Inside The Beltway

Keeping You Informed

A publication of Nixon Peabody LLP's Washington, DC office

March 29, 2010

Critical Developments in Labor and Employment Law

By John N. Raudabaugh

Executive Branch/Administration

On Saturday, March 27, 2010, responding to Senate inaction, President Obama recess appointed 15 nominees to fill critical administration posts in departments and agencies that have been vacant for months and, in the case of the National Labor Relations Board, for more than two-and-one-quarter years. Recess appointments may be made during a break in Senate proceedings. The Senate adjourned on Friday, March 26, 2010, until Monday, April 12, 2010, for its spring recess. Recess appointments expire at the end of the Senate's next session, December 2011. The President's accompanying statement noted that: "The United States Senate has the responsibility to approve or disapprove of my nominees. But if, in the interest of scoring political points, Republicans in the Senate refuse to exercise that responsibility, I must act in the interest of the American people and exercise my authority to fill these positions on an interim basis."

Equal Employment Opportunity Commission

On Saturday, March 27, 2010, President Obama recess appointed two Democrat nominees and one Republican nominee to fill the five member Commission. The new Chair is Jacqueline A. Berrien, a former Associate Director-Counsel of the NAACP Legal Defense and Educational Fund, Program Officer in the Ford Foundation's Peace and Social Justice Program, Assistant Counsel for the LDF, staff attorney with the American Civil Liberties Union, and clerk to the Honorable U.W. Clemon, Judge, U.S. District Court, Birmingham, Alabama. Appointed as Commissioners are Chai R. Feldblum, a professor of law at Georgetown University Law Center and a leading expert on the Employment Nondiscrimination Act, and Victoria A. Lipnic, formerly Assistant Secretary of Labor for Employment Standards from 2002 through 2009.

Current Commissioner Constance S. Barker's five-year term ends July 1, 2011, and Commissioner Stuart J. Ishimaru's five-year term ends July 1, 2012.

Also receiving a recess appointment as the EEOC's General Counsel is P. David Lopez, who has served at the EEOC for 13 years.

National Labor Relations Board

On Saturday, March 27, 2010, President Obama recess appointed two Democrat nominees to the NLRB—Craig Becker and Mark G. Pearce. On April 24, 2009, the President announced his intention to nominate Becker for a term ending December 16, 2014, and Pearce for a term ending December 16, 2013. Becker and Pearce were formally nominated along with Republican Brian Hayes on July 9, 2009. Becker is an Associate General Counsel with the Service Employees International Union and Staff Counsel with the AFL-CIO. Previously, as a professor, Becker authored articles and argued that employers should have no right to speak to employees regarding unionization with any violations resulting in bargaining orders. *See* 77 Minn. L. Rev. 495 (1992-1993). Pearce has been a union-side attorney in private practice in Buffalo, New York. The President did not recess appoint Brian Hayes who is the Republican Labor Policy Director for the Senate Health, Education, Labor, and Pensions Committee and, previously, was a management-side attorney in private practice in Massachusetts.

By way of background, the Senate Health, Education, Labor, and Pensions Committee approved the three nominees by a vote of 15 to 8 on October 21, 2009. However, Senator McCain placed a hold on Becker's nomination calling Becker the "most controversial nominee I've seen in a long time… ." Becker's nomination has been criticized by the U.S. Chamber of Commerce, the National Association of Manufacturers, and the editorial board of the *Wall Street Journal*. The Senate sent Becker's nomination back to the White House on December 24, 2009, but held over the nominations of Hayes and Pearce. The President resubmitted Becker's nomination on January 20, 2010. A hearing was held on February 2, 2010, and the Senate Committee voted 13 to 10 along party lines to send the nomination for a Senate vote. On February 9, 2010, the Senate voted 52 to 43 to defeat a cloture motion ending debate on Becker's nomination. On March 23, 2010, some 20 business groups forwarded a letter to the President urging him not to recess appoint Becker in lieu of a Senate up or down vote. On March 25, 2010, 41 Republican senators signed a letter urging the President not to recess appoint Becker. A group of 132 House Democrats signed a March 26, 2010, letter urging the President to recess appoint Becker that afternoon with the beginning of the spring Senate recess.

