ALERT

LABOR & EMPLOYMENT LAW

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EFCA-'Lite'? – NLRB Board Member Pearce's Comments Foreshadow EFCA-Like Election Period

The new makeup of the National Labor Relations Board (NLRB) combined with recent comments by one of its members indicate a potential major shift in union election procedures – a shift that would undoubtedly favor unions. Under current NLRB procedures, an employee secret-ballot election is generally scheduled within 42 days after a representation petition has been filed by a union with the NLRB. The intervening days between the petition filing and the election offer the employer its opportunity to communicate to employees its corporate view and why it feels remaining union-free is in the best interest of the company. Importantly, unions usually inundate employees with pro-labor propaganda for many weeks and even months prior to the filing of the petition, often leaving employers a "step behind" once a petition is actually filed. Thus, having several weeks between the filing of a petition and a resulting union election is crucial to a company's chance for success. On Thursday, Oct. 21, 2010, newly appointed NLRB member Mark Pearce made comments indicating that he supports shortening election periods for unions, thus calling into question whether the current system will remain in place.

Pearce, a former union attorney, is one of two recent "pro-labor" NLRB appointees by President Obama, the other being former SEIU Associate General Counsel Craig Becker. Speaking at a labor conference at Suffolk University Law School, Pearce noted that the median time-period for an election after the filing of a petition was 38 days during the past year and went on to state that he believes the NLRB should seek to make election periods "*as brief as possible*" (*i.e.*, reduce the amount of time a company has to convey its message to employees). Pearce then alluded to looking to the Canadian system as a model, which conducts elections within five to 10 days after the filing of a petition and holds in abeyance questions concerning voter eligibility until after an election is held. (Under the current U.S. system, employers raise challenges regarding voter eligibility and have these issues resolved prior to an election – which can be critical in determining an election's outcome.) Shortening election periods is one of the primary goals of the infamous Employee Free Choice Act (EFCA), which has been stalled in committee since 2009. Pearce also informed his audience that the NLRB was examining and potentially changing the way "first contracts" (the initial contract between a newly-elected union and a company) are negotiated, another issue EFCA would alter by

forcing employers to go to mediation with a union if no contract can be mutually reached during initial negotiations.

Pearce's comments echo those of the controversial Becker, who has advocated using the NLRB's "rulemaking" authority to circumvent Congress and implement aspects of EFCA. This would be a significant change from the traditional practice of the NLRB of creating legal guidelines through case precedent, similar to the U.S. court system. If the labor-friendly NLRB adopts Becker's philosophy, it could promulgate rules that achieve EFCA's goals and more, including:

- Shortened union elections;
- Electronic posting (in addition to physical posting) of unfair labor practice violations;
- Earlier union access to employees' personal contact information, exposing employees to more union propaganda;
- Restrictions on an employer's ability to communicate information regarding the negative aspects of unionization to employees;
- The use of an appointed mediator to settle "first contracts"; and
- Increased access for union organizers to an employer's place of business and employer-maintained electronic technology.

Making the use of this radical procedure more probable is the fact that NLRB Chairwoman Wilma Liebman also has expressed support for making changes and, in particular, EFCA. With Becker, Pearce, and Liebman now constituting a solid majority of the five-member NLRB, little will stand in their way of implementing their desired policy changes.

While EFCA and the surrounding debate have hit a lull in Congress, these recent remarks by Pearce combined with the express views of Becker indicate that changes to the labor landscape are likely forthcoming – including the possibility that a watered down version of EFCA could be enacted by the NLRB in the coming months. Employers should continue (or start!) taking proactive steps now to mitigate these potential new challenges to remaining union free.

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