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The National Labor Relations Board 2011 Year in Review
An Overview of the Board's Significant Decisions and Other Actions

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Introduction

By all accounts, 2011 was a busy year for the National Labor Relations Board ("Board"). In 2011, the Board saw a 17 percent increase in filings as compared to the prior year, which included both unfair labor practice charges and representation cases. During the federal fiscal year (October 1, 2010 through September 30, 2011), the Board issued 368 decisions, many of which will have a significant impact on employers. The Board also initiated two rulemaking procedures. The first proposed Rule, adopted in part by the Board in December 2011, would modify certain existing procedures governing representation elections. The other Rule, promulgated in February 2011, would require employers covered by the National Labor Relations Act ("Act") to post a Notice of Employee Rights, which outlines employee rights under the Act, such as the right to organize, the right to strike and picket, the right of non-unionized employees to engage in concerted activities, etc.

We reported extensively on the Board's initiatives and activities on our blog [www.palaborandemploymentblog.com] throughout the year, but we have provided an overview of the more significant decisions and actions of the Board below.

The Board's Significant Decisions

According to the Board's November 8, 2011 press release, it has recently addressed difficult issues that had needed interpretation for years. But many of these issues had in fact been addressed previously, albeit not to the liking of the Obama-appointed Board Members. Some of these issues related to the ability to challenge a union's status as collective bargaining representative, the access rights of pro-union employees to employer property, and the availability and calculation of remedies for violations of the Act.

The Board also addressed all but one of the cases remanded as a result of the Supreme Court of the United States decision in *New Process Steel v. Nat'l Labor Relations Bd.*, __ U.S. __, 130 S.Ct. 2635 (2010), which invalidated a number of Board Decisions, holding that a two-Member Board cannot act as a quorum. In fact, the Board's activity spiked immediately prior to the August 31, 2011 expiration of the term of former Chairman Wilma B. Liebman, even though the Board retained a quorum following her departure. A significant number of the Board's decisions, particularly the more controversial ones, were issued over the dissent of the lone Republican Board Member, Brian Hayes. A summary of a handful of the Board's key 2011 decisions is provided below.

a. Protection of the Union's Status as Collective Bargaining Representative

The Board issued an important decision regarding what it described as protection of new bargaining relationships, which really amounted to extended protection of union status. In *Lamons Gasket Co.*, 357 NLRB No. 72 (2011), the Board held that after an employer has voluntarily recognized a union's representative status, the employer, the employees and other unions cannot challenge the union's status for "a reasonable period of time." According to the Board, this reasonable period may range from six months to one year, depending on the circumstances. Interestingly, this decision squarely reversed guidance provided by the Board on the same issue in the 2007 decision, *Dana Corp.*, 351 NLRB 434. In *Dana Corp.*, the Board had concluded that the union's status could be challenged at any time if the employees or the employer made the appropriate showing of interest. However, following *Lamons Gasket Co.*, challenges to a newly-recognized union's status must now wait.

In a related decision, issued the same day as *Lamons Gasket Co.*, the Board extended similar protection to unions in the context of a change in ownership of a unionized company. In *UGL-UNICCO Service Co.*, 357 NLRB No. 76 (2011), the Board held that a union's status is protected from challenge for a reasonable period following the transfer of ownership of a unionized company. In this context, a reasonable period was deemed to be six months if the new employer adopts the existing collective bargaining agreement, but up to a year if the new employer imposes new terms and conditions of employment after taking over operations. This decision also squarely overruled prior Board precedent, established only nine years earlier in *MV Transportation*, 337 NLRB 770 (2002).

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These decisions, overruling relatively recent precedent, were issued over the strong dissent of Member Hayes. Member Hayes stated, correctly (in our view), that these decisions will bar the exercise of employee free choice and force employees (and employers) to recognize unions as their representatives, even in situations where employees may no longer want such representation.

b. Protection of Union Organizing Efforts

In *New York New York, LLC*, 356 NLRB No. 119 (2011), the Board found that a popular Las Vegas casino violated the Act by prohibiting employees of restaurants that operate in the casino from distributing handbills during their off-duty hours. The handbillers were not employees of the casino, but were instead employees of contractors who operated restaurants in the casino. The employees were seeking support for their organizing efforts. The casino had attempted to prohibit the employees from distributing handbills at the casino's main entrance and the entrances to the restaurants.

