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# Congress of the United States

## U.S. House of Representatives
## Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6315

Memorandum

To: Members, House Committee on Small Business
From: Professional Staff
Date: October 5, 2011
RE: Hearing: *Adding to Uncertainty: The Impact of DOL/NLRB Decisions and Proposed Rules on Small Businesses.*

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*Introduction:*

On Wednesday, October 5, 2011 at 1:00 p.m., the House Small Business Committee will conduct a hearing titled: *Adding to Uncertainty: The Impact of DOL/NLRB Decisions and Proposed Rules on Small Businesses.* The hearing will take place in room 2360 Rayburn House Office Building.

The hearing will examine recent proposed rules by the Department of Labor (DOL) and National Labor Relations Board (NLRB) and how these add to the uncertainties faced by small businesses. Specifically, the hearing will examine proposed rules that would impact the ability of small business employers to communicate their views on unionization to their employees and other provisions that may disadvantage small businesses in union organizing drives. It will also examine two recent case decisions by NLRB that groups representing small businesses contend could undermine the rights of employees to request secret ballot elections on union representation as well as allow for the formation of so-called micro-unions.

## I. Background on the National Labor Relations Act

The National Labor Relations Act (NLRA)[1] guarantees the right of certain private sector workers to join or form unions to bargain over workplace issues including, but not limited to, compensation and working conditions. The law outlines the rights and expectations of employees, employers[2] and unions in organization drives.

The National Labor Relations Board (NLRB) is an independent agency that administers the NLRA. The NLRB, the office of General Counsel and the staff of NRLB regional offices

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[1] Pub. L. No. 74-198, 49 Stat. 452, codified at 29 U.S.C. §§ 151-169 (1935).

[2] The Taft-Hartley Act of 1947 (Pub. L. No. 80-101) amended the NRLA to, among other provisions, permit employers to express their views on unionization to their employees.

enforce the Act and settle disputes over elections, decide questions regarding the composition of bargaining units and hear complaints of unfair labor practices.[3]

The law permits unionization through one of three modes:

1) An employer voluntarily recognizes a union as the collective bargaining agent of employees in a bargaining unit;[4]

2) Through the holding of a secret ballot election once 30 percent or more of workers in a bargaining unit sign cards indicating their desire for union representation; or[5]

3) In cases where the NLRB decides that the employer has engaged in unfair labor practices that prevent a fair election from occurring.

Each process has certain advantages and disadvantages for the parties involved. Under current law, unions that are voluntarily recognized by an employer as the collective bargaining agent may be subject to a secret ballot decertification election if 30 percent of employees request one within 45 days of being noticed of the recognition.[6] On the other hand, unions that are certified by NLRB through a secret ballot election of a majority of employees may not be subject to a decertification petition for at least one year following the election.[7] NLRB's proposed rulemaking changes to this process are discussed further in this memorandum.

## III. The Use of Secret Ballots in Union Certification and Decertification Elections

The NLRA gives employers, employees and unions the right to request an NLRB supervised secret ballot election to settle questions of representation. Unions that have compiled authorization cards from at least 30 percent of workers in a bargaining unit may request a secret ballot election supervised by NLRB if the employer does not offer voluntary recognition.[8]

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[3] Pub. L. No. 74-198, 49 Stat. 452, codified at 29 U.S.C. §§ 151-169 (1974).

[4] *Id.* at ___. A bargaining unit is broadly defined as a group of employees that share a community of interest based on their having the same or similar interests with respect to wages, hours and working conditions.

[5] 29 C.F.R. 101.18.

[6] 351 NLRB 28.

[7] 29 U.S.C. 159 (c) (3).

[8] N.L.R.A., *supra* note 5.

Similarly, employers may request an NLRB supervised election in cases where a union has claimed a majority of employees in a bargaining unit have signed authorization cards.[9]

Secret ballots may also be requested by employees seeking to decertify a union as their collective bargaining agent.[10] The process for decertifying a union through a secret ballot election is similar to the process of seeking a secret ballot certification election: 30 percent of employees in a bargaining unit sign authorization cards or petitions requesting the election.

