



NLRB: How Senate Compromise Could Adversely Affect Employers

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A bold threat by Majority Leader Harry Reid (D-Nev.) to reduce the number of votes necessary to approve Executive branch nominees - the so-called "nuclear option" - has helped to ensure that the National Labor Relations Board (NLRB) will continue to advance its current agenda for the foreseeable future.

Senator Reid recently announced a bipartisan agreement through which the nominations of two controversial recess appointees would be withdrawn and replaced by two new Democratic nominees, in exchange for an agreement by Republicans to forego any further challenges to the confirmation process. Holding true to form, the Senate has since confirmed a slate of five nominees to serve as NLRB members, giving the Board its first full complement in 10 years.

For nearly 18 months, the NLRB had been functioning with only three members, two of whom (Sharon Block and Richard Griffin) were deemed unconstitutionally appointed by federal appellate courts, and a third (Chairman Mark Pearce) whose term was set to expire on August 27th. Members Block and Griffin were appointed during what the Administration considered to be a Senate "recess," but those appointments have since been invalidated by several Courts of Appeal. The U.S. Supreme Court recently agreed to take up the issue, but a decision is not expected until early next year. In the meantime, hundreds of recent NLRB decisions are now vulnerable to reversal.

Bowing to political pressure, the Administration had agreed to withdraw the nominations of Block and Griffin, and nominate Nancy Schiffer and Kent Hirozawa to take their place. Schiffer most recently served as Associate General Counsel for the AFL-CIO, while Hirozawa had practiced with the union-side law firm of Gladstein, Reif & Meginniss before leaving to serve as Chief Counsel to Chairman Pearce. Together, they are expected to continue advancing the pro-labor agenda pursued by their predecessors. In that capacity, they will be joined by Democrat and newly reconfirmed Chairman Pearce (himself a former union-side attorney), along with confirmed Republican members Harry Johnson and Philip Miscimarra.

This development does not necessarily impact the legal challenges currently pending before the Supreme Court or the spate of decisions issued up to now, but it does clear the way for the Board to exercise legitimized authority in a number of areas going forward. Consequently, the agency can be expected to continue down the path of increased regulation of union and non-union business alike by

scrutinizing social media policies, at-will statements, confidentiality provisions and access rules for any perceived encroachment on protected concerted activity.

Consequently, employers are encouraged to carefully monitor changing legal developments emanating from this agency over the next several months, and to ensure that their supervisors are properly trained to administer any new requirements.

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Steven M. Bernstein
Regional Managing Partner and Labor Relations Group Co-Chair
813.769.7513
[Email](#)