UPDATED INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

AMENDMENTS TO TITLE 8, SECTIONS 20363, 20365, 20393, 20400, AND 20402 ADOPTED BY THE AGRICULTURAL LABOR RELATIONS BOARD ON APRIL 18, 2012

Amend Section 20363. Post-Election Determination of Challenges

SB 126 includes new subdivision (i) of Labor Code section 1156.3, the existing section governing elections generally. Subdivision (i) sets forth various time limits for the resolution of challenged ballots and election objections. The time limit for the initial evaluation of whether challenged ballots or election objections warrant an evidentiary hearing is 21 days from the filing of election objections or the submittal of evidence in support of challenged ballots. Under existing regulations, challenged ballots are first evaluated by the Regional Director (RD), who issues a challenged ballot report subject to appeal to the Board. Similarly, election objections are first evaluated by the Executive Secretary (ES), with an opportunity for Board review of any objections dismissed. It is unlikely, except in the simplest of cases, that the 21-day time limit could be met under this existing bi-level review structure. In order to meet the 21-day limit, the ALRB proposed to eliminate the initial review by the RD and ES and instead have the Board do the evaluation in the first instance.

1) The Board received public comment that expressed concern that the provision which would require the Regional Director (RD) to forward to the Board and all parties challenged ballot declarations and other relevant evidence in his or her possession potentially conflicts with other regulations that maintain the confidentiality of employee declarations until they testify at a hearing. In order to clarify the intent of the amendments, the Board added an express provision that the RD is not to serve on the parties any declarations, other than those of challenged voters, but instead is to serve a summary of the content of any such declarations in a manner which would not reveal the identities of the declarants. In light of this change, the Board also concluded that the requirement that the declarations of the challenged voters themselves are to be served on the parties needs no further clarification.

2) The Board considered public comment urging that the role of the RDs in evaluating challenged ballots be retained, but decided to adopt its original proposal to eliminate that role. The Board concluded that it would not be feasible to meet the 21-day timeline if the RD continued to perform the investigation and issue a challenged ballot report. Though in theory the regional staff could begin the investigation prior to receiving the arguments and evidence of the parties, in most cases no meaningful investigation could take place prior to receiving the parties' submissions. What needs to be determined at this stage of the process is, based on the parties' contentions, whether there are any material factual

disputes necessitating an evidentiary hearing or whether the challenges may be resolved based on the application of the proper legal analysis to the undisputed facts. These judgments cannot be made in any meaningful way without first knowing the parties' contentions and the basis for those contentions. As a result, 21 days after the parties' submissions would not be sufficient time for the RD to reach a thorough and well-reasoned decision, for the parties to have time to file exceptions with the Board, and for the Board to itself render a thorough and well-reasoned decision.

The Board also concluded that the existing two-tiered review structure, which is not required by statute, was not necessary to preserve due process, as the Board is the ultimate decision-maker under the present review scheme and the standard of review of an RD's challenged ballot report is *de novo*. The Board's decision is subject to review on the same terms regardless of whether there is an initial recommended decision by an RD or ES. Thus, having the matter come directly to the Board to evaluate whether challenges or objections can be resolved or must be set for hearing because of disputed issues of material facts would be more efficient without reducing due process in any regard. Furthermore, given the narrow standard of review of the Board's decisions in election cases, the priority should be to allow sufficient time to make carefully considered and well-reasoned decisions.

While the Board concluded that there is no need to retain a challenged ballot report by an RD, there may be some situations where the Board would find it helpful for regional staff to conduct some specific investigative activity that requires "boots on the ground." Therefore, the Board decided to include language in the amendments to section 20363 to expressly provide for specified investigative activity by the regional staff at the Board's discretion. Leaving this to the discretion of the Board based on the Board's evaluation of the issues involved, whether before or after the parties' submissions to the Board, would be a more efficient use of regional staff time and resources than requiring an investigation by regional staff in all cases.

Amend Section 20365. Post-Election Objections Procedure

The ALRB proposed to amend section 20365 for the reasons described above, i.e., in order to meet the new 21-day time period for determining whether election objections must be dismissed or require an evidentiary hearing. The adopted amendments would effectuate this change by deleting all language relating to evaluation of election objections by the Executive Secretary and replacing it, where necessary, with references to the Board. In addition, the amendments included language ensuring that before the Board issues a certification pursuant to new subdivision (f) of Labor Code section 1156.3 the parties have an opportunity to brief the issue.

