Driving Forward While Looking in the Rear View Mirror: The NLRB After Noel Canning

June 26, 2015

presented by:
Michael J. Lotito, Esq.
Presented by:

Michael J. Lotito, Co-Chair
Littler’s Workplace Policy Institute®
MLotito@Littler.com
415-722-6280
AGENDA

- NLRB’s new “quickie” union election rule
  - What it does
  - Can it be stopped
- What employers should do now
- What employers should do if a union files a petition
- Other Critical NLRB Decisions
- Conclusion and Questions
WHY WORRY NOW?

- The “new” union-dominated NLRB is issuing a series of game-changing rulings
- Unclear whether Congress or the courts can stem the tide
- The accumulating pressure on employers
THE NEW NLRB “QUICKIE” ELECTION RULE

- Effective April 14, 2015
- Effectively shortens the timing of union elections from 40 days to between 10-20 days.
- Why that matters to you
## THE OLD NLRB ELECTION PROCESS

<table>
<thead>
<tr>
<th>Day 1</th>
<th>7-14 Days</th>
<th>14-28 Days</th>
<th>Approx. 20 days After Petition</th>
<th>38-42 Days</th>
</tr>
</thead>
<tbody>
<tr>
<td>Election Petition Filed</td>
<td>Hearing or Stipulation</td>
<td>Request for Review Possible</td>
<td>Excelsior List Due 7 days after stipulation or DDE. Election notice sent and posted no later than 3 days before election.</td>
<td>Election</td>
</tr>
<tr>
<td>RD Sends to Employer</td>
<td>Can have hearing</td>
<td>No delay to election</td>
<td>Names and home address</td>
<td>Count Ballots</td>
</tr>
<tr>
<td>Commerce questionnaire</td>
<td>Open question if employer needs to take position on unit placement issues</td>
<td>Most denied</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Requests posting</td>
<td>Briefs filed</td>
<td>Might impact ballot counting - impounding</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Suggest hearing date 7-14 days</td>
<td>DDE issued</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
## The New Rule in a Nutshell

<table>
<thead>
<tr>
<th>Day 0</th>
<th>Day 8</th>
<th>Day 10</th>
<th>10-14 Days</th>
<th>15-20 Days</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Election Petition Filed</strong></td>
<td><strong>8th Day “Hearing”</strong></td>
<td><strong>Voter List Due 2 days after</strong></td>
<td><strong>Election Notice</strong></td>
<td><strong>Election</strong></td>
</tr>
<tr>
<td>• Immediately served on Employer</td>
<td>• HO discretion to disallow evidence on voter eligibility</td>
<td>• Laid off construction workers may be eligible also, as before</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• A new mandatory poster requirement</td>
<td>• HO will not conduct hearing if unit placement involve less than 20% of unit</td>
<td>• Job classification (new)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• RD sets hearing 8 days out</td>
<td>• RD requires new statement up front covering:</td>
<td>• Location of facility (new)</td>
<td></td>
<td>Board review discretionary</td>
</tr>
<tr>
<td>• RD requires new statement up front covering:·</td>
<td>Who is in?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• RD requires new statement up front covering:·</td>
<td>Who is out?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• RD requires new statement up front covering:·</td>
<td>Supervisors</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• RD requires new statement up front covering:·</td>
<td>Contract Bar</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• RD requires new statement up front covering:·</td>
<td>If not included, forever waived</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• RD requires new statement up front covering:·</td>
<td>Election details</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• RD requires new statement up front covering:·</td>
<td>Details on all unit employees</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Request for Review will no longer delay election</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Employee phone numbers and personal email addresses disclosed to union (new)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Home addresses also (as before)</td>
<td></td>
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</table>
IMPACT OF THE NEW RULE

- Effective date: April 14, 2015
- Denial of employers’ due process and free speech rights
- Denial of employees’ right to learn all the facts about unions before they vote
- A “back door” to Card Check?
- How much difference will it really make?
CAN IT BE STOPPED?

- Two law suits filed, in DC and Texas federal courts
- Individual suit filed in DC combined with DC case
- Status of the litigation
- What about Congress?
WHAT EMPLOYERS SHOULD DO BEFORE A PETITION IS FILED

- Train managers on early warning signs plus do’s and don'ts (TIPS)
- Protect your facilities against unwanted union access (impact of the new *Purple Communications* case)
- Prepare a rapid response plan for union petitions
- Examine bargaining unit questions for possible restructuring
- Review Company handbook policies for vulnerabilities
- Identify potential employee “sore points”
TRAIN MANAGERS AND SUPERVISORS

