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ACT NOW ADVISORY

Court Strikes Down NLRB "Quickie Election" Rules

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In a sharp setback for the National Labor Relations Board (the "Board"), a federal district court in Washington, D.C. (the "Court"), struck down the Board's election rules, which took effect on April 30, 2012, on technical grounds, holding that the Board did not have a properly constituted quorum of three members when it voted to change its election rules and procedures. See *Chamber of Commerce v. NLRB*, No. 11-2262 (JEB), Slip Op., 2012 WL 1664028 (D.D.C. May 14, 2012). This decision comes less than a month after a federal appeals court struck down the Board's notice-posting rule that would have required employers to advise employees of their rights under the National Labor Relations Act, and less than two years after the Supreme Court of the United States in *New Process Steel LP v. NLRB*, 130 S. Ct. 2635, 560 US __ (2010), held that the Board, which is traditionally comprised of five members, must have a quorum of three members to lawfully issue its decisions.

The Court's decision arises from a lawsuit filed on December 20, 2011, by the U.S. Chamber of Commerce and the Coalition for a Democratic Workplace (collectively, the "Plaintiffs") arguing that the Board's amended election rules, which took effect on April 30, 2012, were unlawful in part because they deprived employers of their free speech rights to speak out against unions and because they were procedurally flawed. The Plaintiffs sought to enjoin the rules before they took effect and asked the Court to issue a temporary restraining order, which request the Court denied last month. The U.S. Senate rejected a joint resolution that would have blocked the rules.

U.S. District Court Judge James Boasberg, who was nominated by President Obama and appointed to the Court in 2011, held that the Board did not have a quorum when it voted on the amendments to the rules because Republican Board Member Brian Hayes did not participate in the final vote for the rules in December 2011. Although the final rules were sent to Board Member Hayes electronically, he declined to participate in the vote because he had previously expressed his opposition to the proposed rules at a public hearing. Despite choosing not to participate, Member Hayes wrote a dissent that accompanied the recent publication of the new rules in the *Code of Federal Regulations*. Yet despite Member Hayes's decision to submit an affidavit to the Court in which he acknowledged that because he had already expressed his opposition to the changes in the rules, he did not need to vote, a position shared by the Board, Judge

Boasberg concluded that those actions were insufficient to create the quorum required for a formal vote.

Overview of the Amended Rules

The Court's decision throws out the Board's new "quickie" election rules that went into effect on April 30, 2012. Under those rules, the Board eliminated several steps in the representation process, which was expected to shorten the time between the filing of a petition and the holding of an election. Among the principal modifications in the proposed rules were those:

1. ***Limiting the Scope of the Pre-Election Hearing*.** The amended rules explicitly stated that the purpose of a pre-election hearing is to determine whether a question of representation exists, and had amended Section 102.66(a) of the Board's Rules and Regulations to give the hearing officer the discretion to limit the hearing to relevant matters and eliminate the resolution of many issues traditionally addressed before an election.

2. ***Restricting Post-Hearing Briefs*.** The second principal change would have granted hearing officers the discretion to prohibit the filing of post-hearing briefs and to limit the subject matter and timing of their filing.

3. ***Consolidating Pre- and Post-Election Appeals***. The third proposed change would eliminate an employer's opportunity to file multiple appeals. Under the longstanding previous rules, parties could file an appeal to seek Board review of pre-election issues and a separate appeal to seek Board review of post-election issues, such as challenges to voter eligibility and objections to the conduct of the election.

4. ***Eliminating the 25-Day Waiting Period*.** The fourth rule change removed the 25-day waiting period for scheduling an election after a Regional Director's pre-election decision. The previous rules recommend that the Regional Director refrain from setting an election date sooner than 25 days after ordering an election to allow the Board sufficient time to consider any requests for review that may be filed.

5. ***Establishing a Standard for Interlocutory Appeals***. The amended rules made clear that the Board would grant interlocutory appeals of Regional Director decisions only under "extraordinary circumstances where it appears that the issue will otherwise evade review."

6. ***Establishing Standards for Post-Election Procedures***. This change would require parties to identify significant prejudicial error by the Regional Director or some other compelling reason for Board review, allowing the Board to devote its limited time to cases where its review is warranted.

What Does the Court's Decision Mean?

Since Judge Boasberg did not address the Plaintiffs' substantive arguments, namely, that the new rules fail "to assure employees the 'fullest freedom' in exercising their rights under the Act...," the decision does not prevent the Board from establishing a quorum of three members and voting for, and implementing, the same new, or other, rules. However, the waters are muddied a bit by the fact that three members of the Board are currently recess appointments (as opposed to appointees confirmed by the Senate). As such, several parties have challenged the legitimacy of these recess appointments on the ground that Congress was not in recess when the appointments occurred, and, therefore, President Obama did not have the authority to appoint those members. If a court agrees with this argument, then the recess appointments would be invalidated, the Board would be reduced to two members, and, as a result, would be incapable of constituting a quorum or voting on the rules.

Another interesting question is whether the Board will choose to appeal the decision. If not overturned, Judge Boasberg's decision could substantially impact how the Board conducts business in the future. Specifically, because Judge Boasberg's opinion is not expressly limited to the use of a quorum in the rulemaking process, theoretically, an obstinate member on a divided Board could create a barrier to decision-making simply by ignoring his or her colleagues' requests to decide unfair labor practice and representation matters. Judge Boasberg admitted as much himself, stating that "while the court need not decide whether a member of the Board could intentionally prevent the formation of a quorum, it is worth noting that such things happen all the time."[1]

What Employers Should Do Now

In response to the Court's decision, the Board has issued a press release indicating that it is considering its options. Acting General Counsel Lafe Solomon has withdrawn the guidance to the Regional Offices, which he issued prior to the implementation of the changes to the Board's representation case process. The Regional Offices have been told to apply the old election rules to pending cases, including those filed on or after April 30, 2012. Notwithstanding the Board's apparent acquiescence to the Court's decision, employers should expect the new rules to be voted upon and adopted by a quorum of the current Board.

Anticipating the disadvantage that quickie elections will present, employers should:

- check for and remedy issues that may make their organization vulnerable to a union organizing drive, such as wage and hour violations, or uncompetitive wages or benefits; and

- train managers and supervisors on how to:

[1] *Chamber of Commerce v. NLRB,* No. 11-2262 (JEB), Slip Op., 2012 WL 1664028 (D.D.C. May 14, 2012), at *9.

- forestall interest in union organizing;
- spot the early warning signs of union organizing; and
- quickly and properly report such activities so that the employers can respond appropriately.

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