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WORKPLACE

Volume 2011 - Number 4 - September 2011

Our State of the Unions Address

As demonstrated by the recent events in Wisconsin and many other States, the now-resolved NFL labor dispute, the NBA ongoing lockout, Teamsters President James Hoffa, Jr.'s political rant against the Tea Party, and the NLRB's attack on the Boeing Company's decision to begin manufacturing operations in South Carolina, unions are increasingly in the news – and the publicity is probably good for organized labor. If you only saw the news coverage, you might assume that organized labor, and the popularity of unions in general, are on the rise. But, you would be wrong.

What better time than the recent Labor Day Holiday – a creation of the Labor Movement – to assess the current state of organized labor.

Keeping Things in Perspective

The vast majority of the U.S. workforce chooses to work union-free. In the public sector, employees working for the federal, state, or local government, about 60% of employees choose not to belong to a union. In the private sector, the numbers are truly overwhelming. Of all employees in the private sector, about 93% choose not to belong to a union. Despite the fact that there are about five (5) times more employees in the private sector, today most union members work for the government.

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WORKPLACE is published by the Labor and Employment Group of Butler, Snow, O'Mara, Stevens & Cannada,

Southern states, including Mississippi, Tennessee, and Louisiana, still have the most conservative anti-union population. Only 5.6% of Mississippi workers are represented by unions, while only 5.5% Louisiana workers and 5.8% of Tennessee workers are union-represented. We do not anticipate these percentages dramatically increasing anytime soon.

Even in states which are traditionally pro-union, private sector union membership has not significantly increased. For example, in California, union membership increased from 17.2% in 2009 to only 17.5% in 2010, according to the U.S. Bureau of Labor Statistics. In West Virginia, union representation increased from 15.4% in 2009 to only 16.5% in 2010.

Despite their low membership numbers, unions have always done a good job of creating the ***impression*** or appearance of strong public support. A recent Gallop survey, however, indicates that only 48% of Americans actually favor the idea of unions.[1] According to another recent Gallop survey released September 1, 2011, a majority of Americans, 55%, believe labor unions will become weaker in the future than they are today.[2] Certainly, absent significant assistance, we would expect the percentage of union represented employees to continue to decline, particularly in the private sector.

As evidenced by a number of recent events, organized labor is now receiving significant help from the Obama administration which may well spark a rise in union membership, even in the South. Recent events should send a wake-up call to private employers to monitor what may become frequent changes to what once seemed well-established National Labor Relations Board (NLRB) case law, as the NLRB uses its administrative enforcement powers to provide leverage to unions to increase union membership. Why might the Obama administration favor organized labor?

Big Money, Big Contributions

Even with their relatively modest membership numbers, unions have always generated big money. In 2010, for example, the Service Employees International Union (SEIU), which bills itself as the fastest growing union in the United States, reported total receipts of **$318,755,793.00**.[3] The American Federation of State, County, and Municipal Employees (AFSCME), a union representing primarily public sector employees, took in **$211,806,537.00** in total receipts for 2010.[4] More significantly, both unions were big political spenders. According to a February 25, 2011, article in the Huffington Post, AFSCME spent $87 million in support of political candidates, making it the biggest single source of independent campaign funding last year.[5] Andy Stern, former

President of the SEIU, has claimed his union spent over $60 million to help elect Barack Obama.

While organized labor was not able to cash in or yet claim its biggest prize – the passage of the Employee Free Choice Act (EFCA) – unions have made other notable gains.

Using the NLRB to Help Unions Organize

In 2008, in speeches before the AFL-CIO and United Food and Commercial Workers Union, then-candidate Barack Obama called out President George Bush for "packing" the NLRB with appointees who did not favor unions, something Candidate Obama vowed to change. Candidate Obama made clear his support of and respect for organized labor. To rousing applause, Mr. Obama pledged his loyalty to organized labor shouting that it is time everyone understood, after all, it is called the Department of ***Labor***, and not the Department of ***Management***.[6] Then-candidate Obama expressed his solidarity with his labor audience by telling them it is time we had a president who strengthens our unions by letting them do what they do best – organize our workers. Certainly, as the remarks by Mr. Obama made clear, he does not view the NLRB or the Department of Labor as a "neutral" in matters involving employers and organized labor and he will take the necessary steps to provide more opportunities for union organizing.