- Can they articulate company positions on unions?
- Do they understand their role in making the union irrelevant?
- Do you even know who your “supervisors” are?
- Empowering them with Right of Free Speech
- Cautioning them with TIPS
- Do they understand solicitation and distribution rules and how to apply them?
- Make them sensitive to section 7 concerted activity situations
- Consider the early warning signs
- Who is going to train, how often and in what format?
PROTECT AGAINST UNWANTED OUTSIDER ACCESS

- Develop lawful no trespass, solicitation, distribution and bulletin board rules
- Ensure consistency in enforcement
- Post on the property
- Consider special circumstances such as business parks
- Who should call the police? Will they help? ULP concerns
- Company email policies – the NLRB’s *Purple Communications* case
THE RAPID RESPONSE PLAN

- Preparing initial communications
- Evaluating the issues
- What is the unit?
- Who is on the management team?
- Language issues
- Training of supervisors
- Training of response team
- Preparing for multiple petitions simultaneously
- Who is labor counsel?
BARGAINING UNIT CONCERNS

- Specialty Healthcare considerations
- What are departmental units?
- Who are the supervisors?
- What other inclusions or exclusions should be considered in advance of any petition being filed?
HANDBOOK POLICIES

- Easy unfair labor practices to find
- Key provisions:
  - Confidentiality
  - Speaking to the media
  - Problem solving procedures
  - Speaking about wage issues
  - Solicitation rules and email policies
  - Social media policies
  - Arbitration clauses
  - And more…
CONDUCT OVERALL VULNERABILITY ASSESSMENT

- Wage and hour issues
- Problem solving procedures
- Communication devices
- EEO, Workers Comp and other agency issues
- Hiring practices for salting
- Competitive wage and benefit issues
WHAT EMPLOYERS SHOULD DO ONCE THE PETITION IS FILED

- First decision: Whether to seek a court injunction against the new Rule
- Otherwise must post NLRB Notice and perhaps electronically distribute in 2 business days
- Second decision: Whether to seek a hearing before the vote or “stipulate” to the election
- Pro’s and con’s of hearing vs. “stip.”
IF A HEARING IS NEEDED

- New Statement of Position required or else you may be waiving your rights
  - Any claim of inappropriate unit (or else waived)
    - Explain why
    - Who should be added or excluded
  - Any voting eligibility issues
  - Any election bar or other issues
  - Election details (type, date, time, where, pay period, eligibility formulas)
 ALSO PRIOR TO HEARING

- New requirement to disclose names, work locations, shifts and job classes of everyone in the proposed unit, within 7 days of petition
- Also must disclose additions or exclusions
- Failure to provide names will prevent employer from contesting unit or eligibility in hearing
- May still challenge voters for cause at election
Most Egregious NLRB Decisions

- Reinstatement of Employee Who Called Supervisor Nasty MF. *Pier Sixty LLC*, 362 NLRB No. 59 (March 31, 2015)

- Board Turning On A Dime (*Plaza Auto*). Board was reversed by CA9 on what behavior is protected, then re-determined that they were right in the first place. Interesting facts.

- Right of Use of Employer Email System (*Purple Communications*). Breadth of decision has yet to be seen and inappropriately infringes on employer property rights in e-systems.

- Impact of Specialty Healthcare. Enhanced ability to carve out very fractional segments/departments within stores.
Most Egregious NLRB Decisions

- Policy Russian Roulette. Inability to craft any policy that will withstand agency determined to find non-compliance. Additionally, recent NLRB decision – Boch Imports, Inc., 362 NLRB No. 83 (April 30, 2015) – where despite a) no evidence of the illegal policy ever being implemented, and b) the company working with the Region to develop and implement a satisfactory policy, the Board still ruled that a remedial order was appropriate. So, not only is it extremely difficult to craft an acceptable policy, but when you work with the Board to do so they still ding you for having had a non-compliant policy. Finally, Board indicates must have disclaimer but disclaimer will not “save” unlawful policies.
Most Egregious NLRB Decisions

- Confidentiality Instructions In Investigations. (focus on case-by-case analysis of an limitations on confidentiality instructions during investigations)

- Property Access Rights – (Roundy’s – non-representative/non-employee union agents have right to conduct boycott on premises where there is no exclusionary property interest in play? What?!)  

- Joint Employer Expansion/Focus (Browning Ferris; significant enforcement initiatives in fast-food industry to charge corporate franchisor and franchisees). Local example in this space that is related is extended election proceedings for Jimmy John’s)

- Worker Centers as Unions. (okay, related NLRB-GC advice memo is 9 years old, but GC raised it as recent ABA meeting…)
QUESTIONS?
THANK YOU

Michael Lotito, Shareholder
MLotito@Littler.com, 415.722.6280