Insights, News & Events

EFCA, SCHMEFCA: THE OBAMA BOARD WON'T WAIT FOR LEGISLATION TO CHANGE LABOR LAW

Publication
Oct 1, 2010

(Labor Letter, October 2010)

Even with the Employee Free Choice Act (EFCA) now seemingly DOA, major reform of labor law is not far off. Wilma Liebman and the three new Obama appointees, including Craig Becker, are now in the driver's seat at the National Labor Relations Board. Big Labor justifiably expects the Liebman/Becker-led Board to deliver on Obama's campaign promises and to revamp federal labor law in its favor.

As part of its reform of the National Labor Relations Act (NLRA), the Board will likely institute administrative rulemaking before the end of 2011. The new legislative rules that emerge from this rarely-used process will have the full force and effect of law and will create a new playing field that is heavily tilted in favor of union organizing and union bargaining rights.

OBAMA BOARD COMMITTED TO CHANGING HOW NLRA WORKS FROM WITHIN

NLRB Chairperson Wilma Liebman is on a mission to reform the Act. In Senate testimony in April 2008, Ms. Liebman described the NLRA as an aging and "ossified" statute that, "by virtually all measures, is in decline." Ms. Liebman invited Congress to reexamine the NLRA, a law that has remained static for more than 60 years, "to make sure that our labor law evolves and that the rights it protects do not become illusory."

Less than two years ago, with Barack Obama winning the White House and the Democrats achieving majorities in both congressional houses, legislative reform of the Act appeared imminent. But subsequent events combined to divide the

Democrats and to divert the administration's attention away from labor law reform to other problems, such as the economy and healthcare reform. Accordingly, as of this writing, the Democrats cannot muster enough votes to overcome the Republicans' threatened filibuster of EFCA, and there is virtually no possibility of any legislative amendment of the NLRA.

Meanwhile, the Board now has its first Democratic majority since 2001. In addition to Chairperson Liebman, President Obama nominated Democrats Craig Becker (former Associate General Counsel of the Service Employees International Union) and Mark Pearce (a former union-side lawyer), as well as Republican Brian Hayes. Mr. Pearce and Mr. Hayes were confirmed in June 2010.

Mr. Becker serves under a recess appointment that expires in December 2011. Although Becker was originally appointed in June 2009, he faces stiff opposition from Senate Republicans and is unlikely to be confirmed as a permanent member of the Board. The fifth member of the Board, Republican Peter Schaumber, left office in August 2010. As a result, the Board is currently comprised of three Democratic appointees, one Republican appointee, and one Republican vacancy.

Big Labor and its allies on the left see the current Board composition as a rare window of opportunity for major reform. They also fear that this window will begin to close following predicted Republican electoral victories in November, and may slam shut at the end of 2011 when the Becker appointment expires and the 2012 presidential election cycle heats up. Accordingly, they are pressing the Obama Administration and the Board to act boldly and soon.

The Obama Board will not let a little thing like politics deter it from the mission of reforming federal labor policy by giving the Act a more dynamic interpretation that considers the law's real-world impact on today's workplace. Passage of EFCA is not required for this sea change to occur; the NLRA already authorizes the Board to reinterpret much of the law's existing text and reform the law from within. Just how far and how fast the new Board will move after the November elections is anyone's guess.

Most changes will come in the form of case decisions announcing Board policy shifts. However, the Board also wants to address the inherent problem of labor policy oscillations from one presidential administration to another. All one need do is look back over the decisional flip-flopping of the Clinton and Bush Boards to understand this concern – for what one Board gives, the next Board often takes away in a subsequent decision. Case-generated fixes risk being short-lived, lasting only until the political balance of power shifts again.

Because of its commitment to more lasting labor law "reform" that cannot be so easily undone, the current Board will likely resort to an alternative, rarely-used but

more durable form of policymaking: the administrative rulemaking process. In recent speeches, Chairwoman Liebman expressed a willingness to do just that and to experiment with administrative rulemaking, particularly in representation cases.

WHY LEGISLATIVE RULEMAKING WILL APPEAL TO THE OBAMA BOARD

Statutes that create administrative agencies and grant them enforcement authority commonly delegate rulemaking authority to them as well. Administrative rulemaking is a quasi-legislative process intended to allow an agency to fill the gaps in its authorizing statute and to give effect to broad and often ambiguously-worded statutory provisions. A legislative rule issued in compliance with an authorizing statute has the same legal effect as a provision of the authorizing statute itself.

The NLRA is no exception. Section 6 of the Act specifically grants the Board authority to promulgate "such rules and regulations as may be necessary to carry out the provisions of this Act." Despite this broad authority, the Board has generally avoided the rulemaking process. Instead, it chooses to announce its labor policies and rules of general applicability in the decisions generated by hearings on election petitions and unfair labor practice charges.

