With Or Without EFCA, Labor Reform Is Coming

Insights
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Reconfigured NLRB Next Significant Employer Challenge
The Employee Free Choice Act continues to languish amid partisan squabbles in Washington, which means that its controversial elements such as card check and mandatory interest arbitration are unlikely to see the light of day this year. But as the discourse continues on Capitol Hill, attention is now shifting to the anticipated composition of the National Labor Relations Board (NLRB), which is responsible for administering national labor policy pursuant to the National Labor Relations Act.

Although three of its seats have lain vacant for close to two years now, the NLRB is on the verge of being reconstituted into an agency with the means to impose a sea change in the legal landscape. Indeed, union officials have been looking forward to this moment for some time. So before you breathe a sigh of relief, you may want to consider what lies in waiting, even in the absence of the Employee Free Choice Act. Leaders of the labor movement are already setting their sights on prospects for sweeping reform through agency rulemaking rather than legislative action, and that is where the next round of battles is likely to be fought.

The Volatile Nature Of The Board
The NLRB is primarily responsible for the oversight of representation elections and adjudication of unfair labor practice charges. Over the past 75 years, it has periodically gone through moderate shifts in agency doctrine, depending upon the ideology of the incumbent administration. It is comprised of five members, appointed by the President to serve five-year terms. Traditionally, two of those members arrive with management backgrounds, while two more are aligned with organized labor. The fifth seat controls the decisive swing vote, and may hale from either side as the President sees fit.

The NLRB is presently comprised of Board Chairperson Wilma Liebman, who often served as a dissenting vote and outspoken critic of decisions previously issued by the Bush-era Board. Before assuming member status, Liebman served as legal counsel to the Teamsters union. She is currently joined by Peter Schaumber, a Republican appointed by President Bush. In recent months, President Obama has moved to fill the remaining vacancies with a complement of nominees who carry a distinctively pro-labor flavor. Among the potential members are SEIU counsel Craig Becker and union-side attorney Mark Pearce. Becker in particular has drawn the ire of employers for his expressed aversion to so-called captive audience meetings and an insistence upon "equal access"

for unions. Once confirmed, the nominees would presumably unite with Chairperson Liebman to form a formidable pro-labor majority bloc.

As soon as that happens, the Board is expected to set its sights on reversing a number of decisions issued under the preceding administration. Many "high-priority" targets for this trio are likely to derive from a string of narrow decisions issued in late 2007, during the closing weeks of former Chairman Battista's term. Recent decisions allowing employers to prohibit use of company email for campaign purposes, creating an early window for employees to file decertification petitions, and disqualifying union "salts" from eligibility for reinstatement, are likely to be overturned.

Other concerns surround fundamental employer rights that are now endangered, including the right to counsel non-union employees outside the presence of representatives, excluding temporary workers and front-line supervisors from bargaining units, and even the long-standing entitlement to permanently replace economic strikers.

Rulemaking Versus Case Decisions

The Board usually brings about policy change through case decisions – decisions which can be appealed in federal court. Although the NLRB has traditionally frowned upon administrative rule-making as a means for advancing shifts in ideological doctrine, many anticipate that an Obama board will not shy away from using this as means for reform. The Board might choose this route to effectuate changes ranging from abbreviating the 42-day "campaign period" between representation petition and election that has been in place since 1996, to marginalizing the free-speech rights of employers during the campaign period.

Down the road, President Obama will also have an opportunity to choose the successor to NLRB General Counsel Ron Meisburg, whose term expires in August, 2010. This may turn out to be just as significant, as the General Counsel has ultimate authority to decide whether to prosecute unfair labor practice charges, issue complaints, and seek authorization to pursue temporary injunctive relief in the federal courts.

The General Counsel also has discretion to pursue what has long been referred to as the "industrial death penalty," the Gissel bargaining order. Bargaining orders have rarely been issued in recent years. Unions are expected to begin seeking such orders routinely in an effort to compel employers to recognize them in the presence of violations that threaten to undermine the possibility of a fair election – effectively conducting an end run around more conventional Board procedures.

What Lies Ahead?

The rhetoric coming from organized labor sounds an ominous tone. As SEIU General Counsel Brent Garren has stated, "The labor movement will maximize whatever opportunities we have under the law to represent workers and their interests." Added Steelworkers Director of Rapid Response Tim Waters, "If there's a way for workers to petition the board for relief, no stone is going to be left unturned."

For those employers who are invested in lawfully preserving their union-free status, the window of opportunity is rapidly closing. Don't get lulled into a false sense of complacency merely because talk of card check, binding arbitration and other EFCA provisions has died down for the time being. Now is the time to train your supervisors and managers to operate in a new playing field, dominated by a reinvented agency with an unprecedented mission – to turn the tide for organized labor.

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