Zinsergram a/k/a Legal Update

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On February 5, 2014, the NLRB reissued its proposed rule to dramatically shorten the period of time between the filing of a union election petition and the holding of the election. The reissued rule is the text of the original "quickie election" rule, not the scaled back final version issued in December 2011.

As this column reported earlier, on December 9, 2013, the NLRB voluntarily dismissed its appeal of a lower court decision dismissing its December 2011 quickie election rule. A lower court had invalidated the rule as unlawfully promulgated because it had been promulgated without a quorum of at least three members. The Board is now simply starting over with the same rule, this time approved by a fully confirmed Board of five Members.

Currently, the NLRB's own time target is to hold an election no later than 42 days after the filing of election petitions; on average, the NLRB's General Counsel reports that an election is held 38 days after the filing of the election petition. This timeframe gives Employers the opportunity to communicate to employees the pros and cons of unionization *before* they go to the polls. This 38 to 42 day time frame provides for an informed electorate.

The proposed rule is an openly notorious retaliation for the failure of Congress to pass the so-called "Employee Free Choice Act." That law would have eliminated elections. The only reason for the proposed rule is to prevent Employers from campaigning against unionization.

THE PROPOSED RULE VIOLATES THE FIRST AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA

The United States is distinguished by the presence of the First Amendment. The very foundation of our country is Freedom of Speech. It is not surprisingly that, to emphasize the importance of free speech, it is enshrined in the First Amendment of our Constitution.

Our rights of free speech in our society are very broad and robust, in spite of the fact that the exercise of free speech may offend unions. The proposed rule is designed to shield unions from the competition of ideas in the workplace and the marketplace. The shortened length of time proposed by the rule prevents Employers from communicating to their employees the full range of the pros and cons of being represented by a labor union. Such a rule is repugnant to the First Amendment and many of the most important court decisions in our nation's history.

The proposed rule is a stealth attempt to in part repeal the Taft-Hartley Amendments of 1947. The Taft-Hartley Amendments added Section 8(c) to the National Labor Relations Act. That Section states, "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printing, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

In 1969, the U.S. Supreme Court ruled that Section 8(c) codified the First Amendment into the National Labor Relations Act. In so ruling, the Supreme Court stated:

> *An Employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board. Thus, Section 8(c) merely implements the First Amendment by requiring that the expression of any views, argument, or opinion shall not be evidence of an unfair labor practice.*

The NLRB may not, through a rulemaking proceeding, usurp the role of Congress and amend and/or delete the Taft-Hartley provisions of the Act.

Nothing is more honored or cherished in American culture and society than a secret ballot, democratic election conducted after a vigorous and thorough debate of the issues. A union election is a decisive event in an employee's working life. That employee should be able to have all of the available information before voting. Through the First Amendment, we have "staked… our all" upon the belief that "right conclusions are more likely to be gathered from a multitude of tongues."

By limiting an employee's opportunity to get his or her Employer's perspective on what a union means for the workplace, that employee is forced to vote on an uninformed basis. Protecting an employee's rights under the National Labor Relations Act must protect the employee's opportunity to be informed and to make an educated decision.

The Supreme Court, enforcing the First Amendment, once stated, "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." The proposed rule seeks to prevent the circulation of ideas opposing unions. Without the **time** to circulate its perspective and point of view, an Employer's First Amendment right of Freedom of Speech will be of little value in NLRB elections.

The "bright light" of the First Amendment is a powerful force. The NLRB's proposed rule is an attempt to turn off that bright light.

CONGRESS HAS TWICE REJECTED THE "ELECTION NOW, HEARING LATER" AND THE "VOTE NOW, UNDERSTAND LATER" APPROACHES REFLECTED IN THE PROPOSED RULE

The proposed rule defers most important legal issues to a *post-election* hearing. Under the National Labor Relations Act as written, an Employer has the right to insist on a hearing **before** the election is even scheduled.

Prior to 1947, the Board conducted a number of elections that relegated a number of important election-related issues to a post-election hearing. With the Taft-Hartley Amendments' adoption in 1947, Congress repudiated this process by adding language in Sections 9(c)(1) and (4) of the Act, requiring the Board to conduct an appropriate hearing *before* any election, and permitting "the waving of hearings" only "by stipulation" of all parties.

Congress again rejected the "election now, hearing later" and "vote now, understand later" approaches in passing the 1959 Landrum-Griffin Act Amendments. Expressly rejected was legislation that would have allowed deferring important legal issues to a post-election hearing. The legislative history indicates, "The right to a formal hearing *before* an election can be directed is preserved without limitation or qualification."

THE NLRA'S REQUIRED PRE-ELECTION HEARING MANDATES THAT EVIDENCE BE RECEIVED REGARDING WHO IS ELIGIBLE TO VOTE

The proposed rule defers important issues to a post-election hearing. That includes key issues about who is actually eligible to vote. In particular, it defers until after the election issues of whether someone is or is not a Supervisor. It is important for an Employer to know who is a Supervisor, and who, therefore, may, on behalf of the Employer, exercise the First Amendment right to communicate during the period prior to the election. It is also critical to know who is a Supervisor before the election for unfair labor practice liability purposes.

It is manifestly unfair to allow a union to file post-election objections over the conduct of an individual whose status the Employer was not permitted to clarify before the election. With pre-election clarification that an individual is a Supervisor, the Employer is in a position to control the individual's conduct. The proposed rule is contrary to the current expressed language of the National Labor Relations Act.

THE PROPOSED RULE UNLAWFULLY DELEGATES TO HEARING OFFICERS DECISION-MAKING AUTHORITY

The current language of the National Labor Relations Act prohibits Hearing Officers from even making "recommendations" about issues raised in pre-election hearings. Currently, the Hearing Officer then passes on the evidence to the Regional Director. Regional Directors then decide issues in pre-election hearings. However, Employers currently have a *statutory right* to seek Board review of any action by a Regional Director. The proposed rule eliminates an Employer's right, before the election, to seek review by the full Board regarding decisions of the Regional Directors. As stated previously, the proposed rule, contrary to the Act, defers most issues to a post-election hearing.

The proposed rule gives the Hearing Officer broad authority concerning the hearings. This is contrary to the statute. With respect to post-election hearings, decisions made in those hearings may not automatically be appealed to the Board. Review of decisions made at those hearings is discretionary. Under the current statute, Employers have a statutory right to Review by the Board of any decisions made at the hearing, including pre-election requests to "stay" the election.

The proposed rule deprives the parties of the right to file post-hearing briefs in all cases, unless there is "special permission" of the Hearing Officer. Even when permission is granted, the parties may only address "subjects permitted by the Hearing Officer." This raises serious due-process issues. This decision-making authority given to the Hearing Officer is contrary to the current language of the Act, which precludes Hearing Officers from even "making recommendations" regarding election issues.

THE PROPOSED RULE IMPOSES NEW OBLIGATIONS ON EMPLOYERS

Changes imposed by the rule are too many to summarize in this column. With respect to the requirement to provide to the union the names and addresses of voters, the new rule requires Employers to electronically transmit employee names, phone numbers, and e-mail addresses no later than two days after the Regional Director schedules the election. The proposed rule does *not* clarify whether it requires employees' personal e-mail addresses or business e-mail addresses. Under current law, unions may not use the Employer's e-mail system, in recognition of private property rights. The proposed rule raises privacy and private property concerns.

CONCLUSION

The NLRB is without authority to promulgate the proposed rule. The proposed rule is in direct conflict with express statutory provisions of the Act and its legislative history. The proposed rule is unconstitutional, in violation of the First Amendment of the Constitution of the United States of America.