More change is imminent. Current Republican Member Schaumber's term ends August 27, 2010, and current General Counsel Meisburg's term ends August 14, 2010. It is possible that Becker and Pearce will be packaged along with Hayes and a yet-unnamed Republican nominee for a Board seat and a Democrat nominee to fill the General Counsel position sometime this summer. Such a move would convert Becker and Pearce from recess appointees to confirmed members with the longest available terms all reallocated to Democrats.

Beginning in 1935, the National Labor Relations Board was composed of three members but was expanded to five members with the 1947 Taft-Hartley amendments to National Labor Relations Act. By tradition, the Board majority generally reflects the party of the sitting President. Since December 31, 2007, the Board has operated with only two members, one Democrat and one Republican, and it has issued some 586 rulings of which 80 have been challenged in federal courts of appeals contesting the legitimacy of two-member decisions. On Tuesday, March 23, 2010, the U.S. Supreme Court entertained oral argument in *New Process Steel LP v. NLRB*, Case 08-1457 to review a decision of the Seventh Circuit Court of Appeals upholding a two-member Board decision. In addition to the Seventh Circuit, the First, Second, Fourth, and Tenth Circuits have upheld two-member Board decisions. Only the D.C. Circuit has invalidated and denied enforcement of a two-member Board decision.

Practical implications: it's not the Employee Free Choice Act…but it's close…*REAL CHANGE IS COMING*

A reenergized, partisan National Labor Relations Board may enlist rulemaking to require employers to post notices of employee rights under the Act and to shorten election timing from the normative 42 days to perhaps 21 or even 14 days. The Obama Board undoubtedly will review Bush Board decisions and the following key decisions may be particularly at risk:

- *Dana/Metaldyne* —The Bush Board modified the voluntary recognition bar doctrine (i.e., preventing rival petitions or a decertification petition for a reasonable period, approximately six months, following an employer's voluntary recognition of a union by a majority of employee-signed cards or petition in an appropriate unit). The *Dana/Metaldyne* decision would attach a bar only if all employees were given notice of the voluntary recognition and of their right, within 45 days, to file a decertification petition or support a rival union petition with a minimum 30 percent of employees' signatures, and no such petition(s) is filed. With organized labor's press for the Employee Free Choice Act to, in part, equate voluntary recognition based on card signatures with a secret ballot NLRB-conducted election, card/check, and neutrality agreements, a Democrat majority NLRB may well overturn *Dana/Metaldyne* to remove any restrictions on voluntary recognition.

- *Register Guard* and *Amcast Automotive of Indiana, Inc.*—The Obama Board may reverse the Bush Board's finding that employees have no statutory right to use their employer's e-mail system for purposes of forming, joining, or assisting labor organizations or for other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

- *Oakwood Healthcare Center* and *Harborside Healthcare*—These Bush Board decisions involve both the definition of statutorily-exempt "supervisors" and under what circumstances pro-union activity of a supervisor will be viewed as objectionable conduct warranting a new election. At issue is limiting the scope of the 12-part definition to make more jobs subject to union organizing, thus limiting management's presence on the shop floor.

- *Toering Electric* and *Oil Capitol Sheet Metal, Inc.*—The Bush Board tightened the standards for applicants to prove an employer's unlawful refusal to hire or consider for hiring a union "salt." In the past, an employer could not discriminate against an applicant who wanted to organize the employer's employees. The Bush Board required evidence of the applicant's genuine desire to work for the employer making it far easier for employers to not consider or hire salts. Moreover, the Bush Board required proof that the salt/discriminatee would have worked for the entire backpay period claimed in any compliance specification.