Unlike administrative cases, a valid legislative rule remains effective unless and until the agency that promulgated it rescinds or amends it in accordance with the agency's authorizing statute, or the statute itself is amended. And since an agency is bound by its own rules, it may neither ignore nor overrule a rule via adjudication. Thus, by promulgating legislative rules, the Obama Board may lock its successors in place on substantive points of law until the regulations are amended or abrogated. Do not be surprised if the current Board selectively employs Section 6 rulemaking in certain key areas for the dual purposes of making more durable and lasting "reform" of federal labor policy, and hedging against later policy oscillations in subsequent administrations.

Another "benefit" of legislative rulemaking is that it expedites matters. Agency staff can simply apply a rule to specific facts without having to reexamine or hear arguments on the issue. Because such rules are binding on the parties and the agency, they may be relied upon to predetermine the parties' legal rights and obligations, thus eliminating or limiting the need for many hearings.

This streamlining effect makes legislative rulemaking highly attractive to the Obama Board, especially in the area of R-cases (union election petitions). This Board is committed to expediting R-case handling and substantially reducing the amount of time between the filing of an election petition and the holding of an election from the current six to seven weeks. Indeed, this Board may even attempt to employ legislative rules that eliminate the need for *pre-election* hearings altogether, with an

eye toward getting employees to the polls within a week or two after a petition is filed.

Unions and many commentators favor this "vote first, then litigate" approach, believing that this one procedural change alone will dramatically alter the R-case playing field and substantially improve a union's chances of successful organizing. It would also require employers to be far more anticipatory and proactive in response to possible organizing.

Behind the scenes, the training and planning of administrative rulemaking has probably already begun. According to recent reports, the new Board has retained outside consultants to train their staffs on the intricacies of rulemaking under the Administrative Procedure Act (APA). Under the APA "[r]ules of agency procedure or practice" require neither notice nor public comment, although they would be binding on the Board, its General Counsel and third parties coming before the agency.

If the Board wishes to issue new procedural rules that alter the agency's hearing processes or the order and allocation of proof, it is free to do so within the limits of the NLRA without the need for notice or public comment – even though those new procedural rules might profoundly affect the substantive rights and obligations of employers under the law and ultimately change case outcomes.

The question today is probably not *whether* the Obama Board will engage in legislative rulemaking, because it probably will. Rather, the questions that need answering are when, in what areas, and to what extent that rulemaking will happen. The answers to these questions can be boiled down to two important words: "politics" and "pragmatism."

NOVEMBER 2010 ELECTIONS MAY SHAPE BUT NOT PRECLUDE BOARD FROM ACTING

The Board may historically have shunned legislative rulemaking because the process is more likely to draw the attention and ire of Congressional opponents. This happened in the mid-1990s when the Clinton Board published a Notice of Public Rulemaking on the issue of the appropriateness of single-location bargaining units. The measure was vigorously opposed by the Republican-controlled Congress, which barred the agency from using federal monies on single-location proceedings. In February 1998, the Board succumbed to Congressional pressure and withdrew the earlier notice. Because of this earlier embarrassment, Board rulemaking is not likely to be publicly discussed or openly acted upon between now and the November 2010 midterm elections.

What happens between November 2nd and the December 2011 expiration of Craig Becker's recess appointment is quite another matter. How far and fast the Board moves largely depends on what happens at the polls. If the Democrats retain

majorities in one or both houses, Republicans will be less able to influence the agency's budget, leaving the Board more free to act and to implement substantive rules. But if the Republicans win control of Congress, the Board will have to carefully pick the administrative battles it chooses to fight.

In that scenario, do not be surprised if the agency limits its substantive rulemaking and focuses, instead, on legislative rules that amend the agency's procedures and practices which, under the APA, may be promulgated without public notice and comment. Regardless, do not expect the Board to publicly unveil its plans any earlier than it absolutely has to. The Board is unlikely to show its regulatory hand before April 2011, when federal agencies are next legally required to publish information in the Federal Register on all regulations under development or review.

WAITING FOR THE SHOE TO DROP

Don't be surprised if the Obama Board breaks new ground and morphs from a law enforcement agency that regulates solely by decisional law into a more policy-oriented administrative agency that engages in rulemaking. If the new Board opts for legislative rulemaking, employers can expect the Board to look well outside the box and the plain meaning of the Act's terms to the effect that the law and its implementation will have on workers' rights and union interests.

Moreover, these new rules are likely to have a much longer legal shelf life than the Board's prior decisions. So, come next April Fools' Day, keep an eye on the Federal Register to see just what kind of new administrative tricks the Board has up its sleeve. Actually, don't worry: we'll do that for you.