WIMBERLY, LAWSON, STECKEL,
SCHNEIDER & STINE, P.C.
Attorneys At Law
3400 Peachtree Rd., Suite 400
Atlanta, GA 30326-1107

ALERT

December 28, 2011

NLRB PUSHES THROUGH QUICKIE ELECTION RULES

The NLRB has followed up on its June 22, 2011 Notice of Proposed Rule Making, and on its November 30, 2011 resolutions, and adopted a final rule for union election procedures to be effective on April 30, 2012. The comment period on the new proposed rules did not end until September 6, 2011 and some 66,000 comments were received. Nevertheless, the two-member NLRB majority, both former union attorneys, rushed through the rule in order to take a vote before the end of the year, when the term of Democratic appointee Craig Becker's interim appointment is to expire, leaving the Democrats without a quorum. The new rule was passed without the traditional three-member majority that the Board has historically used to implement major policy changes in its cases. Member Hayes, the lone Republican on the Board, dissented, indicating that the future partisan pendulum would swing and the very precedent the two Democrats established by changing the law with only two votes may facilitate reversal of that law. The two Democratic members delayed the effective date of the final rule so that Member Hayes will have the traditional 90 days after receiving the final draft to write a dissent and have it published prior to the effective date of the rule. The NLRB majority indicates that it has had sufficient time to evaluate the comments and certain changes, leaving other issues for further review and action.

According to the majority, future hearings held following union petitions for an election will be explicitly limited to issues relevant to the question of whether an election should be conducted, rather than getting into more detailed issues on voting eligibility. Pre-election eligibility issues or appeals will basically be postponed until after the election, in order to expedite the election date. NLRB hearing officers will have the authority to limit evidence and to deny the use of post-hearing briefs in order to expedite determination of what is an appropriate voting unit, and post-election appeals as to the voting unit or eligibility to vote will be at the discretion of the NLRB, rather than a matter of right. Attached is an explanation published by the NLRB on the amendments to its regulations that were passed on December 22, 2011.

The final rule leaves the rest of the proposed rule changes for continued consideration by the Board. Among the items not included in the final rule are the electronic filing of petitions, the requirement that hearings be set for seven days after service of the notice of hearing, the requirement of the statement of position filing, inclusion of e-mail addresses and phone numbers in the voter list, and the changing of the period for filing the voter list from seven to two work days.

Senator Mike Enzi (R-Wy) has already announced his intention to challenge the new rule under the Congressional Review Act, and undoubtedly there will be litigation attempting to test the

new rules in court. Due to the Democratic majority in the Senate and the likelihood of a veto, any congressional effort to negate the new rule is very unlikely, as is any early successful challenge to the new rules in court. It is more likely that the real test of the new rule will not come until NLRB cases are reviewed by federal appeals courts, and such appeals will take one or two years to develop. Ironically, the new rules may have the effect of shifting much of the election litigation from the NLRB to the federal appeals courts, although employers will have no need to litigate such cases unless they lose the election and contest the union certification.

Wimberly & Lawson Comments

An important practical question is how soon elections will be conducted under the new rule. Currently, the median time period between a filing of a union election petition with the NLRB, and the holding of the election, is approximately 38 days. Wimberly & Lawson believes that the median election date will be shortened by two weeks to approximately 25 days from the filing of the election petitions with the NLRB. As a practical matter, this means that an employer may receive a copy of the NLRB election petition, not even knowing that a union campaign was going on, and face the prospects of a secret ballot union election among its workforce in just over three weeks. During that time, the employer will have to locate counsel or other expert advisors, determine the appropriate voting unit and make some judgment as to eligibility, of voters, litigate and/or agree to the election procedures, learn the campaign rules of what can and cannot be said to employees, determine the cause of the union organizing and an appropriate employer response, and educate its workforce as to the advantages and disadvantages regarding union representation. Such a task over such a short time period will indeed be challenging for even the most sophisticated and prepared employers.

The natural next question is what, if anything, can employers do to protect themselves from this type of "crisis" in the future? This question is broad enough to warrant a lengthy article or book. Nonetheless, a few basic ideas will be offered.

An obvious suggestion is that employers will need to pay increasing attention to keeping up with what is going on in their workplace, in terms of morale and dissatisfaction issues, and try to address those issues early, before they lead to union organizing campaigns. Similarly, employers will need to let their position or philosophy toward unions be known to employees very early in employment, so that employees will be familiar with the company's position well before rather than the crisis situation three weeks after the filing of the union election petition. A possible early opportunity for employers to make known their position towards unions ironically occurs on January 30, 2012, when the new NLRB federal notice towards rights of union organizing is required to be posted by all employers subject to the jurisdiction of the NLRB. Many employers are posting "side notices" or taking other steps to educate their workforces on union issues in connection with a posting of this new required federal notice. An example of such a "side notice" as suggested by a national trade association is attached. Many employers will put into their pre-hire or orientation programs statements of company policy toward unions, and find other occasions to set forth the company's policy. Most labor experts feel that

workforces that know the company's position towards unions are more likely to remain union free and report to the company any efforts that a union makes to get union cards signed and initiate a union campaign.

While the above steps are fairly obvious, many employers will take other steps to avoid a crisis following the filing of the union election petition. Such steps might include setting up the employer's administrative and managerial structure to maximize the determination of a favorable voting unit, determine who is and who is not a statutory supervisor, and train supervisors regarding union matters, set up appropriate internal employee complaint procedures and communications programs, prepare and/or revise appropriate employee handbooks in order to negate the union promise of a "written" document of rights, and other such long–term planning.

Questions? Need more information? Call Jim Wimberly, or Marty Steckel at (404) 365-0900 or e-mail them at jww@wimlaw.com, mhs@wimlaw.com.