CLIENT ALERTS & INSIGHTS

NLRB Finalizes Rollback of Trump-Era Union Election Changes

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Authors: W. Eric Baisden, Adam Primm

As we previously wrote, five Trump-era changes to the union election process were contested in a lawsuit brought by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO). In a January 2023 decision affirming part of an injunction issued by the U.S. District Court for the District of Columbia, the U.S. Court of Appeals for the District of Columbia Circuit struck down three of the changes. These three: (1) eased the deadline for employers to turn over workers' contact information; (2) delayed certification of election results when employers challenge officials' decisions to hold elections; and (3) limited whom unions may designate as their election watchdog.

The Court of Appeals remanded the issue regarding the remaining changes-one delaying elections in which employers raise voter eligibility and other challenges, the other lengthening the timeline for holding elections-to the District Court for further consideration. Given the pending litigation, the Board postponed implementation of those two changes in March 2023.

Yesterday, the postponement became moot. The Board issued a Final Rule "substantially" returning agency procedures to those promulgated under the Obama Administration in 2014, rescinding the Trump-era changes altogether. The new rule:

- Limits pre-election hearings to whether an election should occur;
- Delays questions about employee inclusion in the bargaining unit to after the election; and
- Eliminates the 20-day period between the order to hold an election and the date of the election itself.

In support of the rule, Board Chairwoman Lauren McFerran stated, "[i]t is a basic principle of the National Labor Relations Act that representation cases should be resolved quickly and fairly. By removing unnecessary delays from the election process, the new rule supports these important goals, and allows workers to more effectively exercise their fundamental rights." However, as with the original procedures established under the Obama Board, the new rule greatly restricts the employers' ability to communicate with and inform its employees about its position and limits the employees from being fully informed prior to voting. Despite McFerran's protestations, the rule is about fast elections that limit or eliminate the employee's ability to counter or oppose the union's positions rather than effectively and efficiently allowing employees to effectively exercise their rights under the Act.

The new rule is effective December 26, 2023.

With the new rule's return to the accelerated Quickie Elections under Obama, employers need to proactively prepare for union campaigns. With the increase in organizing activities through social media, employers are less likely to learn of a campaign until increasingly late in the process when there is little time to prepare a response and train management. As a result, employers should regularly conduct training of management and supervisors regarding unionization and how to answer related questions from employees. Further, they should remain engaged with employees to listen to concerns and respond efficiently and effectively so that employee grievances do not fester unanswered and cause dissatisfaction with management.

For more information, contact a member of Benesch's Labor & Employment Practice Group.

W. Eric Baisden at ebaisden@beneschlaw.com or 216.363.4676.

Adam Primm at aprimm@beneschlaw.com or 216.363.4451.