NLRB continues its aggressive posture

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The National Labor Relations Board (NLRB) continued its assault on private sector employers by recently taking two actions designed to encourage easier and faster union organizing.

NLRB DECISION

In a recent decision, *Purple Communications, Inc.,* the NLRB, based on underlying premises that "everyone uses email" and that email is akin to a "natural gathering place," ruled that it "will presume that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time."[2]

- Consider if the company has positions where it can meet the burden of placing restrictions on the use of email for non-work purposes as necessary to maintain production and discipline.
- Consider the restrictions necessary to provide for the efficient functioning of its email system.
- Consider limiting the employees who need access to email.

NLRB RULEMAKING

The NLRB also recently adopted new rules that govern representation case procedures. The "quickie" or "ambush" election rules, by which they are commonly referred by employers, include the following key changes:

1. Significantly shorten the median time from the filing of a representation petition to a vote from the present 42 days to 14-21 days — and perhaps as few as 10 days.
2. NLRB Regional Directors typically will hold pre-election hearings much sooner now —typically on the eighth day after service of a hearing notice on the employer, which can be served electronically under the new rules.
3. By noon of the seventh day after filing of the representation petition, employers must file a written position statement, which must include all legal issues and objections the employer seeks to raise about the petition/proposed bargaining unit. Failure to raise an issue constitutes a waiver by the employer from presenting evidence on the issue at the hearing. The position statement must include a list of all prospective voters with job classifications, shift and work location as well as name and home address. Thus, within a week of filing the petition, the union will have employee contact information.
4. If the employer objects to the proposed bargaining unit as not appropriate, then it must identify in its position statement the bargaining unit it argues is appropriate. Failure to object to the proposed unit constitutes a waiver by the employer.
5. Issues previously resolved pre-vote now will be resolved post vote — if necessary, including which employees are eligible to vote (as long as the eligibility dispute affects less than 20 percent of the group). Thus, employees likely will be voting without knowing if they are *in* or *out* of the bargaining unit.
6. Employers must provide the union employees' personnel email addresses and telephone numbers in addition to home addresses. Employees cannot stop these disclosures.
7. Instead of the present seven days to provide voting lists, employers will have two business days.

Unless the new rules are enjoined pending the legal challenge filed by several national trade associations, they take effect April

14, 2015. These new rules provide employers very little time to campaign against a union once a representation petition is filed, and the new procedural requirements are unilaterally burdensome on employers.

Employers must actively plan now to establish pro-employer programs to educate their employees about unions and the lack of need for them in the employer's workplace, before the employer is a target of a union organizing campaign. Additionally, employers should review their current operations for the appropriateness of potential bargaining units and whether leads and first-line supervisors meet the National Labor Relations Act's definition of supervisor. With the time between the filing of a petition and election shortened to 10-21 days, employers faced with a petition under the new rules will have lots to do and little time.

Footnotes

- Public-sector employers should be mindful of any notice-and-consent requirements that may affect privacy rights, and workplaces with collective bargaining agreements should consider any contractual requirements affecting workplace monitoring.

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