PUBLICATION

GIVE 'EM AN INCH (part Deux): NLRB Issues Final Election Rule

December 22, 2011

On December 21, 2011, the National Labor Relations Board (NLRB or Board) gave an early Christmas gift to organized labor and a big lump of coal to America's job creators when it issued its "Ambush Election Rule," as Senator Mike Enzi (R-Wyo) has aptly named the rule. As expected, the rule implements the resolution passed by the NLRB on November 30, 2011.

The Rule:

- Gives the NLRB Hearing Officer authority to limit a pre-election hearing to matters relevant to the question of whether an election should be held and authorizes the Hearing Officer to decide whether to permit briefing on those matters.
- Prohibits most appeals of the pre-election hearing which will now be a single post-election procedure. This will effectively end the delay caused by pre-election appeals. Special permission to appeal a pre-election hearing issue may still be granted but only in extraordinary circumstances.
- Gives the Board discretion to hear and decide any appeals to the election process whether pre- or post-election.

The Rule does not go into effect until April 30, 2012, if it goes into effect at all. The Rule has already been challenged on two fronts. On December 20, 2011, the United States Chamber of Commerce, joined by the Coalition for a Democratic Workplace, filed a lawsuit in the federal district court in the District of Columbia seeking to enjoin the NLRB from enforcing the Rule. In addition, Senator Enzi, the ranking member on the Senate Health, Education, Labor and Pensions (HELP) Committee, stated that he will use the Congressional Review Act to challenge the Rule. A successful joint resolution of disapproval by the House and Senate would have the effect of stopping the Board from implementing the Rule.

With no guarantee that the Rule will be enjoined, management cannot ignore the underlying causes of unionization, thinking that the problems can be addressed once the company is aware that a union is trying to organize its employees. If the Rule takes effect next April, the time between the filing of a petition by a union for a secret ballot election and the holding of an election will be greatly shortened, giving the employer less time to campaign.

An employer's belief that its employees are loyal to and respect their managers and supervisors may give that employer a false sense of security. That is why Baker Donelson recommends that a union vulnerability audit be conducted in your facilities before a union election petition is filed. Remaining union-free requires constant vigilance, now more than ever.

Questions for employers to consider:

- How well do you understand and appreciate the human relations environment at your facilities?
- What do employees feel are the positive aspects of working at your company? What are the most commonly heard complaints?
- What is the best thing about working at your facility and the most negative aspect of it?
- What issues would a union organizer use at your facility to achieve unionization?

- How do employees view your policies and practices? How comprehensive are your communications to employees? What is management's credibility?

These are all critical issues that can determine whether or not your facility is vulnerable to a union organization attempt. Because there is a push to turn the passed resolution into a final Rule, management will not have much breathing room before an election in order to fix the problems.

Baker Donelson recommends that the time to act is now. Should you have any questions regarding conducting a union vulnerability audit or any other labor issue, please contact your Baker Donelson attorney or any one of the more than 70 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; and Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee.