COALITION FOR A
DEMOCRATIC WORKPLACE

‘Back Door’ Card Check

Regulatory Action to Strip Rights from Workers and Cause Confusion

The National Labor Relations Board (NLRB) has grabbed headlines in recent months for its outrageous attempt to mandate where and how one company—Boeing—can operate and expand its business. As the *Washington Post* noted, the NLRB’s attack on Boeing “substitutes the government’s judgment for that of the company and this is neither good law nor good business.” Yet, the NLRB’s actions toward Boeing and its employees are the just the tip of the iceberg. The Department of Labor (DOL) and the NLRB both have released proposed rules that are designed to work in concert to deny employees crucial information about union representation, limit employers’ free speech and create legal pitfalls for small business owners facing union organizing drives. At the same time, the NLRB recently issued decisions stripping employees of the right to secret ballots and allowing micro-unions, which would permit organizers to gerrymander elections. At a time of 9.2% unemployment, these regulatory agencies will cause greater economic uncertainty and effectively deprive workers of the information they need to make an informed choice about union membership.

Stripping Worker Rights to Secret Ballots

On August 27, the Board issued its decision in *Lamons Gasket*. The *Lamons* case reversed an earlier ruling that essentially guaranteed employees voting rights by allowing employees to obtain a secret ballot election within 45 days of their employer’s recognition of a union based on card check. The Obama NLRB has stripped employees of this right and ruled workers may not petition for a secret ballot election following recognition based on card check for a period of time. The end result is that employees may be effectively denied the right to a secret ballot for years.

Micro-Unions

The much-anticipated decision in *Specialty Healthcare,* which was issued the same day, is even worse. The ruling paves the way for union organizing of micro-units allowing gerrymandering of union elections. The impact on employers, employees and the economy will be devastating with potential explosion of “micro-unions” within an entire workforce or across multiple locations, making it easier for unions to cherry-pick the unit of employees most likely to support the union and separate it from co-workers, effectively disenfranchising them. For example, a union may choose to organize poker dealers at a casino, rather than all dealers, because it knows the poker dealers support the union, while the blackjack, craps, roulette and other dealers may not. Similarly, a union may organize a small group of employees working on one machine rather than all machinists in a manufacturing facility, because the majority of machinists do not want union representation. These fractured units also would greatly limit an employer's ability to cross train and meet customer and client demands via lean, flexible, staffing as employees could not perform work assigned to another unit. The impact on business productivity and competitiveness would

be significant. Employees also would suffer from reduced job opportunities as promotions and transfers would be hindered by organization-unit barriers.

Ambush Elections & Erosion of Worker Privacy

- NLRB's proposed Ambush Election rule shortens the time for union elections to as little as 10 days. Comments were due August 22, with replies to initial comments due September 6, 2011. The rule will go into effect sometime thereafter.

- The shortened time frame will effectively deprive employees of the ability to hear from their employer before making a decision about union representation. Union organizers, however, meet with employees and campaign for months in advance before an election petition is filed. As a result, employees will only hear one side of the story—the union's—before having to cast their vote for or against representation.

- The proposal squeezes small business owners, who lack the resources and legal expertise to navigate and understand the union election process within such a short time frame.

- The proposal also imposes a new requirement where employers would have to turn over employee personal telephone numbers and email addresses to union organizers.

- There is no need to change the current election time frames as they are reasonable and permit employees time to make an informed decision, which would not be possible under the NLRB's new proposal. The NLRB's own statistics reveal that in 2010, the average election timeframe was 31 days, with over 95% of elections occurring within 56 days.

- The number of NLRB elections held in 2010 increased over 20% from 2009 levels, with 1,666 elections in 2010 versus 1,321 in 2009. The union win rate decreased slightly in 2010, to 67.6% versus 68.7% the previous year. 2010 is the 14th year in a row that unions have won more than half of all NLRB elections. With unions winning the majority of secret ballot elections, the system is clearing working, thus illuminating the real reason for the proposal of the rule: big labor payback for EFCA's failure.

- An employer's right of free speech and opportunity to express its views—under Section 8(c) of the NLRA—on the subject of unionization is severely undermined by the proposed regulations.

Gag Order on Employers

- DOL's proposed rulemaking on persuader activity would change the public disclosure requirements for employers, law firms, consultants, and trade associations that provide services regarding labor relations and union organizing.

- Current law requires reporting for employers, consultants and law firms, where the law firm or consultant directly "persuades" or interacts with employees. The law provides an exemption, however, when a law firm or consultant simply provides advice without directly interacting with employees.

- The proposed change virtually eliminates the "advice exemption," so that businesses would have to provide detailed and confidential information, including possibly proprietary information about business operations and details about contracts for services, including legal services. Activities that would trigger the reporting requirement are expansive and include training for management and supervisors, employee handbooks and documents prepared by attorneys, and materials provided by at conferences or by trade associations.

- Failure to report or filing false or incomplete reports subjects the employer, consultant or law firm, or trade association to civil and criminal penalties.

- The proposed rule will severely limit an employer's access to legal advice and counsel, and "chill" employer free speech, which will have the effect of preventing employees from hearing both sides of the unionization debate.