Advocates of secret ballot elections believe that the anonymity they provide are the truest means of gauging employee preference and intent.[11] These parties contend that in certain cases, employees signing authorization cards have only done so at someone's request or because they fear retaliation by a union, coworkers, family members, and community organizations endorsing the organization drive. There may also be cases where employees wishing union representation do not sign cards for similar reasons. NLRB has also previously found reason to question whether card check reflects an employee's true preference.[12]

## IV. The Impact of NLRB Case Decisions and Proposed Rules on Employee Access to Secret Ballot Elections and Union Composition: *Lamons* and *Specialty Healthcare.*

Small businesses have expressed concerns about two recent NLRB decisions that could significantly disadvantage them in responding to union organization drives, as well as weaken an employee's right to vote on union representation by secret ballot.

**Lamons Decision:** On August 26, 2011, the NRLB issued a decision in *Lamons Gasket Company (Lamons)*[13] related to employee rights to request a secret ballot decertification election when an employer voluntarily recognizes a union. The decision reversed a previous NLRB decision known as *Dana Corp.*

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[9] N.L.R.A., *supra* note 3, at §159 (c) (1).

[10] Unions may also request a decertification election if they no longer wish to represent employees.

[11] NATIONAL FEDERATION OF INDEPENDENT BUSINESS, Legal Center, Case Index, *available at* http://www.nfib.com/legal-center/case-index/case-index-item/cmsid/57874.

[12] *Id.*

[13] Lamons Corp. 357 N.L.R.B. 72 (2011) *available at* http://www.nlrb.gov/cases-decisions/case-decisions/board-decisions.

Under *Dana*, an employee in the bargaining unit could request a secret ballot decertification election within 45 days of their employer's voluntary recognition of the union by card check. Before *Dana*, the NLRB only required that "a reasonable period of time" had passed before a union decertification election could be held.[14]

The *Lamons* decision eliminated this 45-day window and instead restricts petitions for a secret ballot decertification election no sooner than 6 months after the first bargaining session, or no more than one year.[15] The rule may also prevent the petition for as long as four years in cases where an employer and union agree to a contract.

Small businesses may be concerned that employees who signed cards indicating union representation may have only done so at the request of the union, a co-worker, a family member or community organization endorsing the election drive and should have the opportunity to choose union representation by secret ballot. In one in four cases, employee at firms where an employer voluntarily recognized a union have voted for decertification by secret ballot.[16]

**Specialty Healthcare Decision:** On the same day, August 26, 2011, the NLRB issued a decision in *Specialty Healthcare and Rehabilitation Center of Mobile*[17] *(Specialty Healthcare)*. In this decision, NLRB changed the standard for determining the scope of a collective bargaining unit allowing petitioners to claim a narrower definition of community of interest. Critics of this decision contend narrowing the definition of community of interest within a firm will allow unions to organize bargaining units of subsets of similarly situated employees leading to the creation of so-called micro-unions.

Small businesses may be concerned that this decision could require them to negotiate and bargain with multiple unions representing or seeking to represent similarly situated employees, overwhelming the capacity of smaller businesses with that lack the administrative capacity of their larger rivals.[18]

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[14] Dana Corp., 351 NLRB 28 (2007).

[15] Lamons, *supra* note 13, at Page 10.

[16] *Id.* at 13.

[17] Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB 83 (2011) *available at* http://www.nlrb.gov/cases-decisions/case-decisions/board-decisions.

[18] Policy Paper, COALITION FOR A DEMOCRATIC WORKPLACE, Obama Administration Forcing EFCA by Regulatory Edict Economic Study Suggests Job Loss in Millions 4 (2011), *available at* *http://myprivateballot.com/wp-content/uploads/2011/05/NLRB-DOL-Rulemaking-Specialty-Policy-Paper-September-2011.pdf.*

## V. The Impact of NLRB Proposed Rules Related to Secret Ballot Elections and Due Process Rights for Employers

On June 22, 2011 the NLRB issued a Notice of Proposed Rulemaking (NPRM)[19] that critics contend would make substantial changes to the union election process, severely weaken an employer's right to communicate their views on unionization to their employees, and undermines the ability for small businesses to contest pre-election issues before the NLRB. Below are some concerns small businesses have raised over the NPRM.

