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Employment Law Commentary

Not Your Bush Board Anymore: Obama's Appointees To The NLRB

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Employers (and their counsel) spent a considerable amount of time, and suffered much angst, following the election of President Obama while worrying about the threatened passage of the Employee Free Choice Act ("EFCA"), a bill touted by the labor movement as the opportunity to revolutionize American labor law and the American workplace. EFCA would require an employer to recognize a union on the basis of support shown by authorization cards; would require a union and an employer to go to arbitration for a first contract if they are unable to agree on one within 120 days; and would impose significant penalties on employers who commit unfair labor practices. EFCA clearly would have passed the Senate and the House and would have been signed by the President if all that was needed was a majority vote. The only hitch in getting organized labor's top legislative priority completed is that the Democratic Caucus does not have a filibuster-proof majority to bring it to the Senate floor for a vote. But even so, the Obama Administration's ability to make substantial change in the way federal labor law governs management-labor relations is far from dead.

Several recent developments almost guarantee that the legal framework within which labor and management interact is about to change, and in ways that do not favor management.

The National Labor Relations Board ("Board") consists of five members, all nominated by the President and approved by the Senate. Wilma Liebman, a long-time Democratic member of the Board and a former union lawyer, became Chair of the Board when President Obama took office. For many months after the Inauguration, the Board consisted of just two members, Ms. Liebman and Republican Peter Schaumber. The President's attempt to fill two of the open seats ran into stiff opposition from Republicans. Finally, during a Congressional recess in March 2010, the President filled two of the open positions by appointment.

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The most controversial of these appointments is Craig Becker, previously the Associate General Counsel for the Service Employees International Union and for the AFL-CIO. Becker, who has been famously quoted as saying that employers should have no role in union representation elections, is certainly one of the most controversial appointees in years. Before his recess appointment in March 2010, 41 Republican Senators wrote the President, urging him not to appoint Becker. The U.S. Chamber of Commerce called his appointment a "special interest payback" for unions.

The second appointee, Mark Pearce, has spent his entire career as a union attorney. In June of this year, the Senate confirmed Pearce to a full term as well as Brian Hayes, a Republican labor coordinator for the Senate Committee on Health, Education, Labor, and Pensions. With these confirmations, the Board is back to full strength with five members, at least until member Schaumber's term expires in August of this year.

The Board is clearly now an "Obama Board," one that is indisputably aligned with the goals of organized labor and the Administration. The fact that the Democrats could not get EFCA to the Senate floor for a vote may be cold comfort to employers since many of organized labor's goals can be met even without EFCA. It seems certain that the newly-created Board will be able to bring about significant changes in national labor law and will do so without any help from Congress.

Rule Making

Under the National Labor Relations Act ("Act"), the Board can engage in administrative "rule making," the process by which it issues rules dictating how the agency will handle issues in the future. In some ways, rules issued by the Board are more likely to survive judicial scrutiny because courts usually give great deference to interpretations of the Act rendered by the Board. The Board engaged in rule making several years ago when it issued rules on the proper bargaining units in acute care hospitals, and there is no reason to think it won't engage in rule making again to achieve some of the goals that the labor movement thought would be met with EFCA. For example, a major complaint of unions, which they hoped EFCA would fix, is their claim that the election process is too time-consuming and cumbersome. Many of the desired pro-labor reforms to the election process could be accomplished without legislative assistance, for example: quick elections after the filing of a petition; limitations on the right of an employer to communicate with employees during an election; and increased participation in the voting process through the use of unreliable electronic and absentee voting procedures.

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Change by Decision Making

For the past 27 months, the Board has functioned with only two members. Recently, in *New Process Steel LP* v. *NLRB*, the Supreme Court held that the decisions of the Board during that period were improper and invalidated nearly 600 decisions. Some of those decisions will now return to a new Board for a second look by members with a decidedly different pro-labor attitude.

In addition to cases returning to the Board after *New Process*, there are many significant cases already at the Board which were not resolved before the Obama appointees took office. In short, there are plenty of opportunities for the Obama Board to reverse Board precedent, and deliver decisions long sought by organized labor.

