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Policy Brief

Potential Labor Law Changes Under the Obama National Labor Relations Board

With the Recess Appointments of Craig Becker and Mark Pearce, the Democratic Majority on the Board Is Expected to Push the Envelope to Make Up for the Failure to Enact the Employee Free Choice Act

The recess appointment of AFL-CIO/SEIU Counsel Craig Becker has generated strong concerns within the employer community about sweeping changes in the law given his writings over the years. Many of those writings express Becker's strong belief that many significant changes in longstanding law can be made by the Board itself without any change in the statutory language.[i] Even without Becker in the mix, a Democratic majority on the Board—now 3 to 1—ensures significant changes in labor policy.

What follows is a discussion of various areas of the law that could be in play in under the Obama NLRB. We wish to thank Andy Kramer of Jones Day for helping us identify these potential changes. Those changes that can be anticipated include:

Increased Use of Card Checks At a minimum, the Obama Board is expected to increase the issuance of so-called *Gissel* orders (named after a U.S. Supreme Court decision) in which the NLRB may order an employer to recognize the union even though the union has not won an election if the Board concludes that the employer has tainted the election with its conduct. Under current law, for such an order to be issued the union must at one time have had support of a majority of the employees as evidenced by union authorization cards. Thus, the Board could partially make up for the failure of the card check bill by lowering the threshold for the kind of conduct that would trigger such an order. Alternatively, the Board could try to return to a short-lived rule from the 1940s that required an employer to recognize a union unless it had a "reasonable good faith basis" for doubting majority employee support for the union that had been demonstrated through signed cards. Such a ruling by the Board would effectively enact the Employee Free Choice Act.

Increased Union Access to Employees and the Workplace There are several possible avenues the Board could try to take to facilitate easier union access to employees:

- Requiring an employer to provide union access to employees in non-working areas during non-work times (though this would be difficult in view of long-standing Supreme Court precedent under the Constitution);
- Prohibiting an employer from campaigning against a union in the workplace unless it provides equivalent access to the union (alternatively, the Board could try to prohibit employers from requiring employee attendance at meetings to discuss the pros and cons of union representation);
- Requiring the employer to give unions names and addresses of employees in the unit (*i.e., Excelsior* list) earlier than currently required (7 days after election scheduled) and include e-mail addresses.

Shorter Election Campaigns Currently, union representation elections occur in a median time of 37 days following the filing of the union petition, with 95 percent of all elections occurring within 56 days. Since unions typically campaign for weeks and even months before the petition is filed, this gives the employees sufficient time to hear from both the employer and their coworkers before making their decision. There is a very strong likelihood that the Obama Board will initiate rulemaking to shorten this period to two to three weeks by delaying hearings on certain critical issues (*e.g.,* composition of the unit to be represented by the union) until after the election. Reportedly, discussions of EFCA "compromises" have included similar implementation of so-called "quickie elections" as an alternative to card checks, with the similar objective of shielding employees from adequately hearing all sides of the issue.

Union Access to Employer E-Mail Systems One of the first decisions by the Obama Board will likely overturn a Bush Board ruling in *Register Guard* (351 NLRB 1110 (2007)) and prohibit employers from limiting personal use of e-mail systems. More significantly, the Board will probably also require that employers allow use of the system for union messages if the employer permits any employee communications about any donations or organizations, such as Little League, Girl Scouts, charitable organizations or even bake sales.

Disclosure of Company Financial Information Under current law, an employer is only required to disclose confidential financial information to the union at the bargaining table if it contends that it is unable to pay for what the union is asking. The Obama Board could try to expand the obligation of an employer to provide such information to virtually all bargaining situations where economic issues are in contention.

Smaller Units of Employees Unions prefer small units of employees because it requires fewer votes to win a majority. The Obama Board could issue regulations to achieve this, similar to a proposal by the Clinton Board—halted by Congress—that would have established a presumption of separate units for a company's facilities that were a mile or more apart from each other.

Representation of Non-Union Employees The Obama Board is likely to require that employers agree to employee requests to be accompanied and represented by a co-worker or an outside party, such as a union organizer, at a meeting with the employer to discuss potential discipline against the employee. Currently, only union-represented employees have this so-called *Weingarten* right, but, historically, Democrat-majority Boards have sought to extend it to non-union employees.

Expansion of NLRA Coverage of Non-Union Employees Nonunion employees are protected against employer retaliation when more than one employee engages in "concerted activity" for the mutual aid and protection of employees. Currently, this does not apply to a single employee acting by him- or herself but the Obama Board may expand the law to protect a single employee acting on his or her own when the employee states that the object is to help other employees as well (*e.g*., a refusal to participate in a mandatory employee meeting as a protest against the employer's failure to permit telecommuting).