The Board, again with Member Hayes dissenting, essentially found that the contractors' employees' rights under the Act trumped the property owner's rights to exclude individuals from private property. The Board held that property owners may only lawfully exclude a contractor's employees from their property if the employees' activity significantly interferes with the use of the property or if there are other legitimate business interests that justify exclusion. How, or if, these conditions can be met remains to be determined by future cases. This decision essentially grants to a contractor's employees the same rights to handbill as the employer's own employees would have under the Act.

c. Scope of an Appropriate Bargaining Unit in Non-Acute Health Care Facilities

In a very significant decision regarding the appropriate scope of bargaining units in non-acute health care facilities, the Board again reversed precedent, this time precedent that had been in existence for 20 years. In *Specialty Healthcare & Rehabilitation Ctr. of Mobile*, 357 NLRB No. 83 (2011), the Board overruled *Park Manor Care Ctr.*, 305 NLRB 872 (1991), which it called "obsolete." The Board held that employees in non-acute health care facilities will be subject to a heightened "community of interest" standard when determining whether a petitioned-for bargaining unit is appropriate. *Park Manor* had established a specialized test for bargaining unit determinations in nursing homes, rehabilitation centers and other non-acute health care facilities. (Acute care facilities are covered by different rules.)

Interestingly, the Board also established a new, higher hurdle for employers to get over if they seek to challenge the appropriateness of the union's petitioned-for bargaining unit. In the past, an employer merely had to show that the proposed bargaining unit excluded employees who shared a community of interest with the employees in the proposed unit. Now, an employer must show an "overwhelming community of interest" between the fractured groups of employees. It is unclear exactly what this standard requires, but it is apparent that in most cases, the union's preferred determination of what the appropriate bargaining unit should be will prevail. Also, the Board has indicated it will apply this new, higher standard in non-health care settings as well. Therefore, all employers with non-union operations are potentially affected by *Specialty Healthcare*, as it encourages unions to organize in smaller units, such as perhaps by department, or even by individual job classification. The Board indicated it would approve for union representation "any petitioned-for unit readily identifiable as a group of employees who share a community of interest" unless the employer can demonstrate an "overwhelming" community of interest in a larger unit.

d. Pre-Recognition Agreements Found Lawful

In 2011, the Board decided a case that had been pending since 2004. In *Dana Corp.*, 356 NLRB No. 49, (2011), the Board held that an employer and a union may enter into a pre-recognition agreement that, among other things, establishes ground rules by which the union would be recognized if a majority of the employers' employees signed union authorization cards. In *Dana Corp.*, the pre-recognition agreement also provided a framework for any future collective bargaining agreements, which the Board also approved. The Board did confirm that some pre-recognition agreements are unlawful, because the Act prohibits employers from providing certain kinds of support to unions or creating their own company unions. However, the agreement at issue, which was designed to establish the ground rules for organizing Dana Corp.'s non-union facilities, was deemed lawful (even though the union ultimately failed to gain the majority showing).

e. Some Union Actions May Impermissibly Affect Elections

In *Stericycle, Inc.*, 357 NLRB No. 61 (2011), the Board found that the International Brotherhood of Teamsters, Local 70, had financed a lawsuit filed on behalf of employees during the "critical period" between the date of the filing of the representation petition and the date of the election. The Teamsters were seeking to organize the employer's drivers, and had filed an election petition with the

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Board. Shortly after the petition was filed, the union-sponsored wage and hour lawsuit was filed in federal court.

The Board has long held that the period between the date the petition for election is filed and the date of the election is the "critical period," and views conduct during this period more stringently. Under the circumstances, the Board determined that the election, which the Teamsters had won, needed to be set aside and a new election conducted, because of the union's actions during the critical period.

f. Decisions Involving Remedies for Unfair Labor Practices

In three decisions in 2011, the Board explored the available remedies for violations of the Act. In announcing two of the decisions, the Board stated that its goal was to make its remedies more effective and to reflect current workplace practices. In the third decision, the Board appeared to be grudgingly complying with Supreme Court of the United States precedent.

In *Kentucky River Medical Center*, 356 NLRB No. 8 (2011), the Board held that when making an employee whole for violations of the Act, interest on back pay and all other monetary awards must be compounded daily, not quarterly. In *J. Picini Flooring*, 356 NLRB No. 9 (2011), the Board ruled that employers who customarily communicate with their employees electronically will be required to post remedial notices the same way. This may include email or an Internet or Intranet site.

