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Challenge to NLRB Election Rule Fails; Employers Urged to Prepare New Game Plan

In a decision with significant implications for health-care employers, a federal trial court June 1 found NLRB amendments to its representation case rules are neither unlawful nor arbitrary (*Associated Builders & Contractors of Tex., Inc. v. NLRB*, 2015 BL 174029, W.D. Tex., No. 1:15-cv-26, 6/1/15).

The U.S. District Court for the Western District of Texas rejected a challenge by a coalition of Texas business groups to the National Labor Relations Board's rules, dubbed by employers as ''quickie'' or ''ambush'' election rules, saying there was no evidence backing claims that the NLRB adopted the rule changes to favor organized labor. The plaintiffs also failed to demonstrate that they were entitled to an injunction blocking enforcement of the rule changes, the court said.

Health-care labor attorneys have followed the case, and a second pending in the U.S. District Court for the District of Columbia, closely because they have broad implications for hospitals and other health-care provider employers. The attorneys have warned that the rules make providers more vulnerable to union organizing efforts because they significantly expedite the holding of elections following the filing of a petition and tie an employer's hands in a number of respects that limit its ability to respond to a union organizing effort (24 HLR 506, 4/23/15).

Although the plaintiffs immediately filed an appeal with the U.S. Court of Appeals for the Fifth Circuit June 5 (No. 15-50497), attorneys told Bloomberg BNA that health-care providers and other employers shouldn't assume that the rules will eventually be struck down. Instead, employers should prepare now for the very real possibility that these rules are here to stay, they said.

High Stakes in Health Care. Patrick J. Hoban, with Zashin & Rich, Cleveland, said the stakes for health-care and other employers are high because the rules ''significantly reduce the time employers will have to mount their own campaign and counter the misinformation that the union will have been feeding the employees for months prior to filing the petition.'' Combined with the added administrative and procedural burdens placed on employers in the first week after a petition is filed, ''it will be a whole new ball game,'' he told Bloomberg BNA.

In addition to implementing a union avoidance strategy including regular employee training, Hoban advised employers to review and update their employee handbooks, particularly provisions regarding solicitation, distribution, posting, conduct and electronic mail use to comply with NLRB standards.

''In short, employers who would avoid unionization should essentially run a continuous union-avoidance program,'' he said.

Hoban also pointed to data recently released by the NLRB that document what many had feared: that implementation of the rule will lead to more petitions and a significant reduction in the number of days between the filing of a petition and an election.

His firm's review of the data shows:

- from April 14 to May 14, 2015, the NLRB received 280 election petition filings;
- this number is up from 212 representation petitions filed from March 13 to April 13, 2015 before the rule took effect;
- the monthly average of representation petition filings for 2012 and 2013 were 164 and 165 respectively;
- for representation petitions filed since April 14, 2015, elections are being scheduled for a median of 23 days after the petition was filed;
- in 2012 and 2013, elections were typically held 38 days after a petition was filed.

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—Greg Robertson,
Hunton & Williams LLP, Richmond, Va.

The NLRA guarantees employers the right to oppose unionization and explain to their employees why unionization isn't in their best interests. But even though the trial court's *Associated Builders & Contractors* ruling found the rules weren't pro-union, ''the data suggests otherwise,'' Hoban said.

Greg Robertson, with Hunton & Williams LLP, Richmond, Va., agreed that the decision, though not the final word, suggests health-care and other employers need to prepare for the new election rule's requirements and pace.

''While the ruling is a blow to the employer community's opposition to the new rules, it is not the end of the road,'' he said. He pointed to the plaintiff's filing of an

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appeal and the case pending in the federal court in Washington.

The court in the latter case, however, already denied a request for a temporary restraining order and expressed skepticism concerning the plaintiffs' claims at a May 15 hearing (24 HLR 654, 5/21/15).

''Ultimately, employers cannot count on the success of the legal challenges to the board's election rules in federal court,'' Robertson said. ''Employers should remain proactive and prepared to run an effective campaign within a time frame that will likely become more constricted in the next few months,'' he added.

Robertson told Bloomberg BNA that the increased pace creates a real urgency from an employer standpoint and that a two week election process can be logistically challenging for employers who aren't adequately prepared. ''For health-care organizations, pre-planning work can be staggering but it is critical to simply being able to play the game.''

Even simple things can become a nightmare for health-care providers facing a short election cycle, Robertson said. He cited the employer's need to organize meetings with employees of one or more bargaining units in order to provide them with the employer's perspective but said it can be difficult if not impossible to assemble prospective bargaining unit members for such a meeting given patient care imperatives.

''Whether it is meetings with registered nurses, housekeeping, dieticians or some other prospective unit, health-care employers need to figure out in advance how they will organize these meetings without disrupting patient care,'' he said.

Election Rule Changes Now in Place. In dismissing the case, the court rejected arguments of the Associated Builders and Contractors of Texas Inc. and other groups that claimed the board exceeded its power under the National Labor Relations Act by adopting rule changes that may limit parties from litigating some representation case issues until well after employees cast ballots on union representation.

''The New Rule grants significant deference to the Board and the Regional Directors in applying the very provisions Plaintiffs challenge,'' the court said. That fact made it very difficult for the groups to argue that the court should consider the NLRB rule changes invalid on the face of the regulation, the court added.

The board approved the rule changes (RIN 3142-AA08) in December 2014. The Senate and House disapproved the NLRB regulatory action (S.J. Res. 8), but President Barack Obama vetoed their Congressional Review Act resolution March 31, allowing the rule changes to go into effect April 14.

The rule changes require employers to respond to the filing with a statement of position before a pre-election hearing is opened by an NLRB regional office.

Under the amended rules, pre-election hearings are generally to be devoted only to issues necessary to determine whether an election should be conducted. Other issues, including the unit inclusion or eligibility of employees may be deferred to post-election proceedings if they affect a small percentage of a voting unit.

Lawsuit Challenged NLRB Rulemaking. The Associated Builders filed the lawsuit Jan. 13, shortly after the U.S. Chamber of Commerce and allied groups filed their challenge in the U.S. District Court for the District of Columbia (*Chamber of Commerce v. NLRB*, D.D.C., No. 15-cv-9).

The Texas plaintiffs filed a motion for expedited summary judgment in their case, while the NLRB filed its own partial motion to dismiss and a motion for summary judgment. The court granted the NLRB motions and denied the business coalition's request for summary judgment.

The Texas groups argued that the rule improperly restricts employers' ability to litigate threshold issues before a union election, citing new requirements for pre-election hearings and said the new rule is inconsistent with Section 9(c)(1) of the act, which provides for ''an appropriate hearing upon due notice'' before an election is held.

The court, however, found language in the new rule that grants great deference to the board and its regional directors in conducting pre-election hearings ''significant.''

Because the business groups were challenging the NLRB rule on its face, the court said, ''even if the New Rule ordinarily limits the timing and scope of the pre-election process, the deference granted a Regional Director to extend and expand those limits renders Plaintiffs' challenge unavailing.''

The court said the plaintiffs had ''not pointed to any binding authority which establishes the language of 29 U.S.C. § 159 prevents the Board from requiring the filing of a Statement of Position prior to a pre-election hearing, requires the Board to permit employers to introduce evidence concerning voter eligibility in a pre-election hearing, or prevents the Board from delaying consideration of voter eligibility prior to an election.''

Employee Privacy Argument Rejected. The court also rejected the coalition's challenge to a new rule provision requiring an employer to release information, including the personal phone numbers and e-mail addresses, of employees in connection with an election proceeding.

The challengers said information could be misused by unions, but the court said the plaintiffs hadn't explained how employee privacy would be compromised under the new rule.

The court also wasn't persuaded by an argument that the rule change would result in accelerating elections and truncating the time for debate and discussion before a representation election.

The new rule gives regional directors responsibility for setting election dates and instructs them to consider ''the desires of the parties, which may include their opportunity for meaningful speech about the election.''

''[O]nce again,'' the court wrote, ''in light of the fact that Plaintiffs raise a facial challenge to the New Rule, this discretion alone renders it virtually impossible for Plaintiffs to show the election period in every set of circumstances violates free speech.''

The court further said the challengers failed to show that the NLRB rule changes were arbitrary or improper under the Administrative Procedure Act.

Judge Robert L. Pitman wrote the opinion.

Littler Mendelson PC represented the business groups. NLRB attorneys represented the board.

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The order is available at http://www.bloomberglaw.com/public/document/Associated_Builders_and_Contractors_of_Texas_Inc_et_al_v_National/2.