NLRB Election Rule Update - A Last Minute Dash to the Finish Line?

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As most of you will remember, last summer the National Labor Relations Board issued a Notice of Proposed Rulemaking to radically change its election rule procedures. We provided some analysis of the Board's proposal at that time. [Client Alert: NLRB & US-DOL Issue Controversial Notices of Rulemaking] In its notice of proposed rulemaking, some of the more controversial proposals suggested by the Board were items such as: (1) requiring that a pre-election hearing, if it were to occur, be scheduled within seven days of the filing of the petition; (2) giving hearing officers the right to cancel any pre-election hearing where 20 percent or less of the voting unit were at issue; (3) requiring that employers provide Excelsior Lists (voting lists) within two days of an election agreement or decision and direction of election and requiring that the list include names, addresses, telephone numbers and email addresses for employees; and (4) eliminating pre-election challenges to a decision and direction of an election unit determination. As expected, these proposed rules garnered extreme criticism from the management labor bar and various trade and commerce groups, including Williams Mullen. [July 18, 2011 session of the NLRB open meeting]

Subsequent to the public hearings on the proposed rule on July 18 and 19, 2011, the appointment of the Chair of the Board, Wilma Liebman expired, and the Board has been reduced by attrition to only three members. Since then, Republican member Brian Hayes has been a vocal opponent of the NLRB's rush to impose the rules before member Craig Becker's recess appointment expires in December. Mr. Hayes' concern was so great that rumors began to filter out that he might resign before the Board's public hearing on the proposed rules scheduled to occur today. The apparent purpose of a resignation would be to divest the Board of the necessary quorum to conduct any business, including issuing any new rule.

In a dramatic about-face, Chairman Pearce has proposed jettisoning many of the controversial provisions from the earlier Board proposal in an effort to implement at least some of the proposed rule prior to the NLRB's eventual loss of a quorum in December (when Mr. Becker's term expires). Chairman Pearce issued his proposed rule revisions yesterday in advance of today's public hearing. Specifically, his proposal is limited to six items:

- Amend Board regulations to state that the purpose of a pre-election hearing is to determine whether a question concerning union representation exists that should be resolved in a secret ballot election. Accordingly, NLRB hearing officers should be given the authority to limit the presentation of evidence at pre-election hearings to genuine issues of fact material to the existence of representation questions;
- Post-hearing briefs no longer permitted as a matter of right, but only by the permission of the hearing officer;
- Eliminate the right of parties to seek review of regional director's pre-election unit and eligible voter rulings while allowing parties to seek post-election review of issues that have not been rendered

moot by the election;

- Eliminate the current regulatory requirement that an election not be set for at least 25 days from the issuance of a regional director's decision and direction of an election;
- Amend the regulations to limit the right of special appeals of a regional director's election unit rulings to extraordinary circumstances; and
- Amend the regulations to make Board review of postelection disputes discretionary.

Significantly missing, however, are the requirements that (1) hearing officers not permit R-Hearings if only 20 percent of the unit is at issue; (2) a two day Excelsior list be filed electronically with telephone and email addresses; and (3) the employer file a pre R-Hearing outline of all the issues at stake with the risk that, if an issue was not raised, it would be barred from further litigation.

While Chairman Pearce refuses to commit that these issues will not be included at some later date, they have been tabled in the hopes that the new proposal can be passed. Whether member Hayes will agree with the revised version remains to be seen; it is still possible that he could resign his position with the NLRB, thereby eliminating a quorum and depriving the Board of its ability to implement any new rule.

It is imperative that employers continue to voice their concerns with the NLRB and the administration about the perils of these proposed election rules.

For more information about this topic, please contact the authors or any member of the Williams Mullen Labor & Employment Team.

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