

Recess NLRB Appointments Spell Trouble for Employers

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Despite a heated campaign by Republicans urging President Obama not to make recess appointments to the National Labor Relations Board and the Equal Employment Opportunity Commission, President Obama did just that on Friday, March 26, 2010, when he announced his intention to make 15 recess appointments to administration posts. Most controversial was the recess appointment of Craig Becker, who has drawn fire based upon his prior positions with the Service Employees International Union and the AFL-CIO as well as writings critical of any employer involvement in union certification campaigns. In addition, the President announced the recess appointment of Mark Pearce, a union attorney, to the Board.

The recess appointments will bring the Board's numbers up to four of the five seats and, more importantly, a three-to-one Democratic majority of union-side lawyers. The President failed to recess appoint Republican nominee Brian Hayes. Republican Senator John McCain lashed out at Becker's appointment as "clear payback by the Administration to organize labor." There are a number of decisions by the Bush Board which labor hopes the newly reconstituted Board will address and perhaps overrule. In particular, the so-called "Black September" decisions of 2007 addressing supervisory issues, union salting, and neutrality agreements, have been targeted by labor.

There is also a pending legal challenge to any and all Board decisions issued while the Board numbered two members. The sole Republican Board member, Peter Schaumber, recently defended the legal ability of the two-member Board to issue decisions and blamed the decrease in union membership, not on the Board's alleged flawed interpretation of the National Labor Relations Act, but on cultural, economic, and social factors. In particular, he pointed to stronger state and federal labor law protection for employees, as well as a decrease in the manufacturing sector as contributing to the loss of union members.