### 1) Truncated Election Schedules and Employers Communications Rights

Under the rule, the time between when a union files a petition for an election and when the election takes place could be reduced to between 10 to 21 days.[20] NLRB justified this rule as necessary to reduce the amount of time between when a union files a petition for an election and an election is held. While the median time frame between a petition and election is 38 days, and 95.1 percent of all elections have occurred within 56 days of filing a petition, there have been cases where the process has taken substantially longer.[21]

Small businesses worry that this new truncated time period reduces the ability of employers to communicate their views on unionization to their employees, as guaranteed by the Labor Management Relations Act[22] and is unnecessary to address those few outlier cases where an election took more than the 38-day median.

They further contend that unions sometimes spend months secretly communicating with employees in a bargaining unit they wish to organize.[23] Small business employers, on the other hand, may only learn of these activities after a union has presented signed cards to an employer seeking recognition as the collective bargaining agent of workers in the unit, or when a union files a petition for a secret ballot election. Small businesses further claim that ten days is too little time for small businesses to: 1) familiarize themselves with the arcane and complex aspects of rules related to communicating their views to employees; 2) find and hire a third-party

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[19] 76 Fed. Reg. 36,812, *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-06-22/pdf/2011-15307.pdf.

[20] Policy Paper, COALITION FOR A DEMOCRATIC WORKPLACE, 'Back Door' Card Check: Regulatory Action to Strip Rights from Workers and Cause Confusion (2011), *available at* http://myprivateballot.com/research/.

[21] Performance and Accountability Report, FY 2010, National Labor Relations Board 32, *available at* http://www.nlrb.gov/sites/default/files/documents/189/par2010.pdf.

[22] Pub . L. No. 80-101, 61 Stat. 136, codified at 29 U.S.C §§ 151-169 (1947) at §158.

[23] COALITION FOR A DEMOCRATIC WORKPLACE, *supra* note 18, at 8.

consultant or law firm to assist them with this effort,; and 3) adequately communicate their views, especially when a union may have had months to get their message across.[24]

**2) Restrictions on Employer Due Process**

Critics of the NPRM also claim it undermines the due process rights of employers to request a pre-election evidentiary hearing before the board on contested issues, including the size and scope of the bargaining unit, voter eligibility and election misconduct.[25] Under the NPRM, businesses would have no more than seven days to file a Statement of Position listing all of their objections to the election petition after which they would be permanently barred from raising any new issues, no matter how relevant.[26]

Small businesses employers would also be barred from contesting the eligibility of certain voters unless they can demonstrate that these workers amount to less than 20 percent of the proposed bargaining unit.[27]

Small businesses claim that seven days is an inadequate amount of time for an employer to identify and retain legal counsel, much less work with counsel to identify all relevant issues and objections to a petition.

**3) NLRB's Compliance with the Regulatory Flexibility Act**

Some question the adequacy of DOL's compliance with the Regulatory Flexibility Act (RFA).[28] The RFA[29] requires agencies to conduct an Initial Regulatory Flexibility Analysis (IRFA) of their proposed rules to determine the number of small entities likely impacted, the likely economic impacts to small entities, particularly as they compare to larger businesses, as well as identify the availability of less burdensome alternatives to the proposed rule, if practical.

In its IRFA on the scope of small businesses impacted, NLRB simply divided the number of petitions and elections by the total number of private businesses of all sizes to reach a conclusion

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[24] COALITION FOR A DEMOCRATIC WORKPLACE, *supra* note 18.

[25] *Id.*

[26] 76 Fed. Reg. 36,812, *supra* note 19, at 36,823.

[27] *Id.*

[28] U.S. CHAMBER OF COMMERCE, Comments on Representation -Case Procedures Proposed Rule 56, *available at* http://www.uschamber.com/sites/default/files/comments/US%20Chamber%20NLRB%20Response%20Comments%209-6-11.pdf.

[29] Pub. L. No. 96-354, 94 Stat. 1164 (1994), codified at 5 U.S.C. §§601-612 at 603.

that few entities would be impacted.[30] In reality, a substantial number of the 96 percent of all private businesses that the IRFA acknowledges are small businesses are covered entities according to the NPRM.[31] The NLRB simply assumes that an employer not currently subject to a union organization petition or drive is not a covered entity.