President Obama appointed Craig Becker, former Associate General Counsel to both the SEIU and the AFSCME, and Mark Gaston Pearce, a former union-side labor lawyer, to fill two vacancies on the National Labor Relations Board. They joined Chairperson Wilma Liebman, a long-time NLRB Member loyal to unions. Brian E. Hayes is the lone Republican member of the NLRB.

The pro-labor NLRB made no secret of its intention to expand the reaches of organized labor. The NLRB sponsored an ad on Google (which appeared on March 3, 2011) encouraging internet readers to obtain information on how to start a union by accessing the NLRB website. In a letter to Chairperson Liebman, Representative John Kline (R-Minn.), Chairman of the Education and Workforce Committee, called the ad "unquestionably biased" and stated the NLRB must maintain a "***neutral position***" between unions, employees and employers. The ad stated:

Labor Organization Info

Find Info on How to Start a Union.

Get the Process & More on Our Site!

www.nlrb.gov

NLRB's New Notice Posting Regulation

In December 2010, the NLRB proposed a regulation which would require employers to post a notice informing employees of their rights under the National Labor Relations Act ("NLRA"). In what seemed disingenuous at best, the NLRB suggested that the notice was necessary because many employees are unaware of their rights under the National Labor Relations Act. The NLRA is, of course, not new. It has been in place for 75 years. Nevertheless, the notice was promoted with the idea that it would educate employees about their rights and assist them in exercising those rights by filing unfair labor practice charges against employers (i.e., promote statutory compliance by employers and unions).

Many, including NLRB member Hayes, criticized the proposed notice as one-sided or biased in favor of unions. The NLRB acknowledged that the majority of comments it received ***opposed*** the proposed rule.

Nevertheless, the NLRB has now issued a Final Rule ***requiring*** all private sector employers subject to the NLRA to post a Notice advising employees of their rights under the NLRA. Not surprisingly, the Final Rule was adopted in a 3-1 vote with Chairperson Liebman, Member Becker and Member Pearce in favor, and Member Hayes dissenting.

The Final Rule requires covered private-sector employers to post the employee rights notice in conspicuous places in the workplace. Employers who customarily post notices to employees regarding personnel rules or policies on an internet or intranet site are required to post the Board's Notice on those sites as well. Copies of the Notice are available from the Agency's regional offices, and may be downloaded from the NLRB website.[7]

The Notice states, among other things, that employees have the right to act together to improve wages and working conditions, to form, join and assist a union, to bargain collectively with their employer, and the right to refrain from any of these activities. It provides examples of unlawful employer and union conduct and instructs employees how to contact the NLRB with questions or complaints.

The Board has given itself a broad spectrum of penalties to impose for violation of the notice-posting rule, including citation for an unfair labor practice, monetary fines and a possible extension of the charge-filing

statute of limitations in other alleged unfair labor practice matters. The Board may also use the failure to post as evidence of an employer's unlawful motive in unfair labor practice cases involving other alleged violations of NLRA.

The Final Rule becomes effective November 14, 2011. Employers should consider what actions, if any, may be necessary to explain the effect of the Notice.

Nothing in the Final Rule changes or restricts an employer's right to communicate its desire to operate in a union-free environment. Thus, an employer may choose to remind its employees of the company's desires and/or its reasons for opposing union representation by posting that information at or near the NLRB Notice.

Employers may also decide to develop a communication strategy and to conduct education sessions or training of supervisors, managers or employees prior to the posting. Obviously, each workplace is different. If you wish to discuss communication strategies for your organization, please contact the Butler Snow attorneys whith whom you work for labor law matters or the authors of this edition of Workplace.

Overturning Pro-Employer Precedent

The NLRB under the Obama Administration has been aggressive in overturning case law which it believes favored employers. That process is already well underway in a number of different subject-matter areas, most notably in its assisting unions with access and communication to employees and assisting unions in organizing efforts.

Assisting unions with access to and communication with employees

Unions have long complained that it is too difficult for their organizations to communicate with employees. Unions have long sought to "level the field" by being granted access to employees while at work. The NLRB appears to have taken up the union's cause.

