YOUNG CONAWAY STARGATT & TAYLOR, LLP
Attorneys at Law

Employment Law eAlert

NLRB Gone Wild - Update December 16, 2014

Earlier this year we alerted employers that this has been a year of radical decisions from the National Labor Relations Board (the "Board" or the "NLRB"), nearly all favoring unions and employees. We also warned employers that with the appointment of new members and a new General Counsel, the Board was poised to use its ruling making power in addition to its quasi-judicial authority to assist unions in organizing employees. Last week the Board took two major steps to assist union organization efforts.

"Quickie Election" Rules

The NLRB issued its so-called quickie election rules in 2012, only to have a Court invalidate them based on the Board's failure to have a quorum for the vote adopting the rules. The NLRB initially appealed the decision, but subsequently withdrew its appeal.

With a newly reconstituted Board, earlier this year the NLRB once again issued pro-union "Quickie Election" Rules. The Board held public hearings in April to solicit comments from interested parties. Not surprisingly, the Board paid little attention to comments by employers opposing the rules or suggesting modifications. Last week, on December 12, 2014, the Board issued its largely unchanged Quickie Election Rules. The new rules require:

- Acceleration of pre-election hearings. The regional director generally will set a pre-election hearing to be held eight (8) days after the petition for an election is filed. Hearings on post-election issues generally will be set fourteen (14) days after the filing of objections.
- Filing of position statements on a variety of legal issues on or before the hearing date. Issues not identified in the position statement are waived.
- Elections to be scheduled at the earliest practicable date, perhaps as quickly as ten (10) days but more likely around three (3) weeks after the petition.
- Employers to provide employee contact information, including e-mail addresses and phone numbers.
- Limitations on the issues that an employer may litigate before

The Attorneys Of The Employment Law Department

Barry M. Willoughby
William W. Bowser
Margaret M. DiBianca
Scott A. Holt
Lauren M. Russell
Sheldon N. Sandler
Michael P. Stafford

an election, including voter eligibility issues.
- Requests for review to be filed in post-election proceedings rather than before the election.

The new rules will be published in the Federal Register on December 15, 2014, and will take effect on April 14, 2015, absent a successful challenge.

Employee Access to Company Email Systems for Organizational Purposes

The day before issuing new pro-union election rules, the Board overturned its decision in a case called *Register Guard* decided in 2007. In that case, the NLRB held that employees have no statutory right to use their employer's email systems for "Section 7 purposes" such as organizing. The Board requested comments earlier this year on the continued vitality of *Register Guard* in connection with a pending case, *Purple Communications, Inc.* It therefore came as no surprise that the Board overturned *Register Guard* giving employees broad access to employer email systems for organizational and other purposes.

In Purple Communications, Inc., the Board ruled that during non-working time, employees must be presumptively permitted to use their employer's email system when the employer has chosen to give them access to its email system for matters unrelated to work. In other words, if an employer has allowed its employees to use its email system for non-work related reasons (i.e., incidental personal use), then an employer must also allow those employees to use its email system for union-related communications and other purposes protected by Section 7 ("protecting concerted activity") of the Act. An employer who allows incidental personal use of its email system may consider completely banning non-work related use if it can point to "special circumstances" warranting such a prohibition. As a practical matter, however, few employers are going to adopt such a total ban.

Bottom Line

The NLRB issued a number of aggressive, pro-employee decisions in 2013. As predicted, in 2014, the NLRB has not only continued this trend, but also is using its rule-making authority as tool to implement pro-union policies that were initially proposed as legislation but failed to pass Congress.

The Board's individual case decisions augmented by its ruling-making pronouncements show that, although divided 3 to 2 along party lines, the NLRB is decidedly pro-union and will do everything in its power to assist unions in organizing employees.

For additional information, please contact Barry M. Willoughby, Esquire at 302-571-6666 or bwilloughby@ycst.com.