Insights, News & Events

NLRB VACANCIES FINALLY FILLED... BY UNION ATTORNEYS

Insights
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As the healthcare drama recedes from center stage, the next labor reform domino has already fallen. For 27 months, the National Labor Relations Board (NLRB) has operated with only two of its five seats filled. But with the commencement of Easter recess on March 27, President Obama moved swiftly to change that by unilaterally appointing SEIU counsel Craig Becker and union attorney Mark Pearce to seats on the Board.

As recess appointees, their terms will run through late 2011, concluding with the end of the next session of Congress late in 2011. The Administration chose not to extend the same treatment to pending Republican appointee Brian Hayes.

The Political Realities
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 overlapping five-year terms. Traditionally, two of those members arrive with management backgrounds, while two more are aligned with organized labor. The fifth seat typically controls the decisive swing vote, and may hale from either side as the President sees fit.

The pair of union-side labor lawyers now joins Chair Wilma Liebman to provide Democrats with a substantial majority over lone holdover Republican member Peter Schaumber, whose term expires on August 27 of this year. Absent additional appointments in the interim, the Board will soon be reduced to a narrow quorum of three Democratic members with powerful ties to organized labor for the first time in nearly 70 years, thereby depriving it of dissenting opinions necessary to provide reviewing courts with an alternative viewpoint. This summer will also see the

conclusion of NLRB General Counsel Ronald Meisburg's term. Meisburg was a Bush appointee, and the President will presumably fill the position by appointing someone with stronger union ties.

Business groups quickly responded to the news with expressions of concern, and politicians quickly followed suit. Senate Minority Leader Mitch McConnell (R-KY) criticized the appointment of Becker as "yet another episode of choosing a partisan path despite bipartisan opposition." Sen. McConnell went on to state that, "Additionally stunning is the Administration's decision to recess appoint two Democratic nominees to the NLRB and leave the Republican behind."

Sen. John McCain (R-AZ) also expressed "disappointment" with the recess appointments, referring to Becker's appointment as a "clear payback by the Administration to organized labor." A spokesperson for the U.S. Chamber of Commerce echoed those sentiments, adding that the business community "should be on red alert for radical changes that could significantly impair the ability of America's job creators to compete."

The Becker Controversy
Mr. Becker had been a lightning rod for criticism in recent months, much of it emanating from the U.S. Chamber of Commerce, numerous trade associations, and other members of the business community. All 41 Republican Senators have signed a letter urging a bipartisan alternative to the use of a recess appointment to fill the Board vacancies. The controversy surrounding Becker's appointment reached its zenith through a publicized effort led by Senator McCain to block his Senate confirmation, resulting in a 52-33 vote that ultimately ground the nomination to a halt through conventional means. His subsequent recess appointment effectively constitutes an "end run" around any further Congressional dialogue on the issue.

Through a prolific body of prior literature, Board Member Becker has made no secret of his disdain for secret ballot elections, and has called for a system that would eradicate any meaningful role for employers in the representation process. He has also suggested that far-reaching labor reforms can be enacted through administrative regulation instead of congressional action. When given the opportunity, Becker declined to withdraw from that position during Senate nomination hearings.

Teamed with Board Chair Liebman (who herself has suggested that the current system is "broken") and Member Pearce, Mr. Becker is now positioned to follow through on his convictions by undoing a series of long-standing Board decisions, and by implementing substantial aspects of the Employee Free Choice Act by resorting to administrative rule-making as an alternative to federal legislation.

Such a scenario has long been seen as a "back up plan" to the EFCA for organized labor, which had been hoping for a return on the substantial investment in campaign contributions made during the last election cycle. Combined with the looming prospect that Congress will pass the RESPECT Act – which would substantially narrow the scope of the term, "supervisor" under current labor laws – this development threatens to bring about the most substantial labor reforms in 75 years.

The Projected Impact on Your Business

The two most recent additions are expected to commence their roles during the week of April 5th. A newly reconfigured Board will then set about to review approximately 200 pending cases presently before it, many of which have broad ramifications for the parties involved. From there, the NLRB is expected to consider additional cases in controversy that would provide for the reversal of those doctrines that run counter to the pro-union leanings of the new majority.

Decades of well-established Board precedent will soon be at risk, and the shape of the country's current labor relations framework may well hang in the balance. The Board may also embark upon administrative rulemaking to accomplish sweeping reforms that had languished before Congress in the form of the Employee Free Choice Act, thereby facilitating organizing efforts that had been on the decline in recent years.

Along the way, a number of initiatives are likely to be implemented over the next several months, including:

- increasing severe and extraordinary remedies against employers for unfair labor practices;
- restricting an employer's right to permanently replace economic strikers;
- compressing the traditional "campaign period" following representation petitions from six weeks to less than two;
- extending right of unions to access employer premises for campaign purposes;
- allowing employees to utilize email and other employer-provided electronic communication systems for purposes of organizing co-workers;
- combining temporary employees into a unit of regular workers for bargaining purposes, regardless of employer consent;
- providing non-union employees with the right to invoke the presence of a representative during disciplinary interviews;
- upholding authorization cards solicited by supervisors;

- allowing graduate students to vote as employees;
- moving representation elections off employer premises;
- eliminating the right to an employer observer during the election process; and,
- rescinding the right to call for a decertification election within 45 days of a successful card-check organizing drive.

An Obama-appointed General Counsel will present additional challenges, including increased resort to injunctive relief for remedial purposes, more aggressive investigative strategies among field examiners at the Regional level, and an uptick in unfair labor practice complaints.

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, but unions are expected to seek such orders routinely in an effort to compel employers to recognize them, effectively bypassing more conventional Board procedures in the process.

Preparing For Change

A common thread among these anticipated developments involves the reduction of perceived barriers to unions, thereby making it easier for them to organize your employees. Consequently, employers should brace for increased activity in the short-term and beyond, as businesses are increasingly targeted. Proactive communications have always been a critical element of preserving union-free status. Going forward, they may well be the difference between your company becoming unionized or staying union-free.

Those employers who continue to wait on legislative action in the form of the Employee Free Choice Act may be missing the boat. The Democrats' recent loss of their 60-vote majority in the Senate makes quick passage of EFCA in its present form less likely. So the focus now shifts to the NLRB, from which reforms are likely to come fast and furious. Reaction is a luxury few employers can afford under the new framework. Rather, proactive communication will be the order of the day.

For those employers who are invested in lawfully preserving their union-free status, there is now a window of opportunity. 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. 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.

Should you have any questions concerning these recess appoints, their impact on your organization, or how to prepare for potential organizing efforts, contact your

Fisher Phillips attorney.

This Legal Alert provides information about a specific development at the National Labor Relations Board. It is not intended to be, nor should it be construed as, legal advice for any particular fact situation.