In a case involving one of our California hospital clients, the NLRB has announced its intent ***not*** to follow current NLRB precedent regarding access to the employer's premises by off-duty employees. In *San Ramon Regional Medical Center, Inc.*, a National Labor Relations Board Administrative Law Judge determined that a hospital can lawfully allow an off-duty employee access to the hospital interior to visit a patient, to receive medical treatment, or to conduct hospital-related business without impacting the hospital's ability to enforce an off-duty no access policy to

prevent union organizing inside the hospital by off-duty employees. The ALJ based his ruling on the language of the hospital's policy, which contained these limited exceptions to the no-access rule. Despite this ruling and despite our client's policy, which is identical - word-for-word – to the San Ramon policy, the NLRB claims the rule is too restrictive and has advised our client that any exception which allows access by off-duty employees – for *any* purpose (apparently even to seek medical treatment) – will prevent the hospital from prohibiting off-duty employees from returning to the facility in engage in union organizing activity.

The NLRB has long recognized an employee's "right" to wear pro-union insignia in the workplace, absent special circumstances which would permit an employer to restrict that right. Most notably, special circumstances have been found in health care settings where an employer may restrict the wearing of such insignia in immediate patient care areas.

What about in the non-healthcare workplace? Many employers have initiated dress codes or require the wearing of uniforms. Isn't this the type of "special circumstances" which would restrict or prohibit the wearing of union insignia? Not according to the NLRB.

The NLRB has issued a decision in *Stabilus, Inc.*, 355 NLRB No. 161 (2010), which states an employer ***cannot*** avoid the "special circumstances" test by simply requiring its employees to wear uniforms or other designated clothing, thereby precluding the wearing of union insignia. In *Stabilus*, the Board held that even if special circumstances could have been shown to support the employer's policy regarding the wearing of a uniform without any union insignia, the employer had not consistently enforced its policy. Fair enough. But what did the employer allow which was deemed to be inconsistent with its policy?

Employees were allowed to wear clothing with the logo of the Carolina Panthers during its participation in the Super Bowl, could wear costumes on Halloween, and were permitted to wear other than their uniform on the anniversary of the terrorist attacks on September 11. Chairman Liebman and Member Becker found these ***three*** deviations from the uniform policy to be "deliberate and company wide and for occasions analogous to and ***no less significant*** than a union election (e.g., Halloween and the Super Bowl).

As bad as *Stabilus, Inc.* may be, however, the NLRB's decision in *AT&T Connecticut* is worse and may be the best illustration of how far the current Board will go to "protect" an employee's right to wear pro-union

messages in the workplace. Unhappy with the bargaining between the union and employer, some AT&T employees began wearing "prisoner" t-shirts. The t-shirts were white with black lettering. The front of the t-shirt had the notation "Inmate #" with a black box underneath it. On the back the t-shirt had black vertical lines and the words "Prisoner of AT$T." The t-shirt did not identify the union. A total of twenty employees were suspended for insubordination for their failure to remove the prisoner t-shirts despite being ordered to do so by the employer.

The NLRB found that there were no special circumstances which would allow the employer to prevent employees from wearing the t-shirts ***even in their dealings with customers at their homes***. The NLRB found that the prisoner t-shirts "would not have been reasonably mistaken for prison garb" and "the totality of circumstances would make it clear that the [employee] was one of [AT&T's] employees and not a convict." In his dissent, NLRB Member Hayes sums up the obvious problems with the Board's decision:

> Imagine that you are a customer of AT&T Connecticut awaiting a service call. The door bell rings. You open it, and the first thing you see is someone wearing a T-shirt bearing only "Inmate #" on its front. Would you hesitate to let that person in your home, particularly if you lived in a state where there had been a highly publicized and horrific home invasion and murder? ***What would you think about a company that permitted its technicians to wear such shirts when making home service calls?*** Even if you knew about an ongoing labor dispute at AT&T, why would your initial thought when opening the door to your home be "Oh, of course, this person is simply an AT&T technician exercising a right to express his view about that labor dispute?" . . . In my view, the judge and majority have failed to give sufficient weight to the potential for employees wearing these shirts ***to frighten customers in their own homes and thereby to cause substantial damage to [AT&T's] reputation***.

NLRB Assistance with Union Organizing.

The NLRB is also assisting labor organizations by restricting ***employee*** rights to decertify or vote out a union. In a 3-1 decision issued on August 26, 2011, the NLRB overruled 20 years of precedent on how to determine a bargaining unit (voting unit) in union elections. In *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), the Board

determined that a small group of certified nursing assistants at a nursing home could vote on union representation ***without*** including other unrepresented employees.