The IRFA also fails to properly account for the economic costs to small businesses. The rule includes a notice posting and electronic distribution requirements, but attempts no calculation as to the expected costs to employers in time and resources.[32] The IRFA also fails to consider the economic burdens imposed by the seven day maximum time frame between when a petition for an election is filed and a pre-election hearing is scheduled. The pre-election hearing requires a small business to file a Statement of Position contesting all relevant pre-election issues after which the small business waives the right to address any additional pre-election issues, no matter how relevant. The IRFA to the rule simply assumes that a business that wants to avoid the economic cost in preparing a Statement of Position could enter into an election agreement with a union.[33]

Finally, the IRFA failed to account for how small businesses would respond to the truncated time frames between when a petition is filed and an election is held. As a result of the NPRM, employers may feel compelled to dedicate time and resources to familiarize themselves and senior staff on NLRB practices as a hedge against the possibility of a union organization attempt.[34]NLRB simply assumes that a business not subject to an organizing drive would not incur these expenses.

## VI. The Department of Labor's Labor-Management Reporting and Disclosure Act Advice Exemption Interpretation Rule

On June 21, 2001, the Department of Labor (DOL) issued a NPRM[35] calling for new reporting requirements that some believe are intended to put a chill on small business' use of attorneys for legal advice in union organizing campaigns. The Labor-Management Reporting and Disclosure Act (LMRDA)[36] requires employers and third party organizations hired by the businesses to

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[30] 76 Fed. Reg. 36,812 at 36,833.

[31] 76 Fed. Reg. 36,178 at 36,833

[32] *Id.* at 36,834.

[33] *Id.*

[34] U.S. CHAMBER OF COMMERCE, *supra* note 28, at 57.

[35] 76 Fed. Reg. 36,178, *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-06-21/pdf/2011-14357.pdf.

[36] 29 U.S.C. §§401-531 at Section 401 (1985).

communicate their views on unionization to employees to disclose these activities to DOL.[37] The purpose of the law is to ensure that third parties do not engage in unfair labor practices on behalf of employers.

Since at least 1962, the DOL has recognized an exemption for legal advice that attorneys provide to employers, including preparing speeches and written communications that "can reasonably be regarded as a form of written advice where it is carried out as part of a bona fide undertaking which contemplates the furnishing of advice to an employer."[38] The Donahue Memorandum extended the advice exemption to include activity that included direct advice to an employer and indirect communication to employees.[39]

The DOL's proposed rule would define any attorney communication that an employer may provide to employees as persuader activity, requiring reporting under Section 203(a) of the LMRDA.[40] The rule would require employers and attorneys to disclosure information otherwise protected by attorney-client privilege including the existence of the client-lawyer relationship, the nature of the legal representation, fee arrangements and a description of the legal tasks performed.[41] Failure on the part of covered entities to report these communications could result in criminal and civil penalties.[42]

In written comments on the rule, the American Bar Association wrote: "the proposed rule would essentially nullify the advice exemption contained in the statute," and "could seriously undermine both the confidential client-lawyer relationship and the employer's fundamental right to counsel."[43] These concerns have been echoed by organizations representing small businesses.[44]

Small businesses may be concerned that, in addition to additional compliance costs and burdens, narrowing the advice exemption would impose additional burdens on themselves and attorneys,

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[37] 29 U.S.C. §§401-531 at Section 433 (1985).

[38] *Id* at 434.

[39] 76 Fed. Reg. 36,178 at 36,191, *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-06-21/pdf/2011-14357.pdf.

[40] COALITION FOR A DEMOCRATIC WORKPLACE, *supra* note 18 at 9.

[41] AMERICAN BAR ASSOCIATION, Comments Regarding the Department of Labor Proposed Rule on the Labor-Management Reporting and Disclosure Act; Interpretation of the Advice Exemption 1-2, September 21, 2011.

[42] 29 U.S.C. §439.

[43] AMERICAN BAR ASSOCIATION, *supra* note 41.

[44] NATIONAL FEDERATION OF INDEPENDENT BUSINESS, *Comments Regarding the Labor-Management Reporting and Disclosure Act: Interpretation of the 'Advice' Exemption*, September 20, 2011.

making it more difficult to find a qualified attorney willing to provide them with legal services.[45] Trade associations representing small business have also expressed reservation that the NPRM could make such activities as "positive employee relations videos, webinars, seminars, and materials and newsletters intended to advise member companies how to lawfully respond to union organizing" subject to reporting.[46]

**DOL Compliance with the RFA:**

Some may question the adequacy of DOL's compliance with the Regulatory Flexibility Act (RFA). The RFA requires agencies to conduct an Initial Regulatory Flexibility Analysis (IRFA) of their proposed rules to determine the number of small entities likely impacted, the likely economic impacts to small entities, particularly as they compare to larger businesses, as well as identify the availability of less burdensome alternatives to the proposed rule, if practical.

