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January / February 2011

IN THIS ISSUE

NEWS & ANALYSIS

NLRB proposes rule requiring all employers to post notice of employees' right to unionize. – The NLRB has recently granted a petition for rulemaking that has been before the Board for more than 17 years. The petition urges the Board to adopt a rule requiring every employer subject to the National Labor Relations Act to post a notice informing employees of their right to organize.

This is the first time in the Board's 75-year history that it has proposed such a notice, indicating just how pro-union the Obama Board is.

The proposed notice would inform employees of their right to act together to improve wages and working conditions, to form and join a union, to bargain collectively, or to choose not to do any of these things. The language of the proposed notice is identical to that adopted by the DOL for **its rule requiring federal contractors and subcontractors to post a notice of employees' NLRA rights**. Coincidentally, former union attorney and now NLRB member Craig Becker helped draft the DOL notice while serving on the Obama transition team. According to the NLRB, requiring a notice posting by all employers will not only inform employees of their rights, but will also dissuade employers from engaging in unfair labor practices once they are equipped with information about employee rights. The notice will consist of a 11 x 17 inch poster and must be distributed electronically if the employer customarily communicates with employees in that manner.

The proposed rule will treat failure to post the notice as an unfair labor practice under Section 8(a)(1) of the Act, and the Board could also find a willful refusal to post the notice

as evidence of unlawful motive in a case in which motive is an issue. In addition, if an employer fails to post the required notice, the Board may find that the six-month period for filing charges does not begin to run until the notice is posted.

Republican Board Member Brian Hayes dissented from the decision to grant the petition. Hayes noted that, although other federal laws expressly require the posting of individual rights notices, the NLRA does not contain such a requirement. Hayes says the Board lacks the statutory authority to impose the notice posting requirement through rulemaking.

According to the Board, a "great majority" of 6 million small businesses in the United States will be required to comply with the new posting requirement. The Board will **receive comments** on the proposed rule until February 22, 2011.

Board solicits *amicus* briefs on nursing home bargaining units. – In ***Specialty Healthcare and Rehab. Ctr.***, a Board majority of Liebman, Becker and Pearce has asked for *amicus* briefs on the determination of appropriate units for bargaining in long-term care facilities. Member Hayes dissented. According to the majority, the transformation in the long-term care industry over the past 20 years requires the Board to reconsider how the terms of the Act should be applied to unit determinations. In ***Park Manor Care Center***, the Board said that in non-acute health care facilities it preferred to take a "pragmatic or empirical" approach to unit determinations that could include consideration of recurring factual patterns as well as traditional "community of interest factors." This approach has allowed nursing homes to argue for non-professional service and maintenance units which could include a broad range of jobs, including jobs that were not the focus of the union's organizing campaign. This generally works to the advantage of employers.

In *Specialty Healthcare*, the union filed a petition seeking to represent a unit of certified nursing assistants. After an NLRB regional director found the unit appropriate, the employer requested a Board review of the decision, contending that the appropriate unit was a broad unit of all non-professional service and maintenance employees, including dietary aides, cooks, and employees working in the jobs of social services assistant, staffing coordinator, maintenance assistant, central supply clerk, medical records clerk, data entry clerk, business office clerk, and receptionist. Using *Park Manor* as its springboard, Liebman, Becker and Pearce said they believe it is appropriate for the Board to continually evaluate its decisions and rules.

The Board has invited all interested parties to provide information and argument addressing such the following: (1) factual patterns that have emerged in non-acute health care facilities that illustrate what units are appropriate; (2) how the application of *Park Manor* hindered or encouraged employee free choice and collective bargaining in non-acute health care facilities; and (3) whether the Board hold that a unit of all employees performing the same job at a single facility is presumptively appropriate, where there is no history of bargaining.

In his dissent, Hayes points out that none of the parties in *Specialty Healthcare* sought the broad inquiry announced by the majority. According to Hayes, the invitation to file briefs is a "stunning initiative" to consider replacing decades of Board law applying the community of interest standard with a test that will almost surely find that any group of employees who perform the same job in the same facility is an appropriate unit. Hayes also wrote that he has a concern about the Board's invitation for briefs to address unit determinations in other industries. "[T]here is real reason to fear that my colleagues' ultimate purpose is to use this case as a vehicle for abrogating the statutory requirement in Section 9(c)(5) that in 'determining whether a unit is appropriate . . . the extent to which employees have organized shall not be controlling.'"

