An Excerpt From:

K&L Gates Global Government Solutions® 2012: Annual Outlook

January 2012

K&L GATES

Labor Unions Gain Support Through Administrative Actions

During the 2008 presidential campaign, then-candidate Barack Obama pledged his continued support for the Employee Free Choice Act (EFCA), a bill he had co-sponsored in the Senate. The EFCA would have made it easier for labor unions to organize private sector workforces in the United States by, among other things, allowing unions to be certified as the exclusive bargaining representative of a workforce based on authorization cards presented by the union and without the need for a secret ballot election. The EFCA was controversial and met with stiff resistance in Congress. In a question-and-answer session on September 13, 2010, President Obama stated that while his administration continued to support the EFCA, its likelihood of passage that term was "not real high," since, "[f]rankly, we don't have 60 votes in the Senate" to pass it. Instead, President Obama told the group that his administration was trying to do "as much as we can administratively to make sure that it's easier for unions to operate and that they're not being placed at an unfair disadvantage." In other words, what the Obama administration was unable to accomplish through the legislative process it was attempting to accomplish administratively.

Since the president gave those remarks in September 2010, the National Labor Relations Board (NLRB or Board), the agency that administers federal law governing private sector employer-union relations in the United States, has taken a number of unprecedented steps in apparent fulfillment of this directive to make it easier for unions to organize employees.

Proposed Rulemaking to Speed Up Elections

One way the Board has attempted to promote private sector unionization is through a proposed rule designed to speed up the secret-ballot election process. The NLRB allows a union to become the exclusive representative of a group of employees only upon a showing that a majority of the employees in an appropriate unit wish to be represented by that union. The process by which the NLRB determines majority support normally begins when a union files a petition with the NLRB. After an investigation, the Board's regional office conducts a secret ballot election to determine if a majority of employees in the unit wish to be represented by the union. In cases where parties do not agree on terms of the election, the Board's regional office will conduct a pre-election hearing and, if necessary, conduct a post-election hearing to resolve challenges to voters or objections to the conduct of the election.

On June 21, 2011, the NLRB proposed a rule that would dramatically shorten the time between the filing of a union's election petition and the election by curtailing the ability of employers to be heard on pre-election and post-election disputes. Current Board procedures provide for no strict time periods in which hearings on such disputes must be conducted, because the scope and complexity of the issues involved will vary from case to case. However, the proposed rule would require the Board's regional directors to set a pre-election hearing to begin seven days after the hearing notice is served, and a post-election hearing to begin 14 days after the tally of ballots. The proposed rule also would limit the ability of employers to obtain administrative review of disputed pre-election and post-election rulings by the regional director.

The Board's only Republican member, Brian Hayes, sharply dissented from the proposed rule. He cited the Board's expeditious performance in most representation cases and noted that delays were the exception rather than the norm. In fact, for fiscal year 2010, the median time to proceed from the filing of the petition to the election was 38 days (below the Board's target of 42 days), and more than 95 percent of all initial representation elections had been conducted within 56 days of the filing of the election petition (surpassing the Board's target of 90 percent). However, Hayes argued that "by administrative fiat in lieu of Congressional action, the Board will impose organized labor's much sought-after 'quickie election' option, a procedure under which elections will be held in 10 to 21 days from the filing of the petition." He expressed the concern that the change would effectively deprive employers of a legitimate opportunity to express their views to employees about unionization prior to an election.

The NLRB's proposed rule also met with opposition in Congress. On November 30, 2011, the U.S. House of Representatives passed a bill that would effectively block the proposal. Among other things, the bill would require that no union election take place in fewer than 35 calendar days after the filing of an election petition. The bill would also provide that the first election hearing not take place until at least 14 calendar days after the filing of the petition.

The NLRB has not given up on its proposed rule. On November 30, 2011, the same day that the House bill was passed, the NLRB voted 2-1 (with Hayes again dissenting) to approve a resolution adopting a scaled-back version of its original proposal. The scaled-back version, scheduled to take effect on April 30, 2012, will limit the ability of employers to file pre- and post-election challenges to disputed rulings by the regional director but will not incorporate those portions of the original proposal that would shorten the election process. Nonetheless, the scaled-back version is the subject of a lawsuit filed by the U.S. Chamber of Commerce seeking to block its implementation.

