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The NLRB's "Quickie Election" Rule and the DOL's "Persuader" Rule:

Back in the Spotlight with NLRB and Labor Appointments

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Recently, the Senate confirmed Thomas Perez as Secretary of Labor and all five of President Obama's nominees to serve as members of the National Labor Relations Board ("NLRB"). With these moves, the NLRB and Department of Labor ("DOL") appear poised to implement controversial rules that could dramatically affect how employers respond to Union organizing campaigns.

A Senate-Confirmed NLRB and the "Quickie Election" Rule

The NLRB is the agency that that administers federal law governing private sector employer-union relations in the United States. By law, the NLRB consists of up to five members, and a minimum of three members are necessary for the NLRB to have a valid quorum to act. The NLRB's authority to act was until recently called into question by challenges to the validity of Presidential recess appointments to the NLRB.[1] With the Senate's confirmation of President Obama's five nominees to the NLRB, the agency has a full complement of five Senate-confirmed members for the first time in a decade. The current makeup of the Board will remove the cloud of uncertainty as to the legitimacy of NLRB actions taken by a Board composed of members not confirmed by the Senate, paving the way for the NLRB to act on previously proposed rules.

One such rule -- the so-called "quickie election" rule -- would dramatically shorten the time between the filing of a union election petition and the election by curtailing the ability of employers to be heard on pre-election and post-election disputes.[2] The proposed rule would require the Board's regional directors to set a pre-election hearing to begin seven days after the hearing notice is served, and a post-election hearing to begin 14 days after the tally of ballots. The Board initially issued the rule in 2011, but its implementation was stayed as a result of a decision of the United States District Court for the District of Columbia, which held that the rule had been improperly adopted with only two Board member votes, rather than statutorily required three Board member votes.[3] With a full complement of five Senate-confirmed members, the NLRB is likely to place reissuance of the rule at the top of its to-do list.

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[1] Three Courts of Appeals have recently held that appointments of NLRB members without the advice or consent of the Senate under the recess appointments clause of the Constitution, while the Senate was in session although not convened, were unconstitutional, and thus the Board was not operating with a full quorum. *NLRB v. Enterprise Leasing Co. Southeast, LLC*, No. 12-1514 (4th Cir. Jul. 17, 2013); *NLRB v. New Vista Nursing & Rehabilitation*, No. 11-3440, 2013 WL 2099742 (3d Cir. May 16, 2013); *Noel Canning v. NLRB*, 705 F.3d. 490 (D.C. Cir. 2013). The issue is now currently pending before the Supreme Court. See *NLRB v. Noel Canning*, No. 12-1281 (petition for cert granted June 24, 2013).

[2] The NLRB allows a union to become the exclusive representative of a group of employees only upon a showing that a majority of the employees in an appropriate unit wish to be represented by that union- a process which begins when a union files a petition with the NLRB.

[3] *Chamber of the Commerce of the U.S. of Am. v. NLRB*, No. 11-2262 (D.D.C. May 14, 2012). The Board's appeal of this case has been stayed pending the Supreme Court's decision in *Noel Canning.*

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The DOL's Proposed "Persuader" Rule

While the expected quickie-election rules are likely to cause employers to actively engage counsel in anticipation of Union organizing campaigns, another significant rule change proposed by the DOL may have the effect of discouraging such communications.

The Labor Management Reporting and Disclosure Act ("LMRDA") requires consultants hired to influence employees not to unionize, or "persuaders," to disclose all fees paid to and services provided by them on a form filed with the DOL. Since the LMRDA's passage in 1959, the DOL has interpreted the statute as excluding lawyers' fees from the disclosure requirement as long as the lawyers' role was to give "advice" to the employer only, and they did not deal directly with the employees considering organization. Under the proposed new "persuader" rule, however, the "advice" excepted from disclosure by Section 203 would be limited to "an oral or written recommendation regarding a decision or course of action." Consequently, as the DOL has explained, "reportable persuader activities would include those which a consultant engages in any actions, conduct or communications on behalf of an employer that would directly or indirectly persuade workers concerning their rights to organize and bargain collectively, regardless of whether or not the consultant has direct contact with workers."[4] Therefore, any lawyer who works on a persuasive employee communication would be considered a persuader, even where there is no direct contact between the lawyer and the employees. And that lawyer's fees, agreements, and services must be disclosed.

The proposed rule is concerning for several reasons. First, the scope of services which could fall within the DOL's definition of advice is vast. Potentially any employee communication drafted on behalf of an employer could indirectly persuade workers concerning their right to unionize. Specifically, the DOL has stated that reportable activities will include:[5]

- drafting, revising, or providing materials or communication of any sort, to an employer for presentation, dissemination, or distribution to employees, directly or indirectly;
- developing or administering employee attitude surveys concerning union awareness, sympathy, or "proneness";
- training supervisors or employer representatives to conduct individual or group meetings designed to persuade employees;
- coordinating or directing the activities of supervisors or employer representatives to engage in the persuasion of employees;
- establishing or facilitating employee committees;
- developing employer personnel policies or practices designed to persuade employees;
- deciding which employees to target for persuader activity or disciplinary action; and/or
- coordinating the timing and sequencing of persuader tactics and strategies.

Reportable activity will also include supplying an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute, such as information obtained from:

- research or investigation concerning employees or labor organizations;

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[4] "US Labor Department Announces Proposed Rule Concerning Reporting on Use of Labor Relations Consultants," U.S. DOL News Release, June 20, 2011, http://www.dol.gov/opa/media/press/olms/olms20110924.htm

[5] http://www.laborrelationstoday.com/uploads/file/OLMSrevint.pdf

- supervisors or employer representatives;
- employees, employee representatives, or union meetings; and
- surveillance of employees or union representatives (video, audio, Internet, or in person).

Second, the disclosure requirements are onerous. In addition to disclosing the amount of fees paid to the lawyers, employers must report the details of their agreements or arrangements with their labor attorneys and the specific activities performed by the attorneys. The lawyers themselves must disclose, as a matter of public record, all fees received from clients for all labor relations advice as well as the identity of the clients. The Labor and Employment Section of the American Bar Association has expressed the view that such disclosures are a clear intrusion into the attorney-client privilege.[6] Furthermore, failure to abide by the LMRDA's disclosure requirements can potentially lead to criminal penalties. There is justifiable fear within the legal community that this rule will discourage employers from seeking the advice of counsel when confronted with organization efforts, leading to a greater number of, likely inadvertent, unlawful acts by the employers in the course of union organizing campaign.

Although Secretary Perez offered only non-committal comments on the rule during his confirmation process, experts within the labor community do not expect him to halt or materially change the proposed rule. An even stronger indicator that the rule is once again a top priority is that the White House Unified Agenda released on July 3 listed a November 2013 target implementation date for the proposed rule.[7] Thus, barring further legal challenges, employers have every reason to expect this rule to be finalized before the year is out.

Broad Rules with Broad Implications

The NLRB's anticipated quickie election rule and the DOL's persuader rule could have serious consequences for employers confronted with a union organizing campaign. Employers naturally may wish to turn to their attorneys for advice in dealing with the anticipated new election rules. However, waiting to do so could trigger extensive disclosure requirements exposing the employer's previously confidential strategizing with its counsel. Employers, therefore, should seek counsel now in order to prepare for these and other expected pro-labor initiatives from the NLRB and the DOL.

[6] Letter from William Robinson III, President, American Bar Association, to Andrew Davis, Chief of the Division of Interpretations & Standards, Office of Labor-Management Standards (September 21, 2011)

[7] http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201304&RIN=1245-AA03

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