Acting General Counsel wants harsh remedies during organizing. – In still another obvious attempt to facilitate union organizing, the Board's Acting General Counsel, Lafe Solomon, has announced that he expects the Board's Regional Offices to seek effective remedies for serious employee unfair labor practices committed during union or-

ganizing campaigns. Solomon has expanded the Board's aggressive effort to crack down on employer misconduct during campaigns to include not only discriminatory discharges, but also threats, promises, interrogations and other unlawful conduct that has a serious impact on employee free choice. He has told the Regional Offices it may be appropriate to request, from the Board and federal courts, orders requiring employers to read NLRB remedial notices to employees, give unions access to employer bulletin boards and disclose employee names and addresses well before the time the traditional ***Excelsior*** list is required. According to Solomon, employer unfair labor practices may often require a union to "restart" an organizing drive. Providing union access to names and addresses at an earlier date, or for a longer period of time than required by *Excelsior*, may assist in neutralizing the effects of an employer's coercion.

Solomon has also told the Regional Offices that where it is determined an employer's unfair labor practices have had a severe impact on employee-union communications and union bulletin board access would be inadequate to permit a fair election, the Region should submit the case to the Board's Division of Advice with a recommendation for additional remedial measures, which could include granting union access to non-work areas during non-work time, giving a union equal time and facilities to respond to any address made by the employer regarding the issue of representation, and affording the union the right to deliver a speech to employees before any Board election.

These potential extraordinary remedies during organizing efforts will significantly alter the landscape over which employers must travel during union organizing campaigns.

Solomon wants to ensure that deferral arbitrations address employee rights. – For many years the NLRB has recognized arbitration decisions as an alternative method for resolving unfair labor practice charges where the issues under the labor agreement coincide with the alleged unfair labor practice. Now, Acting General Counsel Solomon is recommending that the Board adopt a new framework for determining whether to defer to arbitration decisions in unfair labor practice cases brought under the NLRA. After a review of deferral cases, Solomon claims that the Board needs to give greater weight to safeguarding employees' statutory rights in Section 8(a)(1) and (3) cases. Specifically, he says, the Board should no longer defer to an arbitral resolution unless it is shown that the statutory rights have been adequately considered by the arbitrator. This position should apply not only to discipline and discharge cases, but also to other conduct prohibited by Section 8(a)(1) that is addressed in a grievance under a labor agreement. Solomon will also urge the Board to require that the party seeking the deferral bear the burden of showing that the Board's standards have been satisfied. This would include showing that the statutory issue was presented to the arbitrator and that the arbitrator correctly enunciated and applied the statutory principles.

Solomon also said that consistent with his position on deferral to arbitration awards, he will urge the Board to adopt a rule that gives no effect to a grievance settlement unless the evidence shows that the parties intended to settle the unfair labor practice charge as well as the grievance.

THE GOOD, THE BAD AND THE UGLY

Obama nominations to NLRB will not change its current direction.

- *Senate approval could bring NLRB to five again* – President Obama has nominated Republican Terence Flynn as a Board member. If confirmed by the Senate Flynn will replace Republican Peter Schaumber, whose term expired in August 2010. Flynn's appointment will bring the Board back to a full five-member complement, at least until the terms of Democrat Chair Wilma Liebman and Member Becker expire at the end of this year. (Obama is expected to re-nominate them both to ex-

tend their terms.) Before joining the Board as Chief Counsel to both Schaumber and current Republican member Hayes, Flynn was in private practice representing companies and individuals in labor and employment law matters. If confirmed by the Senate, Flynn's term will run until August 2015.

• *Solomon nominated to four-year term as NLRB General Counsel* – Acting NLRB General Counsel Lafe Solomon has been nominated to a four-year term as General Counsel. Solomon, who was named acting counsel in June 2010, has announced several initiatives to expand the Board's use of existing statutory remedies under the NLRA. Those initiatives include the use of Section 10(j) injunctions to remedy firings and other employer unfair labor practices during organizing campaigns. Solomon is a career NLRB employee who began his career as a Field Examiner and has served as staff attorney for 10 Board members, most recently Liebman. Given his activist, pro-labor bent, it is not clear that his nomination will be confirmed in the Senate.

