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President Obama's Recess Appointments to The National Labor Relations Board and Their Meaning to Employers

President Obama appointed two union lawyers, Craig Becker and Mark Pearce, to the National Labor Relations Board on a "recess" basis. The nominations of Mr. Becker and Mr. Pearce had been part of a package of NLRB appointees that also included Republican Brian Hayes, but the Senate did not confirm that package of nominations due to bipartisan opposition to Mr. Becker, who was a lawyer for both the AFL CIO and the Service Employees International Union. Mr. Hayes, unlike Mr. Becker and Mr. Pearce, did not receive a "recess" appointment, and his nomination remains pending in the Senate.

The "recess" appointments of Mr. Becker and Mr. Pearce mean that they can serve on the NLRB without Senate confirmation until the end of 2011. Their appointments result in a 3 to 1 Democratic or pro-union majority on the five-member NLRB. Democratic NLRB Chair Wilma Liebman is the third pro-union NLRB member, Peter Schaumber is the sole Republican, and there is now one vacancy.

In August, the term of Mr. Schaumber will expire. Unless the Senate confirms Mr. Hayes or the Obama administration nominates another Republican to replace Mr. Schaumber, there could be a 3 to 0 Democratic, pro-union NLRB majority. Whether the Senate will confirm Mr. Hayes to serve on the NLRB and whether the Obama administration will promptly nominate a Republican replacement for Mr. Schaumber after his term expires in August 2010 or will nominate Mr. Schaumber for another term are unknown at this time. A 3 to 0 pro-union majority would be extremely unusual, especially in the light of the tradition that there should be a 3 to 2 split between the President's party and the opposition party.

For employers, the potential consequences of the Becker and Pearce "recess" appointments and, after August, a possible 3 to 0 pro-union NLRB majority may be severe.

Enacting EFCA by stealth. To date, labor unions and their political allies in the Senate have failed to enact the Employee Free Choice Act or a compromise version of EFCA. The "recess" appointments of Mr. Becker and Mr. Pearce, however, may result in NLRB decisions and revisions in NLRB regulations and election procedures that could have the effect of making it easier for unions to organize employees and harder for employers to successfully defend against union organizing efforts and to successfully campaign against a union in a pre-election campaign. A union leader

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and EFCA activist, Stewart Acuff, for example, admitted: "if we aren't able to pass the Employee Free Choice Act, we will work with President Obama and Vice President Biden and their appointees to the National Labor Relations Board to change the rules governing forming a union through administrative action..." In brief, the Becker-Liebman-Pearce NLRB can be expected to enact parts of EFCA through changes in NLRB regulations, procedures, and decisional law.

Here are some of the potential changes that a Becker-Liebman-Pearce NLRB could enact that would have the effect of implementing parts of EFCA administratively, not legislatively:

- Reducing the pre-election campaign period by reducing the current 42-day period from the date when an election petition is filed to the date of an election to a much shorter period of time, such as, for example, 21 days. The scheduling of representation elections on an expedited basis would result in more union election victories and, conversely, more employer election losses.
- Revising NLRB regulations to defer all hearings on the scope of a bargaining unit and the eligibility of employees until after an election has been held. This regulatory revision would also permit the scheduling of representation elections on an expedited basis.
- Issuing decisions that expand union rights and limit employer speech or campaign tactics during union organizing efforts or pre-election campaigns. Altering the rules applicable to pre-election campaigns and campaign tactics to favor unions and restrict or classify as unlawful employer actions or statements could also facilitate more union success in representation elections.

Reversing Bush NLRB decisions and expanding employee and union rights through NLRB decisions. A normal consequence of changes in the composition of the NLRB consists of changes in NLRB decisional law. Under Republican NLRBs, the rulings generally tend to favor employers, and under Democratic NLRBs, the rulings generally tend to favor unions. A 3 to 1 or, after August, a 3 to 0 Democratic majority, however, may result in a more extreme or accelerated reversal of Bush NLRB decisions that favored employers on important NLRB legal issues and expansion of employee and union rights. Both employer groups and labor unions have identified dozens of Bush NLRB decisions that may or will be reversed by a Becker-Liebman-Pearce triumvirate. Changes in NLRB decisional law could adversely affect employers and could facilitate union organizing efforts and union collective bargaining power for years.

Reducing an employer's ability to prevail in NLRB cases. Reversals of Bush NLRB decisions on important NLRB policy issues will be a major effect of the Becker-Liebman-Pearce NLRB, but it will not be the only change that will affect employers. Many, if not most, cases that are appealed to the NLRB, however, do not involve major policy issues, but instead involve applications of established NLRB legal principles. For employers, a 3 to 1 or, after August, a 3 to 0 pro-union will mean that their prospects for prevailing even in routine cases will be diminished. The NLRB, in other words, will become an even more unfavorable forum for employers than it now is. Appealing to the Becker-Liebman-Pearce triumvirate may become an exercise in futility or merely a required, perfunctory intermediate step before appealing to a federal court of appeals. Employers, as a result, may settle cases or elect not to appeal adverse decisions of NLRB Administrative Law Judges, rather than challenge NLRB Regional Office rulings, appeal ALJ decisions to the NLRB, or incur the expense of appealing to a federal appeals court.

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To summarize, President Obama's "recess" appointments of Mr. Becker and Mr. Pearce to the NLRB will have adverse consequences for employers until at least the end of 2011. The potential danger that the Becker-Liebman-Pearce NLRB poses to employers is substantial and should not be underestimated.

For additional information, please contact your Butzel Long attorney or the author of this E-news Bulletin.

Gary W. Klotz
313 225 7034
klotz@butzel.com

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