

# Employers' Summer of Discontent: Obama Labor Board pushes anti-employer agenda

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While employers have been increasingly worried about a double-dip recession, the National Labor Relations Board has had a busy summer proposing and implementing rules and issuing decisions designed to promote the unionization of America's workforce.

The Obama NLRB has taken over where the president has failed, delivering victories to organized labor at a time when the public sentiment toward unions has become, at best, distrustful and at worst, disdainful.

## FINAL RULE REQUIRES NOTICE OF RIGHTS TO EMPLOYEES

Applicable to all employers falling under the NLRB's jurisdiction, the board has issued a final regulatory rule requiring employers to notify employees of their rights under the National Labor Relations Act. The notice informs employees that they have a right to act together to improve wages and working conditions; to form, join and assist a union; to bargain collectively with their employer; and to refrain from these activities.

Employers are required to post the notice where other workplace notices are typically posted, by Nov. 11. The rule also specifies when the notice must be posted in a foreign language.

The notice, on an 11-by-17-inch poster, is now available from the board's website at [www.nlr.gov](http://www.nlr.gov) and in the future from the board's regional offices. A failure to post the notice is an unfair labor practice.

Early in the administration, President Obama attempted to enact the Employee Free Choice Act, also known as "card check" law, as a payback for the enormous support organized labor provided during the election. The legislation would have provided for the certification of a union on the basis that a majority of the employer's workforce signed union authorization cards. It also would have provided for binding interest arbitration for first contracts. For a number of reasons, that legislative effort failed.

Again, however, the Obama NLRB came to the rescue.

## ARE 'QUICKIE' ELECTIONS ON THE HORIZON?

This summer the NLRB proposed regulatory amendments to representation election procedures to provide for "quickie" elections. Officially, the proposed rules are intended to reduce unnecessary litigation, streamline pre- and post-election procedures, and facilitate the use of electronic communications and document filing.

In reality, the proposed rules will limit an employer's ability to respond to organizing campaigns and limit information about the advantages and disadvantages of union

After hearing the parties' positions, the hearing officer will identify their disagreements and accept evidence only on genuine issues of material fact affecting those issues. However, and most importantly, unless the issues affect 20 percent or more of the unit, the litigation of those disputes will be deferred until after the election by the challenged ballot procedure.

Moreover, even if the unit issues are litigated before the election, the parties cannot request review from the NLRB prior to the election.

Once the regional director issues his or her direction of election, the employer will have only two days, rather than seven, to provide the list of eligible voters to the union.

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Under the NLRB's final rule, employers must notify employees of their rights under the National Labor Relations Act.

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representation and collective bargaining available to employees.

Under current procedures, the NLRB strives to hold representation elections within 42 days after the representation petition is filed. However, the board's proposed amendments will shorten that period by days, if not weeks, by deferring most eligibility and bargaining unit issues until after the election and eliminating the parties' ability to request review of an NLRB regional director's decision before the election.

Specifically, the proposed amendments will require the regional director to schedule the pre-election hearing to begin within seven days after a hearing notice is served. By the start of the hearing, the employer must state its position on the election issues that it intends to raise at the hearing, including the appropriateness of the bargaining unit sought by the union and the type, date and location of the election.

The union will then respond to the positions taken by the employer.

The new rules will require the employer to provide phone numbers and email addresses when possible, rather than just names and addresses.

In addition, the new rules will allow petitioners to file election petitions electronically and for the NLRB to provide notices directly to employees through email when addresses are available.

The board received comments and replies through Sept. 6 and had two full days of hearing testimony. Whether the proposed rules become law will depend on how quickly the NLRB acts and whether the president can successfully make recess appointments, as the board may be short one member in December. The proposed rule is available at 76 Fed. Reg. 36812 (2011) or online at <http://federalregister.gov/a/2011-15307>. \*

## BOARD RULES IN 2 IMPORTANT CASES

The NLRB decided two cases of importance to organized labor Aug. 26, just before the

expiration of Chairman Wilma B. Liebman's term at midnight, Aug. 27.

In *Lamons Gasket Co.*, 357 N.L.R.B. No. 72, 2011 WL 3916075, the board expressly overruled the 2007 decision in *Dana Corp.*, 351 N.L.R.B. 424, 2007 WL 2891099. The *Dana* decision re-established a recognition bar that blocks any challenge to a labor organization's majority status for a "reasonable period of time" following the employer's voluntary recognition of the union following a "card check."

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The new election rules will require employers to provide the union with a list of eligible voters and to provide phone numbers and email addresses when possible.

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The *Dana* decision had changed the law regarding voluntary recognition after a card check by providing for a 45-day period during which employees, or another union, could challenge the recognized union's majority status. The 45-day period started upon the employer's posting of an official NLRB notice informing employees of their newly created right to seek a secret ballot election.

Clarifying the phrase "reasonable period of time," the board concluded in *Lamons Gasket* that the recognition bar was no less than six months after the parties' first bargaining session and no more than one year.

During this period, no employer, employee or union may petition the NLRB for a secret ballot election, and the employer may not withdraw recognition from the union. The specific length of this voluntary recognition bar depends on a multiple factors, including:

- Whether the parties are bargaining for an initial contract.
- The complexity of the issues being negotiated and the parties' bargaining processes.
- The amount of time elapsed since bargaining commenced and the number of bargaining sessions.
- The amount of progress made in negotiations.
- How near the parties are to concluding an agreement.
- Whether the parties are at impasse.

The NLRB also reversed current law to provide a union with more protection from being removed due to a lack of majority support

after a new owner/successor employer buys the business. In *UGL-UNICCO Service Co*, 357 N.L.R.B. No. 76, 2011 WL 3916076 (Aug. 26, 2011), the board considered how long a union should have a presumption of majority status when the enterprise whose employees it represents is purchased by a new employer.

Where the purchaser becomes a "successor" employer (that is, it hires at least 51 percent of the seller's employees), it must recognize and bargain with the union. The successor,

however, does not always have to adopt the existing labor agreement and, in many cases, has the right to establish its own initial terms and conditions of employment and then bargain with the union for a new collective bargaining agreement.

The NLRB reversed existing law that held that with a successor employer, the union only enjoys a rebuttable presumption of majority support and that clear evidence that the union no longer had majority support justified the successor employer's refusal to recognize and bargain with the union.

Rather, the board resurrected the "successor bar" doctrine, providing the union with an irrebuttable presumption of majority support for a minimum of six months and a maximum of one year, measured from the date of the first bargaining meeting between the union and the successor employer.

In situations where the successor employer chooses to continue the existing terms and conditions of employment as the starting point for bargaining, the presumed majority support will be for six months. In situations where the successor employer exercises its right to reject existing terms and conditions and implement its own initial terms and conditions while bargaining proceeds, the presumed period of majority support will be no less than six months and no more than one year.

In determining when the presumption elapses, the NLRB will consider:

- The complexity of the issues being negotiated.
- The time elapsed since bargaining began.

- The number of bargaining sessions.
- The amount of progress made in the negotiations.
- How near the parties are to concluding an agreement.
- Whether the parties are at impasse.

## CONCLUSION

The NLRB could be limited soon in its efforts to help labor, foster collective bargaining and promote organized labor. With Liebman's departure, the board is now down to three members: newly designated Chairman Mark Pearce, Craig Becker and Brian Hayes. Becker's recess appointment to the NLRB will end in December.

The U.S. Supreme Court has held that the NLRB does not have the authority to issue decisions with fewer than three members. *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010). Thus, employers should be hopeful that Obama's pro-big-labor efforts will stall.

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