“Ambush Elections” Rule

What It Is

Late last year, the NLRB finalized its “ambush elections” rule, which goes into effect on April 15. This rule would: shorten the time to 10-14 days in which a representation election is held; require pre-election hearings to take place within seven days of the petition; require employers, to handover personal cell phone and email addresses, as well as work locations, shifts and job classifications of all employees in the petitioned-for unit; requires an employer to file “statement of position” by the date of the pre-election hearing; limits the issues that can be litigated prior to the election, and; does away with an employer’s right for a pre-election review.

What it Means for Manufacturers

This rule will significantly alter how union elections are conducted and would take away employers’ rights to be heard prior to an election taking place. Based on the NLRB’s own data, the mean time an election takes place is 38 days and even with a pre-election hearing, over 90 percent of all elections are resolved within 56 days. In addition to filing filed extensive comments during the rulemaking process and participating in the public hearing regarding the rule, in January, the NAM, along with several other business groups, filed a legal challenge to the rule in the U.S. District Court for the District of Columbia.

The “Fair Pay and Safe Workplaces” Executive Order

What It Is:

Last July, the President issued the so-called “Fair Pay and Safe Workplaces” Executive Order (EO), which could exclude certain contractors and subcontractors from doing business with the Federal government due to allegations of federal and state labor law violations.

What It Means To Manufacturers:

The Federal Acquisition Regulation (FAR) Council is expected to issue a proposed rule and the Department of Labor (DOL) will issue guidance on the EO early this year. The EO could essentially exclude contractors and/or their subcontractors from doing business with the government even if there is a mere allegation that a company has violated a labor law. This could affect the status of hundreds of contractors and in turn, who they do business with, when performing work for the federal government. The NAM has been leading the efforts on Capitol Hill on the potential impacts, as well as attending meetings at the White House and the Department of Labor to express manufacturers’ concerns. The NAM also retained Washington’s leading legal expert in government contracting, to help in our efforts to push back against this initiative.
DOL’s New Overtime Rules

What It Is

Last Spring, the President issued a Memorandum directing DOL to revise the Fair Labor Standards Act’s (FLSA) rules governing overtime pay.

What It Means For Manufacturers

Under the FLSA, certain employees are exempt from overtime pay if they meet certain requirements. In 2004 the rules were amended to exempt employees if they made more than $455 per week and performed duties in certain categories, such as a managerial or professional role. We expect the DOL will propose raising the weekly earnings threshold and require that a percentage of time must be performed in certain duties in order for an employee to be exempt. Effectively, this change would require employers to reclassify employees as hourly, making them eligible for overtime pay. This will strip these employees of certain titles, benefits and reduce the number of hours the employee is permitted to work. The NAM will submit comments opposing these types of changes and is a leader in a coalition looking to do the same.

OSHA’s Proposed Rule on Injury and Illness Reporting

What It Is

Late last year, OSHA proposed a new rule on how companies will have to report injuries and illnesses to the agency. Under the proposal, certain manufacturers must submit their injury and illness log reports quarterly, and all reports will now be posted on the OSHA website for public view.

What It Means For Manufacturers

Disclosing this type of information serves little public good, is easily misinterpreted and can lead to unfair conclusions or judgments about a company or particular industry. The numbers of injuries and illnesses published on the OSHA website would also include non-work related incidents, leading to further misperceptions of a company’s record. This will not fulfill employer and employee goals of making workplaces safer, nor does it get people back to work. Last year, the NAM participated in a public meeting and filed comments in opposition to the proposed rule and the supplemental rule. According to the Regulatory Agenda, the rule will be finalized later this year, likely in the summer.
Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP Posting Requirement)

What It Is

Since 2010, the DOL’s Office of Federal Contract Compliance Programs (OFCCP) has been enforcing a rule requiring federal contractors and subcontractors to post a notice of employee rights, similar to what the NLRB attempted to require all employers to post and was ruled to be a violation of an employer’s First Amendment rights.

What It Means For Manufacturers

The OFCCP is charged with ensuring that contractors are adhering to nondiscriminatory workplace practices against protected classes of individuals. Due to the decision in the NAM case against the NLRB for a similar posting requirement back in 2012, the NAM, along with the Virginia Manufacturers Association, filed legal action against the DOL challenging this rule in the U.S. District Court for the District of Columbia. The NLRB’s rule was considered compelled speech and outside the Board’s authority. It is the NAM’s position that the OFCCP rule must also be considered the same. More information will be provided as the lawsuit continues. There will be oral arguments on the lawsuit this spring.

