Zinsergram a/k/a Legal Update

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APRIL 14, 2015 "QUICKIE ELECTION" RULE IMPLEMENTATION ON THE HORIZON

There is lots of activity surrounding the NLRB "Quickie Election" Rule and its projected April 14, 2015 implementation date.

NLRB Activity

This month, the National Labor Relations Board is having a major training session in Washington, D.C. to train its agents on how to implement the new rule. Every Regional Office of the NLRB will send staff to the March 16, 2015 training session for educational purposes.

After the major training session, the plan is for all of the Regional Offices to conduct training on the local level for practitioners. The American Bar Association's Committee on Practice and Procedure under the National Labor Relations Act will be part of this effort to train practitioners.

Congressional Action

A law called the Congressional Review Act allows Congress to stop Rules promulgated by government agencies. Senator Lamar Alexander of Tennessee introduced Senate Joint Resolution 8, which states, "Congress disapproves the rules submitted the National Labor Relations Board relating to representation case procedures … and such rules shall have no force or effect."

On March 4, 2015, the U.S. Senate voted 53 to 46 in favor of Senate Joint Resolution 8. The U.S. House of Representatives will vote on the Resolution later this month. It is certainly expected to pass by a large margin in the House of Representatives.

The Resolution will then be sent to President Obama for signature. He is expected to veto Joint Resolution 8. On March 3, 2015, the Executive Office of the President issued a statement

of policy strongly opposing the Resolution. The statement of policy inaccurately states that the Rule represents "modest reforms."

As I have reported in this column before, the Quickie Election Rule dramatically and unlawfully revolutionizes the election process. The NLRB does not have authority under the current statute to promulgate such a Rule – and it violates the First Amendment of the Constitution.

The administration's statement of policy ties the Rule to helping "the middle class." Interestingly, the Rule itself does not promote itself as helping the middle class. This is just the latest spin on the ill-advised Quickie Election Rule. The statement of policy ends by stating, "If the President were presented with Senate Joint Resolution 8, his senior advisors would recommend that he veto the Resolution."

Chamber of Commerce Lawsuit

As previously reported, the U.S. Chamber of Commerce filed a lawsuit on January 5, 2015 to stop and enjoin the Quickie Election Rule. The Chamber has filed a Motion for Summary Judgment. The NLRB's opposition to this Motion for Summary Judgment – or its Cross Motion for Summary Judgment is due by March 6, 2015. Responsive Brief deadlines for both parties are scheduled, with briefing ending by April 1, 2015.

The Chamber and the Coalition for a Democratic Workplace asserted challenges to the promulgation of the Rule, noting (1) these rules are contrary to the National Labor Relations Act; (2) they violate the Administrative Procedure Act (APA); (3) they violate the First and Fifth Amendments of the U.S. Constitution; (4) they are arbitrary and capricious because the Rule did not set out any new time targets for representation elections; and (5) its alterations of procedures are unnecessary because the Board its already meeting its stated goals under the current system.

The Chamber Complaint requests relief in the form (1) vacating and setting aside the Rule; (2) declaring the Rule contrary to the First and Fifth Amendments; (3) declaring it a violation of the APA; (4) declaring it arbitrary and capricious and an abuse of discretion; and (5) declaring it otherwise not in accordance with the law. The Complaint finally requests that an injunction be issued against the Rule being enforced in any form.

With the implementation of April 14, 2015 looming large, let us hope the court can rule before that time.

Associated Builders and Contractors of Texas, Inc. Lawsuit

A second lawsuit was filed on January 13, 2015 in U.S. District Court in Texas. The Associated Builders and Contractors have filed a Motion in this case. The NLRB has until March 9, 2015 to respond to the Motion and to file its Answer in the case. Further briefing will occur.

The Complaint notes that the Rule should be invalidated by the Court (1) as a violation of the First Amendment; (2) as exceeding the Board's statutory authority under Section 9 of the National Labor Relations Act; (3) as a violation of the Administrative Procedure Act by failing to ensure employees the fullest freedom in exercising their rights guaranteed by the NLRA; (4) as a violation of the APA and the NLRA by interfering with protected speech during representation election campaigns; and (5) as arbitrary and capricious and an abuse of agency discretion because it does not do anything to improve the Board's targets of resolving elections in a more timely manner. The Complaint also requested an injunction be issued to prevent the Rule from being enforced.

As you can see, there are many moving parts surrounding this Rule. The NLRB is proceeding confidently, implementing a major training program. The Republican majorities in both House of Congress are trying to stop it with the Congressional Review Act. Additionally, business groups in two lawsuits are trying to stop the Rule through court action.

Privacy Consequences of Quickie Election Rule

One part of the Quickie Election Rule that is not often discussed is the part that requires Employers to disclose employees' private contact information to unions. Once the Rule goes into effect on April 14, 2015, Employers will be required to disclose to the NLRB and the organizing unions employees' personal e-mail addresses and telephone numbers.

Under the Rule, employees do not have the opportunity to opt out of sharing this private contact information with the union attempting to organize the workforce – neither does the Rule require the Employer to notify the employees that it is disclosing the information.

This is in sharp contrast to a Pennsylvania state law that allows individuals to fight the release of their home address before it is released under the Pennsylvania Right to Know Law. A recent court decision gives the individual the ability to claim that disclosure of information about them might put them at a personal security risk. A recent case in that state involved a union fighting access to its members' personal information under the state law.

Privacy, the First Amendment, and due process are of no concern to the NLRB. Its goal is to do anything it can to help unions organize new employees. At the present time, unions represent only 6.6% of the private sector workforce.

WISCONSIN PASSES RIGHT TO WORK LAW

On March 9, 2015, Wisconsin Governor Scott Walker signed into law a Right to Work law. Wisconsin becomes the 25th state to enact Right to Work legislation. What does this mean? This means it is now illegal in Wisconsin for a union to propose that a Collective Bargaining Agreement require that all employees pay union dues. Now, whether or not an employee joins and/or pays money to a union in Wisconsin will be a matter of free choice. This measure is pro-employee. Paying money to a union is now the voluntary, free choice of all private sector employees in the State of Wisconsin.