



California LABOR Federation

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July 22, 2024

Santiago Avila-Gomez
Executive Secretary, ALRB
Email: Santiago.Avila-Gomez@alrb.ca.gov

Re: ALRB Subcommittee Report Regarding Updated Proposed Modifications to Proposed Rulemaking (AB 113): Majority Support Petitions and Appeal Bonds Written Comments

Dear Mr. Avila-Gomez,

On behalf of the California Labor Federation, please see our comments below in response to the ALRB Subcommittee's Report regarding the current proposed regulations and modifications for AB 113:

1) Comment re: section 20391(b) (48 Hour Employer response)

The California Labor Federation strongly objects to expanding the employer response period to beyond 48 hours. The proposed regulation reads: "If the 48-hour period expires on a Saturday, Sunday, or legal holiday, the time to file the response shall be extended to the corresponding hour on the next business day." Board regulations must not undermine or directly conflict with clear statutory language. This proposed language conflicts with the clear language of the statute which requires an employer response within 48 hours. The statute makes no exception for Saturdays, Sundays or legal holidays.

Expanding the response period to beyond 48 hours will negatively impact union organizing efforts. If a union submits a Majority Support Petition (MSP) on Thursday at 11:00 a.m., compliance with the statute would produce an employer response and employee eligibility list by Saturday, 11:00 a.m. This would allow union organizers to communicate with farmworkers on Saturday evening and on what is largely their only day off (Sunday), when workers are most available. Under the Board's proposed regulations, the Employer would not have to produce its response until Monday at 11:00 a.m., thus giving the employer the equivalent of 4 days. This would deprive the Union of the ability to communicate with workers over the weekend. Given the tight window of time to prove majority status (especially under the initial 5-day period), every day is critical. It is also important to note that farm workers often do work Saturdays, Sundays, and on State and Federal holidays.

There is nothing in the statute which authorizes the Board to extend this 48-hour period, which is clear and was deliberately included in the statute to provide for streamlining of the election process. It does not further the intent or purpose of the statute and we urge you not to move forward with this proposal.

2) Comment re: section 20391(c) (Regional Director Determination)

The California Labor Federation objects to two portions of the proposed language on Regional Director (RD) determination. First, the RD's determination is tied to "three days after receipt of the employer's response." The statute requires a determination within 5 days of the filing of the MSP and, if an employer delays its response by any time period, this will cause the Regional Director (RD) to issue a determination later than the 5 days required in the statute. The Board should follow the language of the statute which provides that: "*Within five days of receipt of the petition*, the board shall make an administrative determination as to whether the requirements set forth in subdivision (b) are met by the petition and whether the labor organization submitting the petition has provided proof of majority support." Lab. Code § 1156.37(e)(1) (emphasis added).

For the same reason, the proposal of the Regional Directors (as expressed in their April 22, 2024 letter) to "be afforded 3 business days after receiving the Employer response to submit the tally" and findings, or to exclude Saturdays, Sunday, and holidays, should also be rejected. While the timelines are tight, that is what the Legislature deemed appropriate. The regulations should be modified to be consistent with what the Legislature set forth: a determination from the Board (RDs) should be made within 5 days of receipt of the MSP.

3) Comment re: 20391(c)(2) and 20391(c)(3), 20391(c)(4) (Providing Tally)

The California Labor Federation objects to the Regional Director providing a "tally" or count of the number of authorization cards submitted. The statute does not require that this information be provided, instead stating that "Within five days of receipt of the petition, the board shall make an administrative determination as to whether the requirements set forth in subdivision (b) are met by the petition and whether the labor organization submitting the petition has provided proof of majority support." Elsewhere the statute simply directs the Board to certify the union upon proof of majority support.

The California Labor Federation believes that providing a tally may encourage employers to file objections, lawsuits, and to otherwise seek to delay collective bargaining. Such objections are a drain on Board resources. The frivolous filing of objections can be avoided if the Board simply stated that a labor organization has submitted proof of support. In many similar state laws on organizing in California and in other states, no tally is provided.

4) Comment re: section 20391(e) (Objections)

This section allows for employers to file objections but does not allow labor organizations to do so. The California Labor Federation maintains that AB 113 never intended to deprive labor organizations of the right to file objections. The text of AB 113 states that: "For purposes of a finding of an unfair labor practice or misconduct under this part and under this section, a misrepresentation of fact or law by an employer, an employer's representative, or agent is an unfair labor practice or misconduct whether or not a labor organization has had an opportunity to respond to or correct the misrepresentation." Labor Code § 1156.27(j).

The term "misconduct" or "election misconduct" is a term of art which has been historically used by both the ALRB and NLRB to denote employer misconduct during an election campaign that can or does affect the results of the election. For example, in the Giumarra Vineyards case, 32

ALRB No. 5, the Board lamented its lack of remedy for employer election misconduct and noted that “[t]he statute does not provide for any other sanctions for engaging in misconduct affecting the results of an election.” *Giumarra Vineyards*, 32 ALRB No. 5 at 4-5. Thus, a union can now be certified through MSP majority, or, as detailed in section 1156.37(j) through proving a ULP, or proving misconduct that renders slight the chances of a new majority support campaign reflecting the free choice of employees.

If a labor organization cannot file objections to an election, then it cannot prove “misconduct” which prevents another free and fair MSP campaign. To deprive a labor organization of this remedy is inconsistent with section 1.156.37(j). The Board should therefore not deprive unions of the ability to file objections.

5) Comment re: Notice to Agricultural Employees

The California Labor Federation agrees that employees should receive notice that the MSP has been filed, but a direct meeting with the employees immediately following an MSP filing is not necessary, and we urge that section be removed so that only the conspicuous notice requirement remains.

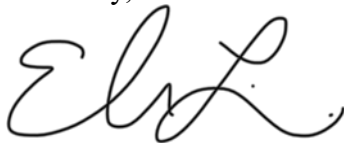
6) Comment re: section 20391(i) (Commencement of MSP Campaign)

The California Labor Federation objects to the arbitrary definition of when an MSP campaign “shall be deemed underway” as a 10% card-signing threshold. This arbitrary number has no support in the statutory language which refers only to employer unfair labor practices, misconduct or vote suppression “during a labor organization’s Majority Support Petition campaign”. Lab. Code § 1156.37(j) and (k).

This definition is problematic because the use of anti-union labor consultants, captive audience meetings, or other illegal activity to dissuade workers from signing cards can happen at any time during an MSP campaign, including before 10% of cards are signed. If an anti-union campaign starts early enough it could stifle the gathering of cards to prevent the union from reaching the 10% threshold.

The California Labor Federation appreciates the opportunity to submit our written comments, and we thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Elmer Lizardi', with a stylized, cursive script.

Elmer Lizardi
Legislative Advocate
California Labor Federation
EL/TNG39521CWA/AFLCIO