Federal Court Blocks Labor Board's New Union Election Rules

Insights
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On the eve of their scheduled implementation date, a federal court judge in Washington, D.C. struck down significant portions of the National Labor Relation's Board new union representation procedures – handing a significant victory to unions attempting to keep the current "quickie election" rules in place. While the brief written decision handed down late Saturday night provides few details (but promises to be followed by a full opinion), it appears that challenged aspects of the new rule have been set aside for failure to comply with notice-and-comment rulemaking requirements established within the Administrative Procedure Act (APA).

The court did not strike down the entire set of union election rules, however, upholding a portion of them and sending them back to the agency for further consideration in light of her other rulings. This includes a section of rules prolonging a collection of union election deadlines. What do employers need to know about this development?

Brief Background
Once the current administration took charge at the White House and the composition of the NLRB shifted to Republican hands, it wasn't long after that the Board began signaling that it would alter union election rules to restore balance in the labor field. As early as 2018, in fact, several Board members indicated they wanted to take on the agency's controversial "blocking charge" doctrine, which allows unions to indefinitely delay representation and decertification elections that could ultimately go against them.

In August, 2019, the NLRB proposed a rule that requiring parties attempting to block an election to contemporaneously offer evidence to support the underlying ULP in the form of witnesses and a summary of their anticipated testimony. The proposed rule contained additional provisions pertaining to election bars on the heels of voluntary union recognition and on extending recognition to unions in the construction industry. Those rules were finalized and published on March 31 and are now scheduled to take effect on July 31, 2020.

On December 13, 2019, the Board issued a separate set of "procedural" regulations designed to roll back some of the more draconian aspects of the agency's so-called "quickie election" rules, which over the past five years have effectively accelerated the timetable between representation petition and union election – thereby reducing the period of time for employees to make an informed decision. The new rules restored a number of pre-election due process provisions for parties

engaged in challenging the scope of the petitioned-for bargaining unit, while extending a number of corresponding posting, filing and hearing deadlines.

Unlike the new blocking charge rules and related changes that were published in March, the NLRB promulgated the quickie election roll backs without a typical period of notice-and-comment from interested members of the public. Instead, the agency contended that these rules were procedural in nature, not requiring input from the public before finalization and all of the process that goes along with such rules. They were initially scheduled to take effect on April 16 – a deadline that was subsequently extended until June 1 due to the COVID-19 pandemic. The agency had launched a series of teleconferences in recent weeks designed to educate stakeholders and members of the public on some of the key changes slated for implementation.

The Legal Challenge And This Weekend's Decision

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) filed a legal challenge in the U.S. District Court for the District of Columbia several months ago, calling for the rules to be struck down in their entirety. The AFL-CIO argued that the rules were substantive in nature, and not just procedural as the NLRB claimed, and should therefore have been subject to the APA's notice-and-comment requirements.

In her May 30 decision, Judge Ketanji Brown Jackson mostly agreed with the AFL-CIO, ruling that significant portions of the NLRB's union election regulations "are not procedural rules that are exempted from the notice-and-comment rulemaking requirements." She concluded by saying that, "because each of these specific provisions was promulgated without notice-and-comment rulemaking, each one must be held unlawful and set aside."

However, she stopped short of tossing the rules out in their entirety, as the AFL-CIO had requested. Instead, she said that those portions of the rules that were procedural in nature would be sent back to the NLRB for further consideration in light of her overall ruling.

What Does This Mean For Employers in the Meantime?

Once her final written order has been issued, the NLRB can appeal her ruling. This seems a likely step, as the agency has invested much time and energy in attempting to inject some certainty in the labor relations arena through the rulemaking process. Rather than letting many important issues impacting businesses, workers, and unions be subject to regular flip-flopping depending on which political party controls the White House, the current Board instead is aiming to develop a consistent and balanced set of standards to guide management and labor through the often-complicated process.

For now, however, employers need to recognize that provisions offering badly needed relief from the more onerous aspects of the Board's quickie election rules are now indefinitely on hold. To the extent that your labor relations strategy included adjustments based on anticipated changes that were set to take effect on June 1, you should now consult with your labor relations counsel to

determine how best to adapt to abbreviated post-petition timetables that are likely to last well into a summer marked by continued labor relations challenges presented by the COVID-19 crisis.

We will continue to monitor these issues, and we'll provide updates regarding matters of interest. Make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions on how these developments may impact your organization and workforce, please contact any member of our Labor Relations Practice Group or your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific federal court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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