Union Representation of Independent Contractors Through decisions or rulemaking, the Obama Board may seek to narrow the exemption of independent contractors, requiring a greater showing of "entrepreneurial control" by the contractors to have status as a separate business as opposed to being employees.

Requiring Employers with Unions to Bargain Over Card Check/Neutrality Agreements Currently, many unions who represent some of an employer's employees try to expand their representation by obtaining a provision in their collective bargaining agreement that requires the employer to recognize that union at other facilities on the basis of a card check and/or remain neutral during the union's organizing attempt. The law is somewhat unsettled but the prevailing view is that unions may ask for such a provision, but the employer can refuse to bargain over it—*i.e.,* it is a *permissive* but not a *mandatory* subject of bargaining. If the Obama Board rules this to be a mandatory subject of bargaining, the union could call a strike to pressure the employer to agree to card check/neutrality.

Workplace Notices The Board may require all employers to post notices of employees' rights to organize unions and engage in strikes and other concerted activities. This will soon be required under Executive Order 13201 at facilities where employees work on federal contracts, but a Board requirement would apply to all employers.

Minority Unions In 2007, several unions filed a request for the Board to issue regulations requiring employers to recognize unions representing less than a majority of the employees. It is considered unlikely that the Board would issue these but it is an issue before it.

Expedited Changes in the Law Virtually all changes in law by the Board are made through case law. (The Board may issue regulations but has done so rarely and on relatively minor, administrative matters.) Thus, the Board typically must wait for the General Counsel to bring a case before it to provide an opportunity to make a decision changing the law, which can often take years. To expedite this, the Obama Board may post an Agenda of Proposed Policy Changes, inviting the General Counsel to issue complaints and expedite cases in those areas to get the issues before the Board. One advantage of this would be to give the employer community advance notice of important issues to be ruled upon

Narrower Exemption of Supervisors Decisions by the Bush Board in a series of cases involving whether certain employees were exempt supervisors were roundly criticized by organized labor (*Oakwood Healthcare*, 348 NLRB 686 (2006) *et al.*). This line of cases is likely to be reversed. The initial impact would be on the health care industry but any narrowing of the scope of the exemption could affect any employer.

Barring Secret Ballot Elections to Overturn Card Check Recognitions Reversing the Bush Board's ruling in *Dana Corp.* (351 NLRB 434 (2007), the Obama Board is expected to ban employee attempts to have the NLRB conduct a secret ballot decertification election to overturn the employer's recognition of a union on the basis of a card check, even where a majority of the employees are seeking such an election.

Union Representation of Staffing Employees The Obama Board is expected to return to a rule by the Clinton Board that would have a single union represent, in a single unit, the regular employees at a site as well as temporary agency employees provided by a staffing agency at the site. Under longstanding law—restored by the Bush Board in *Oakwood* (343 NLRB 659 (2004))—this can only occur by agreement of both of the employers.

Successor Inheritance of Union Agreements The Obama Board will likely expand the areas where a successor employer inherits both a union and the collective bargaining agreement agreed to by its predecessor.

Moving Voting Away from the Workplace (Internet/Mail Ballots) In his writings, Craig Becker has criticized having union representation elections at the worksite, though the purpose of this normal practice is to ensure easy access of employees to the balloting process. The Obama Board may try to move elections to alternative "neutral" sites. Alternatively, it may try to increase the use of mail ballots, which currently are only used where employees are widely scattered. Another option may be use of the Internet, which would be even more difficult to ensure confidentiality of the employees' votes.

Increased Issuance of Injunctions The Board may consider the recommendation by many pro-union commentators that an injunction automatically be sought by the Board whenever an employee is allegedly unlawfully terminated during union organizing and the General Counsel has cause to believe the allegation, even though the General Counsel is often proven wrong when the case comes before an administrative law judge. The effect would be immediate reinstatement of the employee while subjecting the employer to contempt of court for future alleged labor law violations.

In all of these instances, the Board will argue that it has the authority under the existing statute. Most if not all of the changes will be challenged in the federal courts but, even if they are struck down, the law will be in a state of uncertainty for several years.

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[i] "NLRB Nominee Craig Becker Would Eviscerate the Role of Employers in Union Representation Elections," HR Policy Brief 09-110 (July 29, 2009), available at http://www.hrpolicy.org/downloads/2009/09-110%20Becker%20Policy%20Brief%207%2009%20_revised_%20_2_.pdf