LABOR, IMMIGRATION & EMPLOYEE BENEFITS DIVISION
U.S. CHAMBER OF COMMERCE

NLRB Pushes Quickie Elections

Eviscerates Employers' Free Speech Rights

Section 8(c) of the National Labor Relations Act allows employers to express any views or opinions that do not otherwise contain threats of reprisal or promises of benefit. Because section 8(c) safeguards an employer's ability to talk with employees about the pros and cons of unionization, labor unions have long-sought to erode these statutory protections. For example, the "card check" provisions in the Employee Free Choice Act (EFCA) would have undercut 8(c) by allowing a union to be certified before an employer even had an opportunity to express his or views regarding unionization.

With EFCA defeated and no chance to enact similar legislation in the current Congress, organized labor's allies on the National Labor Relations Board (NLRB or Board) are attempting – through regulation – to limit employers' opportunities to lawfully communicate with employees. Indeed, a notice of proposed rulemaking issued on June 21, 2001 will make radical changes to the Board's current representation procedures by shortening the timeframe for an employer to respond to a union's representation petition and thereby restricting an employer's ability under section 8(c) to communicate with its employees regarding unionization.

The NLRB Election Process Works in Most Cases. According to the NLRB's most recent annual report, the median time for an election from the time a petition is filed is 38 days. More than 95 percent of the time, elections occur within 56 days. In addition, more than 90 percent of the time, employers and unions enter into consent, stipulated, or other voluntary agreements about how the election will be conducted. While clearly there are a small minority of cases where delay is a problem, this data proves that in most cases the current election process works efficiently and affords all parties due process rights.

Short Election Time Favors Unions. Labor unions have long sought to reduce the time period for representation elections as short time periods significantly advantage unions over employers. Labor unions choose the time when to go public with a campaign and choose when to file a petition with the NLRB. At the time of filing, they will have a complete campaign prepared and ready to go, including a staff of experienced labor lawyers. On the other hand, employers may very well be surprised by the campaign and have no prepared plan to respond to the union petition, allegations, and rhetoric that will likely accompany the campaign. A fair campaign period recognizes this fact and also permits both sides an opportunity to get their message out to employees before they vote.

NLRB Proposes Dozens of Changes to Election Process. Under the guise of promoting efficiency, the Board has proposed dozens of technical changes to the current election process. As described by dissenting Board Member Brian Hayes, "the principle purpose for this radical

manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining." Hayes also characterizes the new procedures as implementing a "'quickie' election option, a procedure under which elections will be held in 10 to 21 days." Among the most significant changes are the following:

Accelerated Scheduling of the Initial Representation Hearing. The proposed rules would set the initial hearing just seven days after service. This leaves an employer only five business days to undertake numerous critical decisions and actions that may significantly impact its business in the future. First, the employer must determine whether or not to retain counsel. If the employer locates and retains counsel, unless the attorney is experienced in labor law, he or she will have to come up to speed on Board processes, representation procedures and terms of art. Other tasks that the employer or counsel will have to engage in within this incredibly short period include performing a community of interests analysis of the petitioned-for unit, interviewing potential witnesses, preparing exhibits and opening statements, as well as completing the newly-required Statement of Position form.

Mandatory and Onerous Pleading Requirements for Employers. The newly required Statement of Position would require employers to disclose their complete theory of the case regarding:

a. The Board's jurisdiction to process the petition;
b. The appropriateness of the petitioned-for unit;
c. Any proposed exclusions from the petitioned-for unit;
d. The existence of any bar to the election;
e. The type, dates, times, and location of the election

Importantly, in the rush to complete this Statement of Position, if the employer fails to raise a particular issue in this filing, it would be *precluded from presenting evidence* on the issue or cross-examining a witness on the issue at the representation hearing. This raises significant due process concerns, particularly for those employers who cannot retain legal counsel.

Mandated Disclosure of Employee Information. The proposed rule would require employers to turn over to union officials significant private information about its employees at various stages of the representation case process. For example, prior to the pre-election hearing, employers would be forced to provide the Board and union officials with a preliminary employee voter list, which would include names, work locations, shifts, and classifications. Upon receiving the direction of election, employers will then only have two days in which to assemble, create and submit a final voter eligibility list (i.e., *Excelsior* list) which would include the previous information, along with telephone numbers and, where available, e-mail addresses of employees. The immediate demand for the *Excelsior* list will place an unnecessary burden on employers, especially since the Board admits to its own sluggish practices in transmitting *Excelsior* lists to the parties. This requirement would also likely result in the filing of inaccurate and untimely lists, which will do nothing to advance the purpose of the list, which is to inform the employee electorate to ensure a fair and free voting process. However, because the Board has determined that the failure to provided a timely voter eligibility list can, in certain circumstances, invalidate the results of an election, this new mandate would likely be used by big labor to attempt to overturn undesirable election results.

