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RECENT NLRB ACTIVITY: PLACING EMPLOYERS SQUARELY BEHIND THE EIGHT BALL

Lately, much has been written and said about the National Labor Relations Board ("NLRB") and its asserted pro-union shift. Today the NLRB announced proposed rules to govern the representation election process which will effectively thwart an Employer's ability to present its views on union representation after a representation petition has been filed. This is the codification of the "quickie election" organized labor has been seeking for some time.

Under current procedures, on average, a representation election is conducted thirty-eight (38) days after a petition for election is filed with the NLRB. While the proposed rule does not specify a particular time frame for conducting an election, its procedural changes will likely result in most elections occurring within 10 to 21 days of the filing of the election petition. Such a compressed time frame will greatly diminish, if not effectively eliminate, an Employer's ability to communicate its position on union representation to employees. The upshot is that an Employer desiring to remain union free must communicate its union free message on a perpetual basis. If the proposed rule is enacted, waiting for an election petition to begin disseminating the union free message will not be an option.

The proposed rules were released today and will be published in the Federal Register tomorrow, June 22, 2011. Benesch will supplement this Advisory with a more detailed analysis in the coming days. In brief, the proposal would:

1. Require a pre-election hearing within seven (7) days after notice of a hearing is issued. The Notice will be issued within one or two days after the petition is filed.
2. Limit the voter eligibility issues which can be litigated during pre-election hearing to those which involve twenty percent (20%) of the bargaining unit.
3. Require each party to identify its position on all issues to be raised at the outset of the pre-election hearing or be barred from raising the issue at any other time.
4. Require the Employer to submit a preliminary voter list with names, work location, shift and classification at the start of the pre-election hearing.
5. If the Employer views the requesting bargaining unit to be inappropriate, it must, at the outset of the hearing, identify the most similar bargaining unit it believes would be appropriate.
6. Require an election be scheduled at the "earliest practicable date."
7. Require a vote eligibility list from the Employer containing names, addresses, telephone numbers and email addresses of all voters within two (2) business days after the direction of election.
8. A post election hearing would be conducted fourteen (14) days after an election to address any remaining voter eligibility issues if the issues could be outcome determinative.
9. Review of the NLRB Regional Director's decision would be subject to a discretionary appeal.

As noted, the result of these proposed rules will be the conducting of representation elections within 10-21 days of a petition being filed in most cases. This will seriously undermine an Employer's ability to be heard prior to the election. It is noteworthy that NLRB Member Brian E. Hayes, who dissented from the rulemaking decision, specifically stated in that dissent the following: "*Make no mistake, the principal 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.*"

As indicated above, Benesch will be providing a more detailed analysis of the proposed rules very soon. In the meantime, please reach out for any member of Benesch's Labor & Employment Group if you have any questions.

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