Finally, in *Mezonos Maven Bakery*, 357 NLRB No. 47 (2011), the Board held that undocumented immigrant workers are not entitled to back pay following unlawful dismissal, even in cases where the employer knew of their status before hiring them. The Board cited the Supreme Court decision, *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd.*, 535 U.S. 137(2002), which had made clear that awarding back pay to undocumented workers lies beyond the scope of the Board's authority.

g. Protection of Union "Picketing" Rights

In *Sheet Metal Workers Union Local 15 (Galencare, Inc. d/b/a Brandon Reg'l Medical Ctr.)*, 356 NLRB No. 162 (2011), the Board continued its recent practice of limiting the scope of what might otherwise be considered unlawful secondary boycott picketing. The union had a dispute with a construction contractor, and in furtherance of that dispute, displayed a 16-foot inflatable rat balloon at the hospital construction site where the contractor was working. The Board found that this was not coercive, analogizing the rat balloon to stationery bannering found to be lawful in cases such as *Carpenters Local 15006 (Eliason & Kruth of Arizona, Inc.)*, 355 NLRB No. 159 (2010). According to the Board's majority, the balloon display did not involve confrontational conduct, as would picketing, and was in the nature of "symbolic speech." Dissenting Member Hayes would have found that "for pedestrians or occupants of cars passing in the shadow of a rat balloon, which proclaims the presence of a 'rat employer' and is surrounded by union agents, the message is unmistakably confrontational and coercive."

h. Stretching the Limits of "Protected Concerted" Activity

While it is well established that Section 7 of the Act shields "protected concerted" activities engaged in by any employees, union or non-union, the Board seems to have really stretched the limit of what may be considered "concerted" in *Wyndham Resort Development Corp.*, 356 NLRB No. 104 (2011). There, a single employee questioned his employer's new dress code requiring employees to tuck in their shirts. The Board has previously held that a single employee's activity can be considered concerted, if it is engaged in with or on authority of other employees and not solely by and on behalf of the employee himself. Here, however, the only evidence of such "concertedness" was that the questioning of the dress code took place in the presence of other employees. The Board's majority found it unlawful for the employer to have issued a written warning to the "dress code protester," but it seems Member Hayes in dissent had the stronger position when he noted that there was really no evidence the employee had acted on behalf of co-workers or to induce group action.

The Board's Rulemaking Initiatives

As noted above, the Board initiated two rulemaking procedures in 2011. The first initiative, and probably the most controversial, will require all employers covered by the Act to post a Notice of Employee Rights under the Act. The other rulemaking initiative proposed changes to pre- and post-election representation case procedures. Both rule initiatives appear to be designed to assist union organizing efforts.

a. The Notice Posting Requirement

On December 21, 2010, the Board issued a Notice of Proposed Rulemaking, which would require employers to post a notice designed to notify employees of their rights under the Act. On August 25, 2011, the Board announced that the proposed rule had become a "Final Rule," and would require employers to post the notice on or before November 14, 2011.

The Notice Posting Rule was significant and surprising, since

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there is no language in the Act, which has been in existence since 1935, to support such a requirement. In addition, the threat of union organizing is a hot button issue for many employers and many believe that the requirement exceeds the Board's authority under the Act. Several groups raised legal challenges to the posting requirement, including the National Association of Manufacturers, the National Federation of Independent Business, and the U.S. Chamber of Commerce.

On October 5, 2011, the Board announced that it was delaying the implementation date for the Notice Posting Rule until January 31, 2012, and then on December 23, 2011, the Board announced that it would again postpone the effective date of the Notice Posting Rule. The Notice Posting Rule will now become effective on April 30, 2012, if the challenges to the Rule are unsuccessful. Please note, however, that the Board's postponement of its effective date does not affect federal contractors, who already are required to post a similar notice under Executive Order 13496.

The Notice Posting Rule will apply to private sector employers covered by the Act, which includes most employers in the private sector; however, certain small employers with an annual business volume of less than $500,000 may be excluded. If the many challenges to the Rule are unsuccessful, covered employers must post the required notice "in conspicuous places," including all places where notices to employees concerning personnel rules or policies are normally posted. The Rule will require electronic posting of the notice if the employer typically posts workplace notices electronically. The required notice, which is available on the Board's web site, informs employees of their rights under the Act, including the right to organize a union, bargain collectively, discuss wages with co-workers, and to engage in a strike and/or other "protected concerted activity."