• *Craig Becker re-nominated* – Less than one day after Obama held out an olive branch to the business community in his State of the Union address, he appeared to withdraw it when he re-nominated union lawyer Craig Becker to fill the remainder of a five-year term, which would expire in December 2014. After Becker failed to win Senate confirmation in February last year, Obama gave Becker a recess appointment until the end of this year. The recess appointment came despite the expression of concern by 41 Republican Senators over Becker's highly controversial, pro-labor writings and his perceived lack of objectivity in cases involving the unions for which he once worked.

Becker's re-nomination will again face strong opposition from the U.S. Chamber of Commerce and Republicans. Glenn Spencer, the Executive Director of the Chamber's Workforce Freedom Initiative, has called the President's action "more payback for organized labor" and said "it's clearly time to consider a more balanced and mainstream nominee." As one could expect, an e-mail from the AFL-CIO supported the nomination, saying, "Republicans will again have a chance to reject politics-as-usual and put the needs of American working families over their own political interests. The ball's in their court now."

NLRB to fight state secret ballot amendments. – As mentioned **in our previous issue**, the voters in Arizona, South Carolina, South Dakota and Utah have approved amendments to their state constitutions that preserve workers' right to vote for or against union representation. Recently, Solomon wrote the attorneys general of the four states, claiming that the amendments conflict with the NLRA, which provides employees with two paths to union representation – certification based on Board-conducted secret ballot elections, or voluntary recognition based on other convincing evidence of majority support. According to Solomon, the state amendments create a conflict with the rights of employees to select union representatives and are preempted by federal law. Solomon proposed that the state attorneys general obtain a judicially sanctioned stipulation concerning the unconstitutionality of the amendments and told the states he would proceed with federal court actions to invalidate the state provisions if the matter is not resolved.

The attorneys general say they will "vigorously defend our laws" and dispute Solomon's assertion that the laws are unconstitutional. They say that the laws are consistent with current federal law, which guarantees a secret ballot election if voluntary recognition is not chosen. Meanwhile, 18 Republican co-sponsors have introduced a bill in the Senate that will guarantee the use of secret ballots in union elections. And, round and round we go...

Gov. Nikki Haley sued for "anti-union bias." – The South Carolina AFL-CIO and the International Association of Machinists have filed a lawsuit in federal court, alleging that newly elected Republican Governor Nikki Haley

is violating federal labor law by vowing to use state resources to defeat union organizing efforts. The lawsuit stems from the decision of The Boeing Company to add a second assembly line, with up to 3,800 new employees, at its North Charleston plant. Boeing announced that it would be adding the new assembly line after the existing employees at the plant voted to decertify the Machinists last September. When Gov. Haley nominated her director of the state Department of Labor, she allegedly said, "We're going to fight the unions and I need a partner to help me do it." A spokesperson for Gov. Haley says the lawsuit has no basis, and, "if the machinists are offended that the Governor doesn't think unions are a good thing in South Carolina, they're just going to have to get used to it."

Union membership continues to decline. – According to the U.S. Bureau of Labor Statistics, the number of workers who now belong to unions declined in 2010 to a new low of 11.9 percent. In 2009, union membership was at 12.3 percent. Since 2008, the first year of the recession, unions have lost nearly 1.4 million members. In the private, non-farm sector, union membership has fallen to 6.9 percent from 7.2 percent in 2009. Even in the government sector, union membership fell from 37.4 percent in 2009 to 36.2 percent in 2010.

About Constangy, Brooks & Smith, LLP

Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A "Go To" Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by sources such as Chambers USA, Martindale-Hubbell, and Top One Hundred Labor Attorneys in the United States, and the firm is top-ranked by the U.S. News & World Report/Best Lawyers Best Law Firms survey. More than 130 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Alabama, California, Florida, Georgia, Illinois, Massachusetts, Missouri, New Jersey, North Carolina, South Carolina, Tennessee, Texas, and Virginia. For more information, visit www.constangy.com.