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NLRB Adopts Resolution Allowing Scaled Back Election Regulations Package

December 2, 2011

The National Labor Relations Board has decided to move forward with a scaled back package of proposed election regulations, based on a resolution adopted at a rare public meeting of the Board on November 30, 2011.

The regulations were initially proposed on June 22, 2011 and have been the subject of vigorous debate ever since. More than 60 witnesses testified at a hearing before the Board on July 18-19, and over 65,000 written comments were filed later in the summer. The process has resulted in an unprecedented public dispute between the Board's Chairman, Mark Pearce, and Member Brian Hayes in which each accused the other of improper conduct in connection with the process for promulgating the regulations.

The resolution was adopted by a 2-1 vote, with the Chairman and Member Craig Becker voting in favor, and Member Hayes, the Board's lone Republican appointee, voting against. While the Chairman made clear that the NLRB has not dropped any of its plans to overhaul the entire representation election system, the resolution approved the Board's moving forward on a less sweeping set of proposals. Specifically, the Board will now promulgate regulations that:

- Allow Hearing Officers (Regional Office employees) to limit a pre-election hearing only to those matters relevant to the question of whether an election should be held, eliminating the right to raise issues such as the supervisory status of some putative unit members.
- Authorize Hearing Officers to decide whether or not to permit post-hearing briefs, eliminating briefing as a matter of right.
- Eliminate discretionary pre-election review by the Board of questions addressed by the Hearing Officer and, instead, consolidate such issues with a single, post-election discretionary review proceeding, and eliminate post-election review as a matter of right.

- End the practice of not scheduling an election until approximately 25 days after a decision and direction of election (which is the current practice to allow time for a pre-election request for review, now being eliminated).
- Limit the grounds upon which special permission to appeal to the Board may be granted to "extraordinary circumstances" which the Board considers to mean that an important issue will escape review altogether if special permission is not granted.

The resolution still requires the NLRB to draft and formally approve by separate vote the final regulations.

In the purported interest of "streamlining" an allegedly litigation laden process, the NLRB's proposed amendments will likely have the following effects on the Board's representation process:

- Hearing Officers and Regional Directors will have much more discretion to decide the scope of a representation hearing. This will create an additional burden for employers to preview their case, including what proof they have, in order to persuade the Region to even hold a hearing. However, if the Hearing Officer or Regional Director is not convinced, then the issue may never be decided by the NLRB. Take, for example, a typical case. The union petitions for a unit of 50 employees. The employer asserts that the actual unit should be 55 employees (50 petitioned for and 5 additional), because of the interaction and community of interest of all the employees. If the Hearing Officer decides that the employer did not raise a significant enough issue to have a hearing, then the only way the employer would be able to have the issue decided is to ask the 5 additional employees to vote in the election. Those employees' ballots will then be challenged. If the five votes are determinative, meaning they could affect the outcome of the election, then a hearing would be held to determine the eligibility. But if the ballots are not determinative, then no hearing will be held and the employer's issue will not receive due consideration from the NLRB.

- Regional Directors and Hearing Officers will exercise more discretion to determine if an issue is worthy of a hearing, which may also lead to their declining to hold hearings unless they can be persuaded by a strong, detailed offer of proof that the petitioned-for unit is inappropriate. In other words, an employer will have to spend time persuading the Region to even hold a hearing when it could be using the time to prepare its case. One can imagine that a) this will not be uniformly applied throughout the various Regions and b) it now makes it incumbent on the employer to prove its case simply to justify having a hearing.

- If a hearing is held, the Regional Director's ability to dispense with post-hearing briefs will automatically shorten the timeframe for making a decision. Currently, briefs are due one week after the hearing closes, and sometimes longer if there is an agreement due to parties' schedules. This elimination of post-hearing briefs is another way in which the Board is attempting to reduce the election timeframe.
- If the proposed changes are made, an election would be held in a much shorter timeframe if the employer does not otherwise agree on the unit issues. Under the current process, if the parties do not agree on the bargaining unit and the Regional Director issues a decision on the unit issue, the election then must be scheduled between 25 to 30 days from the date of decision. The resolution proposes eliminating the 25-day period (ostensibly because the NLRB is eliminating the pre-election appeal period); presumably, the election could be scheduled as soon as practical by the Regional Director, which - allowing time for the *Excelsior* list and the time for the union to use it in a campaign - might mean as soon as seventeen days after decision and direction of election. Certainly the time is likely to be shorter than even the current 38 day median in even uncontested cases.

These changes must be read in conjunction with the Board's recent decision in *Specialty Healthcare,* where the Board said that if a union proposed a separately identifiable group of employees who share a community of interest, that would be considered an appropriate unit within which to hold an election, unless the employer could show that the group shared an *overwhelming* community of interest with some larger group of employees. The "overwhelming community of interest" standard is likely to be so great a burden that virtually any group suggested by a union that shares a community of interest will be deemed an appropriate unit. Thus, the door is opened up for so-called "micro units" where the union may organize small groups of employees by department, job title, or some other unusual grouping, in order to make organizing easier and get their "foot in the door" with larger employers.

We will continue to keep you posted on these important developments as they occur.

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