The failure to post the notice may result in the filing of an unfair labor practice charge, and if an employer refuses to comply after receiving notice of non-compliance, a Board Regional Director may issue a formal complaint and schedule a hearing before a federal administrative law judge who may then issue an order requiring posting. A willful refusal to post the notice may be deemed by the Board as evidence of "unlawful motive" in cases if there are other alleged violations of the Act. In addition, in cases where an employer fails to post the notice, the Board may excuse employees from the six-month statute of limitations for filing charges based on other alleged unlawful conduct by the employer.[1]

[1] On March 2, 2012, the U.S. District Court for the District of Columbia, in *National Association of Manufacturers v. NLRB* (Civil Action No. 11-1629), held that the Board does have legal authority to require employers to post the Notice but cannot lawfully deem an employers' failure to post the Notice an unfair labor practice and cannot equitably toll the statute of limitations against employers who have failed to post. As of this writing, it is anticipated that appeals will most likely be filed with the United States Court of Appeals for the D.C. Circuit.

b. Proposed Rule Changes to Representation Elections

On June 22, 2011, the Board published a Notice of Proposed Rulemaking that, if fully implemented, would significantly change the union representation election process. According to the Board, the changes are designed to "reduce unnecessary litigation, streamline pre- and post-election procedures and facilitate the use of electronic communication and document filing." In reality, many agree with Member Hayes, who stated in dissent that the changes are designed to "impose organized labor's much sought-after 'quickie election' option."

On November 30, 2011, by a vote of 2-1, the Board resolved to move forward with some, but not all, of the procedural changes it had proposed on June 22. The changes, to be effective on April 30, 2012, will have the effect in many cases of shortening the time from the filing of an election petition to the date of the election. This would make it more difficult for employers to communicate with employees prior to the vote, and make it easier for unions to win more elections, even though unions are already winning elections at a historically high rate of around 70%. Shortening the period between the petition filing and the election date is unfair to employers because employers often are unaware of an organizing campaign until the filing of a petition. Therefore, the rule changes will provide employers less time to fairly present both sides of the representation issue to employees.

One change required by the Rule will substantially limit the issues which can be litigated at the pre-election hearing, depriving the employer of the right to litigate issues related to voter eligibility prior to the election. Indeed, such issues would be relegated to the challenged ballot procedure, with resolution by the Board after the election has been held. Again this change would hamper an employer's ability to implement a fair campaign of its own, because the employer may not be able to fully determine which employees will be eligible to vote in the election. Other changes will eliminate the filing of post-hearing briefs, eliminate the right to seek pre-election review of a Regional Director's decision by the Board, eliminate the current 25-day waiting period to conduct elections when a party has requested pre-election review by the Board, and greatly reduce a party's ability to obtain even post-election review by the Board of Regional Director decisions.

A lawsuit has been filed by the U.S. Chamber of Commerce challenging the new election Rules. On February 16, 2012, 44

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U.S. Senators introduced a Resolution of Disapproval challenging this Rule, and 65 members of the House of Representatives introduced a similar resolution.

The Board's Case Against Boeing Company

On April 20, 2011, the Board's Acting General Counsel issued a complaint against the Boeing Company alleging that it violated the Act by transferring an airplane production line from a union facility in the state of Washington to a non-union facility in South Carolina for discriminatory, anti-union reasons. The International Association of Machinists and Aerospace Workers, District Lodge 751, had previously filed a charge alleging that Boeing had engaged in multiple unfair labor practices related to its decision to place a second production line for the 787 Dreamliner airplane in a non-union facility.

Specifically, the union alleged that the decision to transfer the line was made to retaliate against union employees for participating in past strikes and to chill future strike activity, which is protected under the Act. The union also charged that Boeing violated the Act by failing to negotiate over the decision to transfer the production line. After an investigation, the Board sided with the union and issued a complaint seeking to have the production line transferred back to the Washington facility.

Like the Notice Posting Rule, the complaint was highly controversial for many reasons, not the least of which was the thousand jobs created in South Carolina that hung in the balance. The Board's complaint became a political powder keg, drawing the attention of Congress which opened an investigation into the Board's actions. The issue has also become a hot button issue on the Republican Presidential Primary campaign trail. Ultimately, Boeing and the union reached agreement (no doubt with the help of the significant leverage resulting from the issuance of the complaint) and the union asked the Board to withdraw the complaint. On December 9, 2011, the Board dismissed the complaint against Boeing; however, the Congressional investigation may continue.

