Labor & Employment Advisory

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Two Newly Proposed Rules Could Change Employers' Response to Union Organizing

By David J. Laurent and Brian D. Balonick

On June 21, 2011, the National Labor Relations Board ("Board") and the Department of Labor ("DOL") each announced proposed rule changes that, if adopted, will materially alter how employers and labor consultants (including lawyers) respond to union organizing. The Board proposed regulations that will, in effect, shorten the time between when a union files a petition for an election and when the employees vote in a secret ballot election. The DOL proposed to redefine the advice exception to persuader activities so as to substantially expand the circumstances in which labor consultants and employers must report activities related opposing encouraging employees to remain union free.

NLRB's Proposed Regulations

In introducing its proposed regulations, the Board stated that it is seeking to "remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation" under the National Labor Relations Act. Overall, the proposed regulations streamline the election process by limiting pre-election litigation. While the proposed regulations do not mandate a timeframe for when elections must be held, the practical effect of the changes, if adopted, will be to shorten the timeframe from the current 42-day period that now typically occurs between the filing of a petition and the election.

Here are some of the more significant procedural changes the Board proposed:

- The employer will be required to file a position statement by the date of the pre-election hearing, which is typically scheduled for seven days after the employer receives the petition for an election. The position statement must identify the employer's stand on all hearing issues. For example, if the employer disagrees with the bargaining unit described in the petition, the position statement must identify the most similar bargaining unit the employer concedes would be appropriate. The position statement also must identify the full names, work locations, shifts and job classifications of the individuals in (a) the unit the union proposed and (b) the unit the employer proposed.

- The regional director can direct an election without first resolving certain pre-election disputes. If the Hearing Officer determines that the issues in dispute concern only the voting eligibility of less than 20% of the proposed bargaining unit, the Hearing Offer will close the hearing. If the Regional Director reaches the same conclusion, the Regional Director will not resolve that dispute until after the election has been conducted. Instead, the Regional Director will direct an election and permit the disputed individuals to vote subject to challenge.

- The Regional Director can direct an election before issuing his decision on issues the employer raised at the pre-election hearing. If the Regional Director decides to direct an election following the pre-election hearing, the Director can submit his findings and reasons anytime prior to the tally of the votes.

- Neither party can appeal a Regional Director's decision to the Board before the election.

- Once an election has been directed, the employer must provide the Board and the petitioning union with an electronic copy of all eligible employees' names, phone numbers and e-mail addresses.

Comments regarding the proposed regulations can be submitted until August 22, 2011 to Lester A. Heltzer, Executive Secretary, National Labor Relations Board, 1099 14th Street N.W, Washington, D.C 20570, or electronically through http://www. regulations.gov.

DOL's Proposed Change to the Definition of Persuader Activities

The Labor Management Reporting and Disclosure Act requires labor consultants (including lawyers) and employers who hire them to persuade employees to exercise or not exercise their rights to organize and bargain collectively to report the terms and conditions of their arrangement and the amounts the employers pay the consultants. Nonetheless, according to the DOL, many the current interpretation of the exception for "advice" has been interpreted too broadly and permitted many labor consultants and to avoid reporting what the DOL believes constitutes to persuader activities. Therefore, the DOL proposed to revise the instructions to Forms LM-10 (employers) and LM-20 and 21 (persuaders) to narrowly define the "advice" exception and, thereby, achieve greater reporting.

The proposed instructions state that "[n]o report is required concerning an agreement or arrangement to exclusively provide advice. For example, a consultant who exclusively counsels employer representatives on what they may lawfully say to employees, ensures a client's compliance with the law, or provide guidance on NLRB practice and precedent, is providing 'advice.'"

In contrast, the proposed instructions include a wide range of currently exempt activities under the umbrella of reportable persuader activities:

> An employer and consultant each must file a report concerning an agreement or arrangement pursuant to which the consultant engages in activities that have as a direct or indirect object to, explicitly or implicitly, influence the decisions of employees with respect to forming, joining, or assisting a union, collective bargaining, or any protected concerted activity (such a s a strike) in the workplace.
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> Specific examples of persuader activities that, either alone or in combination would trigger reporting requirements include but are not limited to: drafting, revising, or providing a persuader speech, written material, website content, audiovisual or multimedia presentation, or other material or communication of any sort, to an employer for presentation, dissemination, or distribution to employees, directly or indirectly; planning or conducting individual or group meetings designed to persuade employees; developing or administering employee attitude surveys concerning union awareness, sympathy, or proneness; training supervisors or employer representatives to conduct individual or group meetings designed to persuade employees; coordinating or directing the activities of supervisors or employer representatives to engage in the persuasion of employees; establishing or facilitating employee committees; developing employer personnel policies or practices designed to persuade employees; deciding which employees to target for persuader activity or disciplinary action; and coordinating the timing and sequence of persuader tactics and strategies.
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> **…Persuader activities trigger reporting whether or not the consultant performs the actives through direct contact with any employees. For example, a consultant must report if he or she engages in ay activities that utilize employer representatives to persuade employees**, such as by planning, directing or coordinating the activities of employer representatives or providing persuader material to them for dissemination or distributions to employees, or in which the consultant drafts or implements policies for the employer that has an object to directly or indirectly persuade employees. (Emphasis added.)

The DOL's new definition includes any combination of exempt "advice" and persuader activities. "Thus, if a consultant engages in activities constituting persuader services, then the exemption would not apply even if activates constituting 'advice' were also performed or intertwined with the persuader activities.'"

Additionally, the DOL reasons that lawyers who engage in persuader activities must report the activity, but may exclude confidential communications protected by the attorney-client privilege. The DOL explains, however, that "[i]n general, the fact of legal consultations, clients' identities, attorney's fees and the scope and nature of the employment are not deemed to be privileged."

Consultants who engage in persuader activities must submit the detailed Form LM-20 within 30 days of the engagement and then update the form to reflect any changes. Such consultants also must annually file Form LM-21 which, among other things, requires the persuader to disclose all fees received from each employer for whom the persuader has engaged in persuader activities; however, the report is not limited to fees for the persuader activities. Employers who retain consultants to perform persuader activities must annually file Form LM-10, which similarly identifies the persuader activities and all fees paid to the persuader.

Comments regarding the proposed changes can to be submitted until August 22, 2011 to Andrew R. Davis, Chief of the Division of Interpretation and Standards, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room N-5609, Washington, CD 20210, or electronically by logging onto www.dol.gov, and locating the proposed rule at RIN numbers 1215-AB79 and 1245-AA03.

Many employers, consultants and law firms are expected to file comments regarding these proposed changes. If you would like to receive any assistance in filing comments, please contact the Buchanan Ingersoll & Rooney PC Labor Group.

For more information, email the author(s) at **leadvisory@bipc.com**.