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Labor law changes drawing familiar battle lines

By KATHERINE CONNOR, The Daily Transcript
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The U.S. Chamber of Commerce is sounding the alarm over recent and upcoming changes to labor law, which they say aim to make it easier for unions to organize while adding complexity for employers.

Not everyone is up in arms however, with some local lawyers voicing support for the changes, which they say simply modernize the nation's changing employment structure.

"There's really no way to sugar coat this — the majority of the folks on the [National Labor Relations] Board really do have a policy that favors labor unions," said Glenn Spencer, vice president of the U.S. Chamber's Workforce Freedom Initiative at an event hosted by the San Diego Regional Chamber of Commerce. "These are longstanding, well established policies that employers have learned to live with over the years and figured out how to live under and manage their businesses.

"The goal of all of these changes is to do two things: one is to make it easier for unions to organize, lower the bar for organizing; and two is to make it a little more difficult for employers to resist those types of campaigns."

The changes that Spencer mentioned include updates to what the Chamber calls the "ambush election rule" — known as the "streamlined election rule" by proponents — a new joint-employer standard, concerted activity enforcement, micro-unions and employer email.

The first of these changes, the ambush election rule, mostly affects unionized workplaces, though parts of the other four affect even non-union employers. This new rule, which takes effect April 14 if a Chamber lawsuit challenging it fails, would decrease the timeframe for a union election from 38 days to 10 days and require employers to submit a statement of position within seven days that includes any issues the employer wants to raise with the NLRB in a legal proceeding.

"Any issues you don't include, you waive the right to bring those up later, you forfeit those issues," Spencer said, noting that this is particularly challenging for a small business with no in-house legal counsel. "So it's a very restrictive process for employers."

Spencer said this rule, which the NLRB tried to implement several years ago but was overturned on a technicality regarding the number of voters present, also removes the employers automatic right to a board review of issues with the union election, instead giving reviews on a discretionary basis.

Ricardo Ochoa, partner at **Ochoa Legal Group** and professor of labor law at California Western School of Law, said he thinks the changes included in this rule are actually very modest, and are directed at the minority of cases in which employers intentionally delay NLRB elections to

intimidate the workforce.

He said the proposed need for employers to state what their objection is if they object “seems logical,” as is the move to resolve election disputes after the fact.
“Sometimes on election day in our country, people show up at the polls that don’t appear on voter rolls for whatever reason — maybe they moved, maybe they forgot to re-register — those people are allowed to cast a provisional ballot and after the election we figure out if they’re eligible to vote,” Ochoa said. “Imagine if every time there was a dispute about if someone was registered to vote, we canceled the election and postponed it until we resolved that dispute?”

He said that incentivizes unscrupulous employers to manufacture disputes just to drag out the process.

On the second concern, an update to the joint-employer standard, Spencer and Ochoa again had radically different views on the purpose and benefit of the change.

The update would broaden the definition of a joint-employer from the existing “clear and direct control standard” — an employer must directly control the employees' work situation — to an “industrial realities standard,” which Spencer said is vague and too all-encompassing.

He gave the example of a large office building contracting out janitorial services and requesting that the work be done when employees have left for the day as now setting terms and conditions of employment, and qualifying that company as a joint-employer with the janitorial contractor and subject to those regulations as such.

Ochoa, on the other hand, said its purpose is simply to bring employment standards in line with contemporary structures, which oftentimes have employees of, say, Microsoft, working side by side with contracted employees whose terms of employment are still set by Microsoft.
“That’s the reality at Microsoft or Nissan, where they have temporary suppliers or contract employees working on site, doing the same work but typically for less pay, fewer benefits and ultimately with no way to really hold the employers accountable,” Ochoa said. “We need the NLRA to recognize those changes — we can’t act like it’s the 1930s.”

That change is pending before the NLRB.

Spencer also voiced concern over the broadening of concerted activity regulations — employers can’t stop employees from discussing things like wages, benefits and unionizing — to include social media and now also company email systems, and the *Specialty Healthcare* decision that made “micro-units” appropriate as a bargaining unit, instead of the previously accepted larger groups of workers in a broad class or group.

He said since that NLRB case, the principle has been used to allow bargaining units as specific as employees in the women’s shoe department at Bergdorf Goodman, stating that the smaller, more specific unit makes it much harder for employers to resist union campaigns.

Ochoa said that is nothing to be feared.

“There’s nothing to be frightened of just by your employees wanting to have a democratic place of work,” he said. “It is the policy of the U.S. government in Section One of the National Labor Relations Act to promote collective bargaining as a way of resolving workplace disputes — our country is on the record as saying we believe the best way to address workplace concerns of

employees is for them to address them themselves."

He said all this means for employers is they have to sit down at the table with employees and talk.
"The purpose of a lot of these changes … are really about making sure that employees and the desires of employees are accurately reflected," Ochoa said. "This is about getting a more accurate reflection of what employees really want. "