The Board's Social Media Agenda

The Board's foray into regulating the ever-expanding world of social media began with what the Board's Acting General Counsel called a "straightforward case" involving an employee's Facebook postings that mocked her supervisor. Many in the employer community, however, did not believe the matter was all that "straightforward."

On October 27, 2010, the Board's Hartford Regional Office issued a Complaint alleging that an employer, American Medical Response, violated the Act when it terminated an employee who posted disparaging remarks about her supervisor on her personal Facebook page. As with the Boeing complaint, the social media complaint touched off a media firestorm and fired a shot across the bow, signaling the Acting General Counsel's intent to actively police the previously uncharted social media waters.

a. The American Medical Response Complaint

After an employee posted negative, critical comments mocking her supervisor on her personal Facebook page, other employees commented on her posts. The employee was terminated because of the disparaging comments, which the employer considered to be in violation of its social media policy. The Acting General Counsel authorized a complaint alleging both that the termination violated the Act's prohibition against punishing employees for engaging in concerted protected activity, and that the employer's internet postings policy was overly broad in violation of the Act. He asserted that the employee was engaged in protected activity when she was critical of her supervisor, and that the employer's policy restricted employees' rights under the Act.

On February 7, 2011, the NLRB announced a settlement of the Complaint, which included a provision that required the employer to revise its social media and internet postings policy, which according to the Board had improperly restricted employees from discussing their wages, hours and working conditions with co-workers and others while not at work.

Even though the *American Medical Response* matter never moved past the complaint stage and therefore was never adjudicated by a judge, it was nonetheless an eye-opener for many employers and was certainly a sign of things to come from the Board. It is no secret that unions are using social media as an aid to organizing, and employees are using social media for just about everything. Understandably, employers are interested in protecting their legitimate business interests from attacks online, and employers may discipline employees whose comments or posts infringe on these interests or violate employer policies.

While the settlement did not establish binding precedent, it was clearly an indication of the Board's intent to protect employees' social media use. The Board's Acting General Counsel has remained very active in the social media area after the initial complaint was issued, making clear that his oversight would extend to both unionized and non-union employers, as he aggressively investigated and pursued claims involving employee discipline and allegedly overbroad employer policies throughout 2011.

b. The Board's General Counsel Advice Memorandums and Social Media Report

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In July 2011, the Board's Office of General Counsel ("OGC") issued three (3) Advice Memorandums directing the dismissal of charges, and also issued a social media report, summarizing its actions on several charges involving social media. The OGC guidance makes clear that even the Acting General Counsel believes the Act does have limits and will not shield all employee social media activity from discipline. He agreed that in some cases, employee activity may be so inappropriate that it loses the protection of the Act.

A July 7, 2011 Advice Memorandum directed dismissal of a charge involving a bartender discharged for posts on his Facebook page. The bartender complained to his step-sister on Facebook that he had not received a pay raise and also about the bar's tipping policy. The bartender also made derogatory comments about the bar's customers. The OGC found that the bartender had not engaged in concerted activity because while the posts did address the terms and conditions of his employment, the bartender was not discussing these issues with his coworkers, and there was no attempt to initiate group action among employees.

In another case, the OGC directed dismissal of a case involving the discipline of a Wal-Mart employee who posted negative comments about his supervisor because the supervisor had criticized his work performance. Even though the employee's post was commented on by his coworkers, the OGC found that the employee's conduct was more a personal gripe, and which does not rise to the level of protected concerted activity.

In a July 19, 2011 Advice Memorandum, the OGC directed dismissal of a charge challenging the discharge of an employee who made comments on Facebook, while at work, that mocked the mentally ill patients to whom the employee was supposed to be providing care. The OGC found no protected concerted activity because the employee was not communicating with coworkers, she was not discussing the terms and conditions of employment, and she was merely having a personal conversation with a friend.

As noted above, the Board's Acting General Counsel also released a Report, summarizing his actions on 14 cases involving social media. The Report shed important light on the OGC's view of when employee social media use is protected by the Act, the permissible scope of employer social media policies, and how even unions can get into occasional trouble when using social media.