Unnecessary Limitations on Evidentiary Hearings, Briefing and Board Review. In certain circumstances, the proposed rule would defer the litigation of representational disputes, such as the eligibility of voters, until *after* the election is held. Furthermore, the proposal also eviscerates parties' rights to appeal post-election determinations of Regional Directors. These proposed changes to the hearing process elevate form over substance and will result in, among other things, limited evidentiary discussions and incomplete hearing records. Additionally, by deferring eligibility disputes until after the election, the proposed rule may result in *Excelsior* lists with a 20% error factor. The Board has previously found that eligibility lists with such a high error rate are not in compliance with the *Excelsior* rule.[1]

Attack on Free Speech, Due Process. Taken together, the provisions of the proposed regulation add up to a substantial attack on employers' section 8(c) rights. By shortening the election process, employers will have less time to communicate to employees their views regarding unionization. This is particularly troubling, given the fact that the Board has failed to address exactly why such changes are necessary. Indeed, if the Board is concerned with the actions of recalcitrant employers' behavior during the election period, the solution for the problem is already available through unfair labor practice procedures. As Member Hayes states in his dissent, "[e]mployers who are wont to use impermissible means to oppose unionization" are still likely to use such impermissible means even if the election process is shortened.

Comments Due August 22, 2011. If you wish to file comments, you may use the attached template as a guide. If you decide to draft your own comments, please be sure to include the Regulation Identification Number (RIN) on the comments. The RIN for this proposal is 3142-AA08. If you wish to review the proposal before sending comments, it is available here: http://www.gpo.gov/fdsys/pkg/FR-2011-06-22/pdf/2011-15307.pdf.

Comments may be filed electronically through http://www.regulations.gov. You can find the proposal and the link to submit comments by searching using the RIN.

If you file comments by mail, you should send comments early enough to reach the Board by August 22, taking into account delays due to security procedures. Comments should be sent to:

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street NW
Washington, DC 20570

Members of the business community should also engage their federally elected officials and emphasize that the Labor Department and National Labor Relations Board's pro-union agenda must be reined in.

[1] *See, e.g., Sonfarrel, Inc*., 188 NLRB 969 (1971).

Template for Drafting Comments to the NLRB

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street NW
Washington, DC 20570

RE: RIN 3142-AA08, Proposed Rules Governing Representation Case Procedures

Dear Mr. Heltzer:

I am writing to comment on the Board's proposal, published in the *Federal Register* on June 22, 2011, to significantly overhaul the union representations procedures used by the National Labor Relations Board (NLRB or Board). The proposal would significantly erode the due process rights of employers and make it more difficult for employees to become fully informed of the issues prior to a union representation election. I urge the Board to withdraw the proposal immediately.

First, no compelling case for change has been made. It is my understanding that the average time period for representation elections is 38 days, with the overwhelming majority occurring within 56 days. Most elections, therefore, appear to take place in a fair time period. While there may be some small number of cases where things appear to take too long, the Board has not analyzed those cases and instead is trying to revise the rule for all cases.

In terms of the substantive changes proposed by the Board, I am very concerned about the Board's proposal that pre-election hearings take place within seven days, that employers must file a "Statement of Position" before or at the hearing, and that many arguments not raised at the hearing would be forever waived. Working together, these three changes will make it significantly more difficult for small businesses to respond to a union campaign. Indeed, it may take the better part of 7 days to simply find counsel, never mind appropriately analyze the union's proposed bargaining unit and other issues. The fact that failure to raise an issue in the statement of position would forever waive it is far too harsh a penalty, especially to employers with no history or experience with union campaigns.

Furthermore, I am concerned by reports that the proposal could result in union elections regularly occurring in as little as 10 to 21 days. While it is not true in every case, many times employers do not know of a campaign until they hear from the NLRB that a petition has been filed. The union files a petition at a time of its choosing and it will not file a petition unless it is fully prepared. However, the employer needs some amount of time to communicate with its employees about the campaign, perhaps needing to correct misleading union rhetoric. Because

most elections seem to occur in a relatively quick timeframe today, changing the process to seriously undermine employer free speech rights cannot be justified.

I am also concerned about the proposal's requirement that would force employers to turn over confidential information about employees, including phone numbers and email addresses. The rules do not make it clear whether the Board is referring to home or work contact information (or both). Forcing disclosure of this information is irresponsible, dangerous and unfair to employees. Further, providing work phone numbers and emails would almost guarantee solicitation and distraction during working time. This has never been mandated during union campaigns and would disrupt and harm business, not to mention undue long standing precedent.

For these reasons, I respectfully urge the Board to withdraw the proposed rulemaking in its entirety.

Sincerely,