Under prior Board precedent, the smaller CNA unit would likely have been found inappropriate and an election would have included other non-professional employees working in the nursing home. The decision allows unions to carve out or seek to organize smaller units in a workplace:

> … when employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the [smaller] petitioned for unit.

While the decision arose in a non-acute healthcare facility (nursing home), it illustrates how the current NLRB may view the determination of voting units in industries. As noted in his dissent, Member Hayes writes, *" . . . Make no mistake. Today's decision fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction."*

Member Hayes is blunt. He sees the actions of the NLRB as open support for organized labor. Hayes believes that the motivating force in the NLRB's actions in overruling prior decisions has one primary purpose: to reverse the "decades-old decline in union density in the private American work force."

In *UGL-UNICCO Serv. Co.*, 357 NLRB No. 76 (2011), the Board overturned prior precedent and reinstated the "successor bar" doctrine. This rule applies when a new employer has taken over a prior employer's operation and has hired a majority of the employees of the previous employer. In such circumstances, the successor employer would have

an obligation to recognize and bargain with the incumbent union. Under prior Board law that obligation could be ended if either the successor employer had evidence that a majority of the employees no longer wanted to be represented by the union or if employees filed a petition to decertify the incumbent union.

The "successor bar" rule protects the incumbent union by restricting the ability of the employees to vote the union out. The ruling guarantees that the union cannot be voted out for a period of six months to a year – even if a majority of the employees have clearly and openly stated that they no longer wish to be represented by the union.

Similarly, in *Lamons Gasket Co., 357 NLRB No. 72 (2011),* the Board further restricted employees' free choice rights by holding that an employer's voluntary recognition of a union based on the support of a majority of employees bars a union decertification election for a "reasonable period" of time. The case focuses on the new bargaining relationship created by an employer's voluntary recognition of a union based on a showing of support by a majority of employees. Under prior precedent in place since 2007, if an employer had voluntarily recognized the union (i.e., the employees had not been permitted to vote in a NLRB-conducted secret ballot election), the employees could call for an immediate challenge to the employer's decision by filing for an election using the NLRB decertification process. Accordingly, if at least 30% of the covered employees signed a decertification petition, a NLRB supervised secret ballot election could be held. Having been denied the initial opportunity to ***vote*** on the question of union representation, this process would ensure that all eligible employees could vote – by ***secret ballot*** – as to whether or not they wanted to be represented by the union. The process seems fair. Clearly, it would not apply unless a significant number of employees (30%) indicated a desire to schedule an election. Indeed, the NLRB always claimed to support the secret ballot election as the preferred way for employees to decide whether or not to be represented by a union. Yet, by this decision, the Board has guaranteed a union will continue to represent employees for a "reasonable period" whether they like it or not.

As with its decision reinstating the "successor bar doctrine," this decision shows that the current NLRB has little regard for protecting the desires of employees. This Board appears more interested in restricting employee choice when that choice could be detrimental to a union.

Hold On, More Changes Expected

As with the Notice posting requirement, the NLRB has proposed new

rules to streamline and speed up the union election process. On June 21, 2011, the Board proposed major reforms to its procedures for conducting representation case proceedings. This is the most substantial revision to the Board's election process since 1935.

These are proposed regulations which means they must go through a notice and comment period prior to the Board issuing final regulations. However, the regulations do not have to be approved by Congress. The Board held public hearings on the proposed regulations on July 18-19, 2011, and the public comment period for the regulations closed on September 6, 2011. With those formalities satisfied, the NLRB has the administrative right to issue the final, mandatory regulations at any time.

The proposed regulations contain technical, but substantial, changes to election procedures. Here are a few key points:

- No pre-election challenge of voter eligibility if less than 20% of the bargaining unit is at issue.
- No pre-election appeal to NLRB of Regional Director rulings.
- Pre-election hearings would begin no more than 7 days after the Notice of Hearing is served and most post-election hearings would begin no later than 14 days after the ballots are counted.
- The list of eligible voters would be provided to the union no later than the opening of the pre-election hearing.
- The issues at the pre-election hearing will be significantly restricted.
- The final list of eligible voters would be given to the union in 2 work days and in electronic format, and would include ***email addresses*** and ***telephone numbers***.