The Board received public comment in support of retaining an initial evaluation of election objections by the ES based on considerations very similar to the objections to

eliminating the role of the RDs in evaluating challenged ballots. The Board believes that the reasons for eliminating the ES role in election objections are even stronger than those for eliminating the role of the RDs in evaluating challenged ballots. The ES does not conduct any investigation, but merely evaluates the sufficiency of the election objections based on the objections and accompanying declarations and argument. The Board on review does exactly the same thing on a *de novo* basis and could just as easily do so in the first instance. Moreover, the existing role of the ES is a historical relic that dates to a time when the agency was much larger and the ES had attorneys under his supervision to assist him in this task. Therefore, the Board voted to eliminate the role of the ES as originally proposed.

The Board received public comment objecting to the use of the term "bargaining order" in proposed new subdivision (g) of section 20365, based on concern that this would create unnecessary interpretive issues in determining whether employer misconduct that warrants setting aside an election also warrants certification of the petitioning union. The Board agreed that it is better to mirror the statutory language rather than to use other terms, even though they may be synonyms. Therefore, the Board voted that the term "bargaining order" be deleted from new subdivision (g) and be replaced with references to "certification."

The Board also received public comment urging that new subdivision (g) could, or should, be construed to allow for bifurcation of the issue of whether an election should be set aside from the issue of whether, if so, the union should be certified based on the standard set forth in Labor Code section 1156.3, subdivision (f). It was urged that this would include the evidentiary hearing as well as briefing on the issue. In fact, this was not the intended meaning of the proposed language, nor does the Board believe that it is susceptible to that meaning. Rather, the language was intended to ensure that the parties are given the opportunity to brief the issue of the propriety of the certification remedy before it is considered by the Board. Furthermore, the body of evidence that is relevant to whether an election should be set aside due to employer misconduct is the same body of evidence that is relevant to the issue of whether certification of the union is appropriate under section 1156.3, subdivision (f). In other words, in determining whether certification is an appropriate remedy, the Board will look at the proven misconduct and make a judgment as to whether that misconduct "would render slight the chances of a new election reflecting the free and fair choice of employees."

As a matter of course, prudent counsel for a union will offer all available evidence of employer misconduct in order to get the election set aside, regardless of whether the certification remedy also is sought. Conversely, employer counsel will offer all available evidence in defense of the allegations of misconduct. Thus, there would be no reason to reopen the evidentiary hearing to allow additional evidence by either party. The only possible exception might be where the Board concludes that it needs evidence on an issue that the parties did not address nor had notice that they should have addressed. The

Board retains the authority in such rare circumstances to reopen a hearing under the existing procedures.

Amend Section 20393. Requests for Review; Requests for Reconsideration of Board Action; Requests to Reopen the Record

The amendments to section 20393 would delete references to requests for review of the Executive Secretary's evaluation of election objections, a function that would be eliminated per the proposed changes to section 20365. The proposed amendments also would clarify the regulation by making a request for review a simple one-step process which leaves the filing of responses to the discretion of the Board.

Having decided not to change the original proposal to eliminate the role of the ES (see discussion above regarding sections 20363 and 20365), the Board voted to adopt the amendments to this section as originally proposed.

Amend Section 20400. Filing of Declaration Requesting Mandatory Mediation and Conciliation

SB 126 makes two changes to the Mandatory Mediation and Conciliation (MMC) provisions of the Agricultural Labor Relations Act. One, for certifications issued after January 1, 2003, it changes the minimum time after an initial request to bargain that must elapse before requesting referral to MMC. Second, it expands the circumstances when referral to MMC may be requested to include a) when the Board has issued a certification pursuant to new subdivision (f) of section 1156.3 of the Labor Code, or b) when the Board has dismissed a decertification petition upon a finding of unlawful employer involvement with the petition. The proposed amendments to subdivision (c) of section 20400 account for the two new circumstances when MMC may be requested.

Consistent with the change to section 20365 adopted by the Board, the Board voted that the term "bargaining order" be replaced with "certification." In addition, in response to public comment the Board agreed to add the clarifying phrase "pursuant to Labor Code section 1164, subdivision (a)(4)" after the phrase " or dismissal of a decertification petition."

Amend Section 20402. Evaluation of the Declaration and Answer

The proposed amendment to section 20402, subdivision (a) conforms the regulation to the proposed changes in section 20400 by adding a necessary reference to the amended subdivision (c) of section 20400.

While there was no opposition to the proposed amendments to section 20402, it was pointed out in public comment that section 20402 contains a provision that is outdated

and can be deleted. Specifically, subdivision (a) contains the following language: "[A] declaration dismissed under this regulation shall not be included in the total of seventy-five (75) declarations permitted under Labor Code section 1164.12." Pursuant to the language of section 1164.12 of the ALRA, the 75 MMC declaration limit was operative only until January 1, 2008. As there no longer is any limit, the Board agreed that this language be deleted. This is a "change without regulatory effect."