In its IRFA, the DOL assumes that only 5,953 small entities would be impacted by the rule, and of this number only 3,404 would be classified as employers.[47]The IRFA also claims the rule would not have a significant economic impact on small entities.[48]

The DOL's IRFA readily acknowledges that 99.7 percent of all employer firms qualify as small businesses, yet assumes that only 3,404 of these firms are impacted.[49] Similarly, the RFA requires agencies to determine the differences in economic costs of an NPRM to small firms compared to larger firms. The IRFA assumes that costs for impacted firms are minimal, but fails to take acknowledge that the fixed costs of complying with additional reporting and paperwork requirements impacts small entities to a greater degree than larger entities.[50]

## VI. Additional NLRB Decisions of Concern to Small Business

Organizations representing small business have recently filed suit challenging a NLRB rule[51] requiring 6 million private employers to post notices informing employees of their rights to join

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[45] NFIB, *supra* note 44, at 6.

[46] *Id.*

[47] 76 Fed. Reg. 36,178 at 36,204.

[48] 76 Fed Reg. 36,178 at 36,205.

[49] *Id.*

[50] *Id.*

[51] 76 Fed. Reg. 54,006, *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-08-30/pdf/2011-21724.pdf.

and form unions. The rule takes effect on November 14, 2011. An employers' failure to adequately post these notices could subject them to unfair labor practice sanctions.

Issues have also been raised regarding NLRB's legal authority to require the notices. [52] Opponents of the rule note nothing in the NLRA, or its subsequent Amendments, requires or provides NLRB the authority to mandate the posting of these notices.[53] They note that most of the other general workplace rights notices were specifically required by statute, such as those involving an employee's rights under the Family and Medical Leave Act, the Occupational Safety and Health Act, and the Americans with Disabilities Act, among others.[54] The only other instance where NLRB required an employer to post a notice in the absence of specific statutory language involved issues in which employers are not subject to citations or penalties for failing to comply.[55]

Similarly, the board is deciding to promulgate this rule in the absence of any pending case or petition where such workplace notices are at issue; and have also questioned the agency's authority to propose the rule in the absence of such a case.[56]

Small businesses claim these notices are unnecessary and biased in favor of unions.[57] They not only object to information contained in the notices, but information excluded from the notices, such as an employee's right to decertify a union, their right to refuse to pay dues for political purposes, and the right to refuse to join unions in Right-to-Work states. They are also concerned that small business are more likely to accidentally violate the requirement since they don't have dedicated compliance staff.[58]

## Conclusions

The NLRB and DOL have provided little empirical evidence that their proposed regulations related to representation case procedures and bona-fide legal advice are necessary to address any real problems occurring in the private sector. As previously cited, the NLRB exceeds its own

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[52] 76 Fed. Reg. 54,006 at 54,038.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] COALITION FOR A DEMOCRATIC WORKPLACE, *supra* note 18 at 7.

[57] Id. at 7.

[58] Press Release, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, NFIB Asks Court to Stop Enforcement of New NLRB Poster Rule, September 28, 2011, available at http://www.nfib.com/press-media/press-media-item?cmsid=58318.

performance goals related to representation case procedures and unfair labor practices investigations and DOL has not identified a particular need for overturning decades of practice related to the advice exemption to the LMDRA. In both cases, the NLRB and DOL appear to be moving forward with their respective NPRMs "on their own initiative, rather than in response to a petition for rulemaking or in response to any specific problem identified by prior litigation."[59]

The potentially onerous nature of these proposed rules are compounded by the NLRB's recent decisions in *Lamons* and *Specialty Healthcare.* When given a choice of voting by secret ballot, a majority of workers voted 75% of the time to certify a union as its collective bargaining agent and 25% of the time to decertify a union. The possibility of smaller collective bargaining units in the Specialty Hospital decision could further disadvantage small business employers in union organizing campaigns.[60]

[59] *Id.* at 36,830.

[60] *Id.* at 4.