The OFCCP “Pay Data Tool”

What It Is

Last year the President issued a Memorandum requiring the OFCCP to develop a tool to measure federal contractors against “industry standards” regarding pay. The goal would be to predict which contractors would likely engage in pay discrimination, based on gender and race.

What It Means For Manufacturers

Under the proposed rule, federal contractors will be required to submit an “Equal Pay Data Report” consisting of employees’ W-2’s categorized by different professions, gender and race. While the stated goal is to shed light on workplace compensation, the rule will be duplicative to what a contractor already submits annually. This data collection could show an employer is out of compliance with the rule when in fact that may not be the case. We anticipate this rule to be finalized sometime this year.
Ongoing Issues

NLRB’s Specialty Healthcare Decision

What It Is

The NLRB’s decision in the Specialty Healthcare case in 2011 overturned seven decades of labor law regarding the appropriate standard for who can form a collective-bargaining unit. Under the new standard as few as two people can now form a “micro-union” in one facility or location.

What It Means For Manufacturers

The Specialty Healthcare decision will unnecessarily divide employees and hinder a manufacturer’s ability to manage operations effectively. One micro-union could shut down production and/or operations at any given time. The decision in Specialty Healthcare has been cited as a precedent in several cases of union organizers seeking to limit the size of the collective-bargaining unit to increase their likelihood of success. The NAM continues to join in amici opportunities to express concern over this bad precedent and will support efforts in the new Congress to overturn the opinion through legislation.

OSHA’s Proposed Respirable Crystalline Silica Rule

What It Is

In September 2013, OSHA published its proposed rule on respirable crystalline silica, which would cut the permissible exposure limit in half from 100 micrograms to 50 micrograms over an eight-hour time frame. The rule would mandate engineering and administrative controls before personal protective equipment can be used, and restricted work areas, as well as require additional medical monitoring, training and recordkeeping.

What It Means For Manufacturers

Among those most vulnerable to the rule are foundry, glass, china and pottery, brickmaking, metal and mineral production, paint, concrete product, cut stone, structural clay and refractory industries as well as anyone in their supply chain. These manufacturers, and others, are already implementing appropriate controls and taking the necessary steps to ensure their employees’ safety. The rule would impact 534,000 businesses and 2.2 million workers, including 25,000 hydraulic fracturing employees and 1.85 million construction workers. Estimates by engineering and economic consultants show an impact of $5.5 billion in annualized costs, whereas OSHA has estimated only $656 million, averaging $1,200 per business, based on outdated data and
flawed analysis. The NAM submitted comments to the proposed rule and testified at the public hearings expressing opposition to the rule change. According to the Regulatory Agenda, OSHA anticipates no action on the proposed rule through this summer.

**DOL’s Proposed Persuader Rule**

**What It Is**

In June 2011, the DOL proposed sweeping changes to the rules under the Labor-Management Reporting and Disclosure Act. This new regulation seeks to drastically reinterpret longstanding requirements on how employers can seek advice or consult with legal counsel on labor laws.

**What It Means For Manufacturers**

Under the proposed regulation, the definition of “persuader” activity would be expanded to include many activities recognized as labor law advice. The proposed changes would likely make it more difficult for employers, particularly smaller-sized manufacturers, to access legal assistance in navigating complex labor laws. It would effectively “gag” employers to keep employees from hearing both sides of the unionization debate and make them more susceptible to organization attempts. It is anticipated that the DOL will finalize this rule this summer.

**OSHA’s Sub-Regulatory Agenda**

**What It Is**

OSHA has increased the use of sub-regulatory actions, such as guidance, memoranda and directives, to achieve what it cannot through Congress or the regulatory process.

**What It Means For Manufacturers**

OSHA has attempted several times to circumvent the rulemaking process. By issuing new guidance, memoranda and directives and using the “general duty” clause as justification, the agency avoids having to go through the public comment process. The NAM believes that OSHA will continue to try to use this method at every opportunity to invoke rule and policy changes. One example of this approach is a Letter of Interpretation (LOI) issued on February 21, 2013, and made public two months later. The LOI essentially overturns decades of previous policy on whether third-party nonemployees may accompany an OSHA inspector during the walk-around of a nonunionized facility. While it is only an interpretation, the letter is being distributed to all regional offices and will have the effect of being a binding document, thus allowing third parties access to facilities. The NAM is aware of a few incidents of union representatives accompanying OSHA inspectors since the LOI was made public.