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Client Alert:
Labor and Employment

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Court Invalidates NLRB's Representation Election Regulation

April 30, 2012 was the effective date for the National Labor Relations Board's regulation to streamline representation election procedures – the so-called "ambush" or "quickie" election regulation.

On May 14, 2012, however, a federal court invalidated the NLRB's regulation on the ground that a quorum of NLRB members did not exist when the NLRB voted to adopt the final rule in December 2011. Three members are required for a quorum of the NLRB. Member Hayes did not vote on the final rule, while Chairman Pearce and Member Becker voted to adopt it. The court stated: "Two members of the Board participated in the decision to adopt the final rule, and two is simply not enough." Because there was not a quorum, the NLRB "lacked the authority" to issue the regulation, which "cannot stand." Consequently, "representation elections will have to continue under the old procedures" that were in effect before April 30, 2012.

The court did not rule on any of the other legal challenges to the NLRB's regulation. It noted that "it may well be that, had a quorum participated in its promulgation, the final rule would have been found perfectly lawful." This statement means that the NLRB may seek to vote again to adopt the regulation with a quorum of three NLRB members participating in the vote.

When the NLRB votes again to adopt the regulation, however, the validity of that vote will be subject to challenge on the ground that the President's recess appointments of three of the current NLRB members were unconstitutional because the Senate was not in recess at the time of the recess appointments. If those recess appointments are found to be unconstitutional, then a valid quorum of three NLRB members would not exist to vote again to adopt the regulation or, for that matter, to issue any decisions or to vote on any other regulations.

To summarize, the court's invalidation of the regulation due to the lack of a quorum means that, for now, the pre-April 30th election procedures will continue to be used. Yet the court's decision does not end the controversy over the regulation. The NLRB can be expected to appeal the decision. Also, if the NLRB votes again to adopt the regulation with a quorum that includes the three recess-appointed NLRB members, the court's decision increases the likelihood that the constitutionality of the three recess appointments will be addressed in a later decision.

The court's invalidation of the NLRB's regulation about representation election procedures is the second major setback that the NLRB has suffered in the past month. In April, a federal appeals court enjoined the implementation of the NLRB's requirement that private sector employers post a notice about employee rights under the National Labor Relations Act, pending the appellate court's decision on the validity of that requirement. As a result of these two decisions, neither of these controversial initiatives of the current pro-union NLRB has taken effect yet.

While employers do not yet have to post the NLRB's notice about employee rights and are not now subject to the NLRB's "ambush" election regulation, the current NLRB's activism in support of union organizing efforts means that employers should be reviewing and enhancing their policies and programs for remaining union-free. An employer, among other actions, should engage in the following preventive measures:

- Adopt a union-free plan
- Publish a union-free policy
- Ensure that its work rules and employment policies comply with NLRB decisions
- Train its supervisors and managers to be effective leaders in a union-free workplace
- Conduct a union vulnerability audit
- Conduct an employee opinion survey
- Institute programs to develop and maintain positive employee morale

If you have any questions about this decision or what union-free employers should be doing now, please contact your Butzel Long attorney or the author of this Client Alert.

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