By ROBERT J. HAURIN

A Laborious About-Face

Big Changes Expected in Regulation of U.S. Labor-Management Relations

With the change in administrations at the White House, it is all but certain that the National Labor Relations Act (NLRA), the federal law that regulates the relationships among unions, employers and employees, will be interpreted and administered in a manner that is far more union friendly than at any time in recent history. Already President Obama has signed a group of executive orders reversing the Bush administration's practices on a number of significant issues affecting all employers – union-represented and non-union workforces – so as to encourage collective bargaining and to make it easier for unions to organize workers. He also has appointed two new members to the National Labor Relations Board (NLRB) who are associated with the labor movement, thereby tilting the balance of power on the board to organized labor for the first time since the Clinton administration.

The NLRB is primarily responsible for administering and enforcing the NLRA. The NLRA is the statute that regulates relationships between management (the employer) and labor (unionized employees). The NLRB's responsibilities include overseeing union representation elections and adjudicating unfair labor practice charges that have been filed against employers and labor organizations. The NLRB consists of five members who are appointed by the president and confirmed by the Senate. Board members generally serve five-year terms.

Over the years, the NLRB has been comprised of two Republican members with management backgrounds, two Democratic members who are aligned with organized labor and a fifth member who may be aligned with either side depending upon the ideology of the president who makes the appointment. Both Democratic-led and Republican-led boards have shown in the past that board precedent is not sacrosanct, and is susceptible to reversal. The "Obama Board" that has recently taken shape will likely be no different and may be poised to reverse certain rulings of the "Bush Board" that preceded it.

Until recently, the NLRB had been operating with just two of its five members – one Democrat, and one Republican. The make-up of the NLRB, however, has undergone drastic change this year. On March 27, 2010, President Obama bypassed the Senate confirmation process and made two controversial recess appointments to the NLRB, naming Craig Becker and Mark Pearce to the board.

Becker was previously an attorney for the Service Employees International Union and AFL-CIO. Mark Pearce is a union-side labor lawyer from New York. Thus, Becker and Pierce have joined Chair Wilma Liebman to create a 3-to-1 majority on the board for organized labor. This is the first time in more than 70 years during which labor has enjoyed such a majority. The sole remaining Republican is Peter Schaumber, and one position remains vacant as of this article's writing. Schaumber's term expires Aug. 10, 2010.

The appointment of Becker, who *The Wall Street Journal* calls "labor's biggest weapon," has particularly drawn the ire of the Senate and business community including the U.S. Chamber of Commerce. Among other things, Becker has previously expressed his opinion that employers should have no role in union organizing campaigns and union representation elections. Becker has also voiced his disagreement over an employer's right to hire permanent replacement workers in an economic strike and has stated that the NLRB should use its power to issue "bargaining orders" in cases in which a union representation election is marred by coercive conduct on the part of the employer. A bargaining order that heretofore was used only in extreme cases requires that an employer recognize a union and engage in collective bargaining without holding another representation election.

Becker's strong, pro-labor views have also raised concerns that the NLRB might circumvent Congress by using board decisions and rulemaking to implement portions of the Employee Free Choice Act (EFCA) that stalled last year in Congress. It should be noted that EFCA, in its current form, has little chance of becoming law.

The current composition of the NLRB will undoubtedly have a major impact

The current composition of the NLRB will undoubtedly have a major impact on business and labor management relations in the coming years.

on business and labor management relations in the coming years. In fact, many prior decisions of the board during the Bush presidency, which are largely considered "pro management," are expected to be overturned and replaced with new law that is likely to be considered "pro union."

For instance, the former Bush-appointed board's determination in a case known as Register Guard received a good deal of attention when the NLRB held that an employer could lawfully prohibit its employees from using e-mail for union organizing activities even if it allowed its employees to use e-mail for other personal matters. The dissenting board members, however, took the position that e-mail should be treated like other forms of solicitation so that employees should have the right to engage in e-mail solicitation when not on work time. It is likely that this case will be overturned or at least limited by the Obama Board. If reversed, it will be more difficult for an employer to prohibit the use of e-mail for union organizing activities while, at the same time, make it easier for unions to organize workers.

In another example of how the NLRB's decisions have changed in tantum with changes in presidential administrations, in IBM Corporation, the board held that employees in non-unionized workforces do not have Weingarten rights (the right to be represented by a coworker at an investigatory interview that might lead to discipline). The board in IBM actually overruled the board's decision in Epilepsy Foundation of Northeast Ohio. In Epilepsy, the Clinton Board concluded that non-union employees were entitled to Weingarten rights. It is likely that IBM will be quickly reversed and the pendulum will swing back in favor of employees' rights in a non-union environment.

Likewise, Harborside Healthcare, Inc. involved the extent to which supervisory pro-union activity is objectionable conduct such that it interferes with an employee's right to choose in a union election. The majority members of the board held that, absent mitigating circumstances, solicitation of a union authorization card by a supervisor has an "inherent tendency" to coerce the employee solicited and therefore the challenging employer does not have to establish that the supervisor engaged in coercive conduct for an election to be overturned. The dissenting members of the board charged the majority with creating an "arbitrary double standard" in their treatment of pro-union and anti-union conduct, because employers have long been allowed to conduct "captive audience" speeches to employees during election campaigns. If Harborside is reversed, an employer will have to demonstrate that a supervisor's pro-union conduct during an election campaign was so coercive that it materially affected the outcome of an election for an election to be overturned.

