LABOR AND EMPLOYMENT

NLRB AMBUSH ELECTION RULE WITHSTANDS AN APPEAL

by James B. Perry

An employer-led challenge to the National Labor Relations Board's 2015 changes to union election rules has been rejected by the 5th U.S. Circuit Court of Appeals.

The rejection means that the controversial rule changes – which commentators have called the "quickie" or "ambush" election rules because they speed up the process of union elections – live on.

On Friday, June 10, 2016, a three judge panel of the 5th Circuit rejected an appeal by a group of employers to invalidate the NLRB's 2015 election rules. This decision refused to reverse the summary judgment granted to the NLRB by District Court Judge Robert L. Pitman.

The rules were adopted April 15, 2015 by a 3-2 majority of the NLRB members, along party lines. The new rules eliminated most of the reasons for pre-election hearings, and required employers to provide information to petitioning unions concerning the employees that it considers eligible voters, including their names, positions, shifts, work locations, email addresses, and cell phone numbers, before the parties reach an election agreement or an election is ordered.

The participants in the case are noteworthy. District Judge Pitman, who granted the original Summary Judgment, was appointed by President Obama. The employers were led by the Associated Builders and Contractors of Texas, Inc. The three Judge panel of the 5th Circuit consisted of Circuit Judges Edith Brown Clement and Catharina Haynes, both appointees of President George W. Bush, and District Court Judge Marina Garcia Marmolejo, an appointee of President Obama.

The 5th Circuit opinion, drafted by Judge Clement, illustrated the difficulty faced by litigants in challenging a rule promulgated by an administrative agency. The standard of review is highly deferential to the agency. Judge Clement's decision pointed out that, unless Congress has directly spoken to the issue in question, the Court should defer to the agency's reasonable interpretation of the statute. She explained that under the Administrative Procedures Act, a court can only set aside an agency rule or regulation if it is arbitrary, capricious, an abuse of discretion, or otherwise not supported in the law or by substantial evidence, on the whole record.

These new NLRB rules illustrate the power and authority granted to administrative agencies and emphasize that political elections matter. Employers should prepare to operate under the new rules. This means that employers who wish to communicate their opinions on unionization to their workforce should consider strategies to do that before a petition is filed. Also, each non-union employer should review its workforce to determine who has supervisory authority, and whether specific groups of employees should be combined with others in an appropriate voting unit. Our Labor and Employment Group has significant experience in this area and can assist with these issues.

FOR MORE INFORMATION CONTACT:

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