general public has until August 22, 2011 to submit comments regarding the OLMS' June 21, 2011 NPRM.

The NLRB's Proposed Rules

The NLRB's proposed new rules have been promulgated for the proposed purpose of reducing "unnecessary litigation, streamlining pre and post-election procedures, and facilitating the use of electronic communications in document filing." See proposed amendments to NLRB Election Rules and Regulations Fax Sheet, June 20, 2011.

The rules proposed by the NLRB include a number of specific changes that would have the effect of dramatically shortening the time period between the filing of a union election petition and the holding of an election. Among the specific changes are:

- Unions could electronically file a petition with the NLRB to initiate representation election proceedings;
- Bargaining unit determinations must be held within seven days of a petition being filed;
- Eliminating most pre-election litigation of disputes involving the composition of the bargaining unit. Disputes involving 20% or less of the proposed bargaining unit would be deferred until after the election;
- Shortening the time period in which the employer is required to produce an Excelsior list (a list of eligible voters) from seven days to two days;
- Employers would be required to provide unions with phone numbers and email addresses of eligible voters along with their geographic addresses;
- The NLRB would have discretion to determine whether to review pre- and post-election disputes.

The NLRB's proposed changes to its representation election procedures have stirred much controversy. Many management representatives have echoed what NLRB member Brian E.

Hayes stated in his dissent to the NPRM:

> Today, my colleagues undertake an expedited rulemaking process in order to implement an expedited representation election process. Neither process is appropriate or necessary. Both processes, however, share a common purpose: to stifle full debate on matters that demand it, in furtherance of a belief that employers should have little or no involvement in the resolution of questions concerning representation ... . Sadly, my colleagues reduce that cornerstone [of an open government] to rubble by proceeding with a rulemaking process that is opaque, exclusionary, and adversarial. The sense of fait accompli is inescapable.

Very contentious public hearings were already held before the Board on July 18 and 19. The NLRB will continue to accept written comments until August 22, 2011.

Conclusion

The proposed rules announced by these two federal agencies clearly favor unions and impede an employer's ability to communicate an opposing message during the midst of a union organizing campaign. Accordingly, employers are well-advised to educate their employees from the moment of hire concerning the company's belief that a third party representative is unnecessary. The employer's campaign message should be communicated before a campaign by a union ever starts. In addition, employers should maintain policies and practices that prevent pro-union sentiment from taking root. Finally, employers are encouraged to submit comments to both the OLMS and the NLRB registering objections to the proposed rules.

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