The definitional test for who is a supervisor may also change under the Obama Board. In Oakwood Healthcare, the Bush Board ruled that certain charge nurses were supervisors under the NLRA because of their delegated authority to assign work to employees. An individual who is classified as a supervisor is excluded from a proposed bargaining unit with no right to vote in a union representation election.

The controversial Oakwood decision has made it easier for employers to classify workers as supervisors. An act pending in Congress known as the RESPECT Act will dramatically limit which workers can be classified as supervisors and thus excluded from bargaining units. The RESPECT Act would eliminate from the statutory definition of a supervisor the duties to "assign" and "responsibility to direct" and instead require that employees must spend the majority of their time performing traditional supervisory functions to be classified as a supervisor. Even if the RESPECT Act fails, the Obama Board will likely overrule Oakwood and make it more difficult for employers to classify workers as supervisors.

Many other board precedents are at risk of being overruled including limiting the amount of back pay that is recoverable by a "salt," the standards for combining in one collective bargaining unit temporary workers jointly employed by a staffing company and a client employer with regular workers solely employed by the client employer, whether graduate students are employees under the NLRA, and whether the threat of a plant closing during a union organizing campaign will be presumed to be disseminated throughout the workplace. In all, board case law as it exists today is likely to undergo dramatic change in the next two years.

In addition to the changes expected in board decisional law, NLRB Chair Liebman has also indicated that she will consider the use of rulemaking

CONTINUED ON PAGE 13

It is well-settled that Congress' commerce authority includes the power to regulate those intrastate activities that substantially affect interstate commerce.

Most recently, in *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court confirmed Congress' authority to criminalize the manufacture, distribution or possession of marijuana as it applies to intrastate growers and users of marijuana for medical purposes. The court reasoned that the law falls squarely within the Commerce Clause because production of a commodity meant for home consumption has a substantial effect on supply and demand in the national market for that commodity.

Supporters of the Health Care Reform law argue that unlike the criminal acts of possessing a gun in a school zone or battering a woman, purchasing health insurance is an inherently commercial activity, and the lack of purchasing health insurance has economic consequences to national health care systems, including Medicaid, and insurance companies that transact business across state lines. In contrast, critics of the new law challenge the application of those cases that deal with the economic impact of commodity production, being clearly distinguishable from an individual's refusal to purchase health insurance.

The composition of the Supreme Court has changed, with only three each of the Lopez and Morrison majority and minority remaining. The court's three newest additions, Justices Roberts, Alito and Sotomayer, have yet to cast their votes on this Commerce Clause debate. Notably, however, Justices Roberts and Alito were part of the majority that recently overturned legislation backed by the Obama administration seeking to limit corporate and union spending for political campaigns.

While legal analysts are split on the merits of the attorneys general's legal actions, most agree the issue will ultimately be decided by an unpredictable Supreme Court. ■

Stacy N. Lilly (www.thelillylawoffice.com) is a freelance attorney who specializes in assisting other attorneys and law firms with their insurance coverage and litigation practices. She is a member of the Philadelphia Bar Association's Insurance Law Committee.

CONTINUED FROM PAGE 11

in the future. Traditionally, the board has used its rulemaking power very sparingly, and only to issue narrow rules. Liebman has promised to be far more aggressive. The NLRB could use its rulemaking power to make it easier for unions to organize workers by:

1. Limiting the period for election campaigns.
2. Requiring employers to turn over employee names, addresses and phone numbers to a union earlier in the union organizing campaign.
3. Requiring equal access to both workers and the workplace for unions during union organizing campaigns.
4. Requiring employers to post notices in the workplace that inform employees of their rights under the NLRA. The posting is already required for federal contractors pursuant to President Obama's Executive Order.

The common thread among all of these expected changes in the law is to remove barriers to unions and their organizing efforts. In short, significant union-friendly changes are on the horizon, despite the failure of EFCA in Congress. ■

Robert J. Haurin (rhaurin@weinsteinfirm.com) has been practicing labor and employment law for employers and management since 1994. He is an attorney with The Weinstein Firm, a boutique legal and consulting firm focusing on workforce issues.

CONTINUED FROM PAGE 9

in which the horse carriage industry is threatening animal and public welfare, to pass a law that would ban horse-drawn carriages in Philadelphia. The law should further require that horses be officially retired and transferred to authorized sanctuaries where they can try to heal from their injuries and live the rest of their lives engaging in natural horse behaviors.

Councilman DiCicco's contact information is Room 332, City Hall, Philadelphia, (215) 686-3458, (215) 686-3459, Frank.DiCicco@phila.gov. For more information on Philadelphia activists' efforts to ban horse-drawn carriages, please e-mail banhdcphilly@peaceadvocacynetwork.org. ■

Dara Lovitz (dara.lovitz@hotmail.com) is an adjunct professor of Animal Law at Temple University Beasley School of Law and the Earle Mack School of Law at Drexel University; she is also the Director of Media and Public Relations for Peace Advocacy Network.