Aggressive Pursuit of Injunctive Relief

The Board is also promoting private sector unionization through its aggressive pursuit of injunctive relief in organizing campaigns. Section 10(j) of the National Labor Relations Act authorizes the Board to petition a United States District Court for injunctive relief upon issuance of an administrative complaint alleging that an unfair labor practice has occurred. Historically, the NLRB has exercised its discretion to seek Section 10(j) relief sparingly, generally reserving petitions for such injunctions only for extraordinary cases. However, on September 30, 2010, the acting general counsel of the NLRB announced a new initiative to pursue Section 10(j) injunctive relief in all cases in which the NLRB contends that an employee was unlawfully discharged during a union organizing campaign. This change in enforcement policy has been accompanied by a marked increase in Section 10(j) actions. Whereas the NLRB filed a total of 86 Section 10(j) petitions for injunctive relief for the four-year period covering fiscal years 2007 to 2010 (an average of 21.5 per year), it filed a total of 45 such petitions in fiscal year 2011 alone. With this change in enforcement policy, the Board is now wielding its considerable power to seek Section 10(j) injunctive relief in further support of union organizing campaigns.

New Posting Requirements

The Board is also advancing union activity through a new posting requirement. Now scheduled to be effective on April 30, 2012, this rule is facing several legal challenges, including a suit by the U.S. Chamber of Commerce. If it survives, most private employers will be required to post a notice advising employees of their rights under the National Labor Relations Act. Among other things, the notice advises employees of their right to (1) organize a union; (2) form, join, or assist a union; (3) bargain collectively through representatives of their own choosing for a contract setting wages, benefits, hours, and other working conditions; (4) discuss union organizing, wages, and other terms and conditions of employment with co-workers or a union; (5) take action with co-workers to improve working conditions by raising complaints with the employer or a government agency and seeking assistance from a union; (6) strike or picket, depending upon the purpose or means of the strike or picket; and (7) choose not to do any of the above. The notice also advises employees that it is illegal for the employer to prohibit them from talking about a union during non-work time or distributing literature during non-work time in non-work areas. Similarly, it states that it is illegal for a union to threaten or coerce them to gain support.

The notice must be posted in a conspicuous place where other notices are displayed. It must also be linked to any internal or external website where other notices are posted.

Conclusion

The Democratic-controlled NLRB has taken a number of steps in apparent fulfillment of the president's directive to make it easier for labor unions to organize workers. It has proposed rules that would dramatically speed up the secret-ballot election process; it is aggressively pursuing federal court injunctions where unfair labor practices have been alleged in union organizing campaigns; and it has imposed a new posting requirement. These and other actions by the NLRB pose significant challenges for private sector employers in the United States seeking to resist union organizing in their workplaces. The transformation of the NLRB from an impartial enforcer of national labor law into an advocate for unionization will likely continue, and perhaps intensify, until after the 2012 election.

Rosemary Alito (Newark)
rosemary.alito@klgates.com

George P. Barbatsuly (Newark)
george.barbatsuly@klgates.com

K&L GATES

Anchorage Austin Beijing Berlin Boston Brussels Charleston Charlotte Chicago Dallas Doha Dubai Fort Worth Frankfurt Harrisburg Hong Kong London Los Angeles Miami Moscow Newark New York Orange County Palo Alto Paris Pittsburgh Portland Raleigh Research Triangle Park San Diego San Francisco São Paulo Seattle Shanghai Singapore Spokane Taipei Tokyo Warsaw Washington, D.C.

K&L Gates includes lawyers practicing out of 40 offices located in North America, Europe, Asia, South America, and the Middle East, and represents numerous GLOBAL 500, FORTUNE 100, and FTSE 100 corporations, in addition to growth and middle market companies, entrepreneurs, capital market participants and public sector entities. For more information about K&L Gates or its locations and registrations, visit www.klgates.com.