



Top NLRB Issues for 2012

by James B. Yates and Sarah E. Pawlicki

The unprecedented flurry of activity by the National Labor Relations Board (NLRB) has been keeping both human resource professionals and labor and employment practitioners on their toes. When Pres. Obama was inaugurated in 2009, he promised a plethora of employment law changes, almost none of which have been able to successfully navigate the divided Congress. Health care reform was the notable exception. With a deadlocked Congress, Pres. Obama's calculated tack for promoting his labor-friendly agenda is to circumvent Congress and legislate by executive fiat. This year promises to be yet another active year for the NLRB. Following is a short list of some of the hottest topics in labor law for 2012. Most will be controversial.

Composition of the NLRB

The NLRB typically is comprised of five members, and in 2010, the Supreme Court held that the Board must have at least three members to constitute a quorum and conduct its business. At the end of 2011, member Wilma Liebman's term expired followed by the expiration of the recess appointment of former SEIU attorney Craig Becker. Because Mr. Becker was never approved by the Senate he could not be re-appointed, therefore, the Board was left with only two members, Mark Gaston Pearce and Brian Hayes. Republican Senators vowed that they would not recess over the holiday break in order to preclude any recess appointments by the President and kept the Senate

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in pro forma session. On January 4, 2012, Pres. Obama announced the recess appointments of three individuals, ignoring the pro forma session of the Senate. The three appointments are:

1. Sharon Block – Ms. Block has served as the deputy assistant secretary for congressional affairs at the Department of Labor. Prior to that she was senior labor and employment counsel for the Senate HELP committee working for Senator Edward Kennedy. She also served as senior attorney for Chairman Battista at the NLRB and an attorney for the appellate court division of the NLRB.

2. Terence Flynn – Most recently, Mr. Flynn has served as chief counsel to Board member Hayes and was formerly chief counsel for member Schaumber. Mr. Flynn was also in private practice for several years working as a management side labor attorney.

3. Richard Griffin – Mr. Griffin has been general counsel for the International Union of Operating Engineers and serves on the board of directors for the AFL-CIO Lawyers Coordinating Committee since 1994.

If these recess appointments withstand legal challenges, the individuals must be approved by the Senate or they may not be reappointed after the expiration of their terms at the end of 2013 (the end of the next Congressional session). Therefore, these nominees and the new Board will have sufficient time to dramatically transform labor law as we know it.

Board Rulemaking

Traditionally, the NLRB, as a so-called independent board, makes its "law" through the decisions issued by the Board. This is significantly different than many government agencies, such as the Department of Labor, which promulgate rules interpreting the laws the agency enforces. In 2010, the NLRB began a dramatic and unprecedented shift in the manner in which it conducted its work by issuing proposed regulations and then approving final rules. For example, on August 30, 2011, the NLRB published a final rule requiring union and non-union employers to post specific employee notices of "employee rights" under the National Labor Relations Act (NLRA). Employers also must post the notices electronically, if other personnel-related rules or policies also are posted electronically. The notices must be posted in "conspicuous places" on the employer's premises. However, due to litigation over the final rule, that posting deadline has been delayed twice and is currently scheduled for April 30, 2012.

On December 22, 2011, the NLRB published another set of regulations, this time revising the process for union elections and substantially shortening the period between the filing of a petition for a union election and the actual election. Currently, when a union petitions for an election, a hearing may be held to determine certain issues including which employees are included in the bargaining unit. The new regulations significantly limit pre-election hearings which usually involve employer challenges. Faster elections place employers at an extreme disadvantage, particularly those employers who were unaware that union organizing was underway until union cards were presented. The final rule is scheduled to take effect on April 30, 2012, although like the posting requirement, a lawsuit has been filed by the U.S. Chamber of Commerce and other employer groups challenging the new rule.

The NLRB is promoting a labor-friendly agenda both in its decisions and through newly found "rulemaking" authority. The challenges to the Board's actions will certainly be a continued source of litigation and ire for employer groups and those disagreeing with Pres. Obama's labor-friendly initiatives.

Social Media

The NLRB continues to actively pursue cases involving employee allegations of unfair labor practices against employers who restrict employee social media use when employees are engaged in "protected, concerted activity." Since 2010, the NLRB has pursued hundreds of cases involving employees who were disciplined or discharged for making comments on Facebook, Twitter, etc. In general, the deciding issue has been whether the comment constitutes activity that would warrant protection under the NLRA. This issue should remind employers that the NLRA applies to ALL employers (provided the NLRB's jurisdictional requirements are met), not only employers with a unionized workforce. These cases will continue to be a focus of the NLRB and all employers are well-advised to update or implement a social media policy that does not overly restrict employees from engaging in protected, concerted activity.

The overwhelming theme emanating from the NLRB is that the Board will aggressively protect unions, union-related activity and union organizing efforts. Recent labor-friendly NLRB decisions have reversed long-standing precedent and have created uncertainty in areas of previously established labor law. For example, in *Specialty Healthcare*, the Board overruled a 20-year-old precedent on how it determines the appropriateness of a bargaining unit and expressed a clear preference that smaller units, even as small as a single job classification, may be an appropriate unit. Given the new recess appointments and Pres. Obama's pro-labor agenda, employers must continue to closely monitor the NLRB's actions.



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