- *Oakwood Care Center*—This case involved the employer's use of third-party employees to supplement its own workforce. The Bush Board found the third-party employees to be jointly employed but held that both employers must agree to submit to a union petition for a multi-employer unit. An Obama Board reversal would cause significant issues for temporary staffing arrangements.

- *Waters of Orchard Park*—In this case, the Bush Board held that employees' calls to report problems to a New York State Patient Care Hotline were not protected as they did not relate to a term or condition of work. Should the Obama Board take a contrary position, it will surely result in more "reporting" by disgruntled employees to government and civic agencies and groups.

- *IBM Corp.* and *Holling Press, Inc.*—The Bush Board overruled prior decisional law to hold that unrepresented employees do not have a statutory right to have a co-worker present during investigatory interviews which may lead to discipline and/or discharge. In a related case, the Bush Board found no protected right for an employee to solicit a fellow employee to be a witness in support of the employee's personal case of alleged harassment. The Obama Board likely will overturn these decisions and may even expand the right to include a non-employee representative.

- *Alladin Gaming, LLC*—In this case, the Bush Board did not find as unlawful surveillance when managers interjected their company views on unionization to a group of off-duty employees signing union cards at lunch in the breakroom. The Obama Board is expected to severely restrict supervisory "interference" of any kind.

- *Palms Hotel & Casino, Lafayette Park Hotel, Lutheran Heritage Village, and Delta Brands, Inc.*—One of the most litigated issues (and used by unions to organize) is whether employer language in employee handbooks and policies interferes with, restrains, or coerces employee rights under the Act. The Bush Board argued for a reasonable reading and that the mere maintenance of an arguably overbroad rule does not serve as a basis for overturning an election. Dissenters, including the new Obama Board Chairman, contended that such rules can not be read in isolation, that rules which tend to "chill" employees from engaging in protected activities are unlawful, and the mere maintenance of an unlawfully overbroad rule is grounds for setting aside an election.

- *Jones Plastic and Engineering Co.*—The Bush Board held that employees hired on an at-will basis can be permanent replacements for striking employees. The dissenters argued that offers of permanent employment to strike replacements, to preclude reinstatement of striking employees, must not permit termination for any reason. This, in turn, would conflict with extant precedent and make strike replacement difficult, if not impossible.

- *Additional targets*—"quickie" elections in less than the traditional 42 days from the filing of an election petition; limitations on employer speech; liberal findings to justify re-run elections, bargaining orders, special damages, and full back-pay awards; liberal interpretations of information requests to "facilitate" bargaining; and upending the common-law of contract interpretation to require bargaining and/or prevent unilateral management implementation of anything not clearly and unmistakably waived by the union by express contract language in the applicable collective agreement.

OK, so with all these changes on the horizon…*NOW WHAT SHOULD YOU DO*?

1. Preserve your operating flexibility and conduct a Unit Analysis* to be fully prepared for union organizing. (*A Nixon Peabody proprietary analysis of operating facilities, job classifications, manpower utilization, policies and procedures, and supervisory designations and reporting relationships).

2. Always tell employees the truth, communicate often, and have a plan and strategic topics.

3. Invest in training executives, managers, and supervisors regarding the law of union organizing, employee rights, and company policies and rules.

4. Review employee selection processes and use new employee orientation to teach the "business of the business" and company perspective on third-party representation.

5. Consider conducting employee attitude surveys and study the results.

6. Create and support an employee dispute resolution procedure.

7. Maintain uniformity and consistency in administering and enforcing policies and rules corporate-wide and review annually to help ensure legal compliance.

8. Evaluate union density, union activity, related litigation, and the law of successorship when considering greenfield operations, mergers, and/or acquisitions.

9. Get "buy-in" from the C-suite regarding the employee relations plan.

10. Continuously audit your HR procedures and activities and correct errors.

For further information, please contact your regular Nixon Peabody attorney or:

- John N. Raudabaugh at 202-585-8100 or jraudabaugh@nixonpeabody.com