If the proposed regulations are issued in final form, they most certainly will shorten the period of time an employer will have to determine issues related to whether the petitioned-for unit is appropriate for an election (or should be challenged) and will shorten the period of time an employer will have to inform and educate employees and/or persuade them to reject the union in an election. This means that employers must be prepared. As with developing a strategy around the posting of the NLRB Notice, each workplace is different and what may be appropriate in one may be inappropriate in another. Certainly, the rules are changing. What efforts, if any, you choose to implement (e.g., employee educational workshops, supervisory training, updating job descriptions, reviewing the criteria to determine supervisory status, etc.) will be determined by many factors, including your candid assessment of your organization's vulnerability to a

union organizing campaign.

The Board's Revolving Door And Changing Political Landscape

At midnight on August 27, 2011, National Labor Relations Board Chairperson Wilma Liebman's term on the National Labor Relations Board expired. Appointed by President Clinton and reappointed by President Bush, Ms. Liebman served almost 14 years during one of the most tumultuous time periods in recent NLRB history.

With Ms. Liebman gone, the Board is down to just three members -- two Democrats (Mr. Becker and Mr. Pearce) and one Republican (Mr. Hayes) – which barely meets the required 3-Member quorum for deciding cases. Soon, Member Becker's recess appointment to the Board will expire. Thus, the Board may be reduced to only two Members, one below the required quorum for deciding cases.

To add further intrigue, Republican strategists, including South Carolina Governor Nikki Haley, are outlining another plan to limit the effect of the presently-constituted NLRB. In the event President Obama makes another recess-appointment or a Democratic Member is confirmed, Republicans may persuade the one sitting Republican Member, Brian Hayes, to resign, once again bringing the number of Board Members below the required three-member quorum. As confirmed by the recent U.S. Supreme Court decision in *New Process Steel v. NLRB*, 130 S.Ct. 2635 (2010), the Board may not act (e.g., issue decisions, impose rules) with less than three members.

We will keep you posted as the players and the strategies work their course in Washington, D.C. In the meantime, our advice is to comply with those final regulations and cases issued by the NLRB, recognizing that future Board pronouncements may require, yet again, different action.

What This All Means for You

Increased political support has emboldened unions and their members to voice their anti-management sentiment in a variety of different venues and media forms. If you really want to know how unions feel about employers, listen to the pro-union anthem by the Dropkick Murphys, which was posted on the SEIU's website. A summary of the lyrics tells you all you need to know: "*When the boss comes calling, he'll put us down, when the boss comes calling, gotta stand your ground, when the boss comes calling, don't believe their lies. When the boss comes calling, he'll take his toll, when the boss comes calling, don't sell your soul, when the boss comes calling, we gotta organize. Let them know,*

*we gotta take the b****rds down, let them know, we gotta smash them to the ground, let them know, we gotta take the b****rds down*." [8]

While we do not believe the sky is falling, recent events should send a ***wake-up*** call to employers to monitor unions' increasing political influence and what may become frequent changes to what once seemed well-established Board case law, as the NLRB uses its administrative enforcement powers to provide economic and other weapons to unions to increase union membership. Employers who do not stay abreast of these changes may unknowingly commit unfair labor practices, providing unions with more leverage in organizing workers (or at least this is what the unions are hoping for).

To stay informed of the ever-changing labor relations landscape, please contact the Butler Snow attorneys with whom you work for labor law matters or the authors of this edition of Workplace.

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[1]"Labor Unions See Sharp Slide in U.S. Support," www.gallup.com(September 3, 2009).
[2]"New High of 55% of Americans Foresee Labor Unions Weakening," www.gallup.com (September 1, 2011).
[3] LM-2 filed March 31, 2011.
[4] LM-2 filed March 24, 2011.
[5] "The Real Political Math in Wisconsin," Howard Finebaum, www.huffingtonpost.com (February 25, 2011).
[6]The video of then-candidate Obama's AFL-CIO speech may be viewed at http://www.youtube.com/user/EmployeeFreedom#p/u/79/iMNVIQqatyU
[7]The Notice may be accessed and downloaded at www.nlrb.gov/poster.
[8]"Beck: SEIU's New Battle Cry," http://www.foxnews.com/on-air/glenn-beck/transcript/beck-seius-new-battle-cry(February 24, 2011).

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