May 15, 2012

Federal Court Strikes Down New NLRB Election Rule

The U.S. District Court for the District of Columbia invalidated the National Labor Relations Board's ("NLRB") election rule that went into effect on April 30, 2012. The election rule limited representation hearings to the issue of whether an election should take place, decreased the amount of time between when a union files a petition for an election and when the election takes place, limited the appeals process and increased discretion of the NLRB Regions during representation hearings.

The district court struck down the rule because the NLRB did not have the necessary quorum when it voted on the final rule in December 2011. The National Labor Relations Act requires a quorum of at least three members of the NLRB's five-member board before it can validly conduct business for the agency.

When the NLRB published the final rule that amended the election procedures, only two of its members voted in favor of adopting the rule. At the time, there were two vacant seats. The NLRB's third seated member, Brian Hayes, did not cast a vote. Hayes had voted against the initial rulemaking and against proceeding with the drafting and publication of the final rule. However, he did not participate in the vote on the final rule. He received a notification that the final rule had been circulated for a vote, but he took no action in response. Nevertheless, the NLRB determined he had "effectively indicated his opposition."

The court's ruling found that member Hayes "cannot be counted toward the quorum merely because he held office, and his participation in earlier decisions relating to the drafting of the rule does not suffice. He need not necessarily have voted, but he had to at least show up." The adoption of the rule by only two board members was insufficient. There was no quorum. Without it, the NLRB was without power to issue rules for the agency.

The court's invalidation of the new election rule is one of a series of recent federal court decisions that have invalidated new, recently published rules by the NLRB. The court's holding is welcome news to employers, given that the rule would have limited the opportunity to communicate with employees after a union has filed an election petition with the NLRB.

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