

PUBLICATION

Court Denies NLRB its "Quickie"...at Least for Now

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The National Labor Relations Board's (NLRB) controversial rule aimed at streamlining union elections is invalid because it was enacted without the required three-member quorum, a federal judge in Washington, D.C. ruled.

The U.S. Chamber of Commerce and the Coalition for a Democratic Workforce successfully argued that because Republican Brian Hayes did not participate in the December 16, 2011 decision to adopt the final rule amending its representation election procedures, the NLRB didn't have the authority to issue it. Two of the board's three members voted in favor of adopting the final rule when published. The third member, Hayes, did not cast a vote; but he previously voted against the rule and against proceeding with its drafting and publication. The court found that the NLRB could not characterize Hayes's prior opposition as participation sufficient to meet the NLRB's quorum requirement.

Judge Boasberg of the District of Columbia explicitly ruled that he wasn't weighing in on the other procedural and substantive challenges to the rule, noting that had a quorum participated in the rule's promulgation, it may have been found "perfectly lawful."

This holding constitutes a temporary victory for opponents of what has been dubbed the board's "quickie" or "ambush" election rule. Under that rule:

- a) hearing officers may limit evidence presented at pre-election hearings to that which is "relevant to a genuine issue of fact material to whether a question of representation exists";
- b) hearing officers may deny an employer's request to submit a post-hearing brief;
- c) employers are no longer entitled to file requests for Board review challenging a regional director's decisions and directions until after an election is concluded;
- d) the 25-day period between the issuance of a decision and direction of election by a regional director and an election is eliminated;
- e) employers' ability to seek special permission to appeal a hearing officer's ruling to the Board is circumscribed; and
- f) the Board may refuse to review a regional director's resolution of post-election disputes.

These new rules, if passed again, would have their biggest impact on petitions that seek to represent multiple employee classifications and petitions that raise issues regarding a potential voter's supervisory status or other exclusions from a voting unit, as such issues will no longer be resolved until after the election. They would also limit the range of evidence parties can introduce at hearings in support of their positions. Consequently, employers that are not prepared to develop a quick response to the filing of a petition might find themselves unable to properly defend their legal rights and unable to exercise any meaningful control over the pre-election process. More importantly, employers who have not acted proactively may have a difficult time winning a "quickie" election.

Further, the Board's acting general counsel recently issued a memorandum establishing certain "best practices" not contemplated in the Board's new election rules. These best practices allow the Board to convene an election within as little as 18 days from the time a union petition is filed. Currently, the NLRB has a target of holding an election within 42 days after a petition is filed.

Baker Donelson attorneys will continue to monitor these developments and stand ready to assist you in crafting new union avoidance strategies. Contact any of our nearly 70 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee; and Houston, Texas.