Here are examples of just a few issues which are likely to be resolved by the new Board:

1. Should employees be permitted to use their employer's email to urge support of a union? In 2007, the Bush Board answered this question negatively, holding that an employer could permit some types of employee solicitations by emails while at the same time prohibiting organizational solicitations such as those conducted by unions. *Register Guard*, 351 NLRB 1110 (2007). Wilma Liebman, then a Board member and now Chair of the Obama Board, dissented in that case stating, "where … an employer has given employees access to email for regular, routine use in their work, we would find that banning all nonwork-related 'solicitations' is presumptively unlawful absent special circumstances."
2. Can a union station a 15-foot inflated rat at the entrance to a building, leaving the impression that the union has a labor dispute with the building owner rather than its true target, a subcontractor working in the building? The law is clear that a union cannot "picket" in front of a building under those circumstances. Is the presence of a rat a type of "signal picketing" which gives rise to an illegal secondary boycott and is prohibited under the Act? And what about a 30-foot banner in front of the building that says "Shame on (the building owner)" and "Labor Dispute" but doesn't explain with whom the union has a dispute. If the Union representatives holding the banner are not yelling, chanting, or marching, is the banner "picketing,"

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which can be barred as a violation of the secondary boycott provisions of the Act?
There are a number of cases pending before the Board raising these very issues. Given the current make up of the Obama Board, it seems likely that the unions involved in this activity will be found not to have violated the National Labor Relations Act.

3. Who is a "supervisor" under Section 2(11) of the Act?
In *Oakwood Healthcare Inc*., 348 NLRB 686 (2006), the Board concluded that charge nurses in a hospital were supervisors because, among other things, they assigned tasks to other employees, such as designating an employee to a place to work, a time to work, or tasks to perform. Supervisors, of course, are not covered by the National Labor Relations Act and have no rights to participate in union elections. Then-member, now Chair of the NLRB, Liebman, in a dissent, argued that "assign" must affect basic terms and conditions of employment and not just "tasks." The dissent also argues that the obligation that a supervisor must "responsibly" direct employees means that the supervisor must be fully accountable and responsible for the "performance and work product of the employee he directs." This is a much higher standard for supervisory status than that set by the previous Board. There is little doubt that the *Oakwood* rational will be rejected by the Obama Board, that the determination of supervisory status will involve a much higher level of job responsibilities than under current law, and that workplaces will have many fewer supervisors who can be counted on to be on management's team.

4. A union worker has the right to be represented by a union representative at an investigatory interview if the worker reasonably believes the interview could result in discipline. *NLRB v. Weingarten*, 420 U.S. 251 (1975) ("Weingarten Rights"). Does a non union worker have the right to have a co-worker accompany him or her to such an interview? This issue has swung back and forth for years. Under a Board appointed by President Carter, the answer to the question was "yes." Under a Board appointed by President Reagan, the answer was "no." Under a Board appointed by President Clinton, the answer was "yes," again. Under a Board appointed by President Bush, the answer was "no," again. You can see where this is going. In the decision by the Bush Board, then-member Liebman dissented, noting that employees denied such a right are "stripped of a right integral to workplace democracy." It is unlikely that Chair Liebman has changed her mind.

IN SHORT, THERE ARE PLENTY OF OPPORTUNITIES FOR THE OBAMA BOARD TO REVERSE BOARD PRECEDENT, AND DELIVER DECISIONS LONG SOUGHT BY ORGANIZED LABOR.

What to Do

The only thing we can say with certainty is that federal labor law in the next several years will be unpredictable. There are things, however, that an employer can do to anticipate the changes that are coming.

- Educate your supervisors about unions: how they organize and what your company's position is on unionization. We expect an increase in union organizing efforts as the new Board paves the way for easier union recognition. When a union files a petition, there will be even less time than under current laws to respond and educate your employees. Employers should proactively address these issues now.
- Pay attention to the decisions from the Obama Board. Morrison & Foerster will continue to issue client Alerts as significant decisions are issued by the Board and will provide guidance to employers on how to cope with new requirements.

While there have been efforts to negotiate a compromise on EFCA, those efforts do not appear to have yielded any results. Indeed, one of the main negotiators, Sen. Arlen Specter (D-PA), lost in the primary and will be out of office in January 2011. ■

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