The Report confirmed that while the Act protects employees who engage in concerted activity from discipline, there are limits to that protection and certain activity will lose the protection of the Act. Yet, the Report stated that protected activity may include calling a supervisor an "a—hole" and even referring to a supervisor as a "scumbag." The Report further noted that the OGC found all of the policies that it reviewed to be overly broad, finding only one provision of one policy acceptable. Nonetheless, the Report provides valuable insight for employers seeking to remain compliant in this quickly changing social media arena.

c. Hispanics United of Buffalo, Inc.

On September 6, 2011, a Board Administrative Law Judge (ALJ) issued the first actual decision involving discipline for employee social media use. In *Hispanics United of Buffalo, Inc.* Case No. 3-CA-27872 (2011), the ALJ ruled that the employer, a small non-profit agency, unlawfully discharged five employees based on comments posted on Facebook. He held that the employees' Facebook comments amounted to concerted protected activity under the Act, and as such, their comments were shielded from discipline.

The five employees were critical of a coworker on Facebook, and made sarcastic and vulgar comments about her and the employer's clients. When the employer learned of the posts, it conducted an investigation and determined that the five employees' actions violated the employer's policies. As a result, the employees were terminated. The ALJ, however, concluded that the Facebook discussion involved the terms and conditions of employment, specifically, job performance and staffing levels (even though there was no mention of inadequate staffing and none of the employees claimed that they actually performed their jobs satisfactorily). The ALJ also found that the vulgar language and sarcastic remarks were not sufficiently inappropriate to lose the protection of the Act, and the ALJ went on to conclude that the comments did not violate the employer's policy.

As a result, the ALJ held that the employees were unlawfully terminated for engaging in concerted protected activity, and therefore, he ordered all five employees reinstated with back pay and interest. The case is presently pending before the Board after appeal of the ALJ's decision by the employer.

d. Knauz Motors, Inc.

On September 28, 2011, another Board ALJ found that an employee who was discharged for posts he made on his Facebook page was not discharged in violation of the Act. In *Knauz Motors, Inc.*, Case No. 13-CA-46452 (2011), the ALJ found that the employee's Facebook posts contained both protected and non-protected activity, but that the employee was terminated for only the non-protected activity. As a result, the ALJ refused to find that the employee's discharge was unlawful, contrary to the position urged by the Board's Acting General Counsel.

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The decision involved two different threads on the employee's Facebook page. The first included sarcastic pictures and comments about a sales event at the car dealership where the employee worked. The employee was dissatisfied with the food selection for the event, and had expressed his displeasure at a meeting prior to the event. Apparently, another employee also voiced a similar complaint at the meeting. The ALJ found that since more than one employee complained about the food, the complaints constituted "concerted" activity. The ALJ also found that the food selection at the event, even though "not likely," could have ultimately had an effect on employee compensation. Therefore, the complaints on Facebook about the sales event were considered concerted protected activity by the ALJ.

However, the second Facebook thread, which contained pictures and comments regarding an accident at a related dealership, was found to be unprotected activity. The accident involved a 13-year-old boy, who was permitted to sit in the driver seat in a new vehicle that crashed into a pond. The employee took pictures of the accident and posted the pictures on Facebook with commentary. The ALJ found that these posts did not constitute concerted protected activity because there was no discussion with other employees about the accident and no connection to the employees' terms and conditions of employment. The ALJ also concluded that the employee's termination was lawful because he was terminated for the posts regarding the accident, and not the posts regarding the sales event. The Board's Acting General Counsel filed an appeal, and the matter remains pending before the Board.

Conclusion

As noted above, the Board was operating with only three members at the end of 2011. In addition, the term of Member Craig Becker, a recess appointment, ended with the last Congressional session. On January 4, 2012, President Obama made three recess appointments to the Board, Democrats Sharon Block and Richard Griffin, and Republican Terence Flynn. Traditionally, presidents have not made recess appointments unless the Senate recesses for 10 days or more, which was not the case on January 4. No doubt future litigants before the Board may argue that decisions to be made by these recess appointments are constitutionally defective.

In any event, it is likely that the Board's pro-union agenda will continue under Chairman Pearce, who has shown himself to be, if anything, perhaps even more "pro-union" than his predecessor Wilma Liebman. No doubt, next year's "Year in Review" will be an interesting one. We will, of course, continue to post regular updates on the Board's actions on our blog throughout the year, so that employers can continue to keep abreast of the Board's activities as they unfold.