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Insight — May 15, 2012

A federal district court judge invalidated the National Labor Relations Board's (NLRB's) controversial "ambush election" rule yesterday, ruling that the Board had lacked a three-member quorum needed to pass the rule last December. The ruling followed a failed Congressional attempt to halt the rule, and came just two weeks after the rule became effective on April 30th.

Citing Woody Allen's famous quip that "eighty percent of life is just showing up," Judge James E. Boasberg of the U.S. District Court for the District of Columbia noted that "[w]hen it comes to satisfying a quorum requirement, however, showing up is even more important than that." Judge Boasberg found that two NLRB members, both Democrats, had voted for the rule, but that a third member, Republican Brian Hayes, had not participated in the vote. Specifically, Member Hayes had failed to vote after the final rule was electronically circulated to him on December 16th, and the agency had failed to reach out to him for his vote. Instead, the Board had simply published the rule. Judge Boasberg accordingly found that the NLRB had acted without a statutorily mandated three-member quorum needed to pass the rule. *Chamber of Commerce et al. v. NLRB*, No. 11-2262(JEB) (D.D.C. May 14, 2012).

After addressing the quorum issue, Judge Boasberg then declined to resolve substantive challenges to the rule. The U.S. Chamber of Commerce and other challengers had argued that the rule violates the National Labor Relations Act, exceeds the NLRB's authority, and is unconstitutional. While expressing no opinion on these matters, Judge Boasberg noted that "nothing appears to prevent a properly constituted quorum of the Board from voting to adopt the rule if it has the desire to do so." If the Board now properly votes to readopt the rule, however, it will face the additional hurdle of an already pending legal challenge to President Obama's recess appointment of three current Board members, at a time when the Senate may still technically have been in session. If these appointments are found invalid, the Board has no authority to act.

Unless or until the Board properly votes to readopt the "ambush election" rule, Judge Boasberg's decision provides that "representative elections will have to continue under the old procedures." This is a significant win for employers. The rule would have significantly sped up the timeline between a union's petition for official recognition and an employee vote on representation. This, in turn, would have limited employers' ability to express their views on collective bargaining before an election. Recent studies suggest that unions' success in elections increases dramatically when the timeline between a petition for recognition, and an employee

vote, is compressed.

For more information about the NLRB's "ambush election" rule, or other pending challenges to recent Board actions, please contact Brian M. Mumaugh or Brad Williams of Holland & Hart's Labor & Employment Practice Group.

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