

TMG Update

UNION "FOX" IN THE HENHOUSE

(by Thomas C. Grimes, Senior Vice President and Principal,
The Mickus Group, LLC)

On the first day of Congress' Spring recess, organized labor finally received a "down payment" from the Obama administration with the recess appointment of Craig Becker and Mark Pearce to the NLRB (National Labor Relations Board). After the promised delivery of labor reform to reward unions for their support stalled in the Senate with EFCA (the Employee Free Choice Act) and the Republican filibuster-blocked nomination of Obama appointees to the Labor Board, the President used his recess appointment authority to place the most controversial pro-labor appointment, Craig Becker, on the NLRB. Now that organized labor's most extreme reformer is on the Labor Board, a cheer could be heard from union leaders in one ear, while an outcry of opposition to "the fox is in the henhouse" started ringing in the other ear. Although our auditory senses are currently overtaxed, now is a good time to review what these recess appointments mean, and assess the wide range of opinions on what could happen next.

Opinions about the future after these recess appointments are wide-ranging. At a minimum, it will assure unions favorable Board panels. (Many cases which reach the NLRB in Washington are decided by rotating 3-member panels. With 3 pro-labor and only 1 pro-management Board member in place until August, unions are guaranteed a favorable mix.) Beyond that, special bulletins from management labor attorneys and strong public statements from

organizations like the National Right to Work Legal Defense Foundation (NRTW) quickly began their analysis and predictions of what could now happen to labor reform. One NRTW spokesperson even stated his belief that the real "prize" for organized labor with these recess appointments will be arbitration in first contract situations. (NOTE: The NRTW, which is a non-profit organization that provides free legal aid to workers with grievances against unions, reported that it immediately filed motions demanding that Mr. Becker recuse himself from 12 pending cases it is involved in on behalf of individual employees to protect them from compulsory unionism. Since Mr. Becker was involved with organized labor on these cases, NRTW feels that now, as an NLRB Board Member, a significant conflict of interest exists.)

These bulletins and statements consistently seem to support our belief that some level of additional labor reform is coming. However, timing and political uncertainties through the end of the year seem to affect those opinions – from "expect no controversial decisions" due to political factors, to an array of feelings that "members-only" bargaining by minority unions and reversal of past decisions pose the real threat.

The current outcry all centers on observations that the broad rule-making authority of the NLRB can tackle issues such as the length of election timelines, card check "majority" recognition, employer participation in

elections and challenges, members-only bargaining, first contract arbitration, and other procedural matters that may or may not be within the Labor Board's existing authority. Little is known about what will actually happen. Nonetheless, a "smorgasbord" of labor reform options appears to be on the union's "banquet table". Furthermore, those who advocate labor reform firmly believe that increased union representation in the workforce is a "cure" for not only their economic situation, but for the nation as well.

Craig Becker, former legal counsel to SEIU, general counsel to the AFL-CIO, and a law professor with rather extreme views, has already documented his belief that employers should not be allowed to participate in union elections in any way or be involved in any election challenges. Mr. Becker even has indicated a belief that the Labor Board can implement card check without additional statutory authorization – a belief that some sources suggest NLRB Chairwoman Wilma Liebman shares. Perhaps one of Mr. Becker's most "radical" statements is that traditional democratic principles, such as free choice not to be unionized and vote by secret ballot elections, should not apply to issues of union representation.

Presidential recess appointments are common – President Bush made 170 such appointments including seven (7) to the NLRB, while President Clinton made 139 such appointments during their terms in office.

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The Mickus Group, LLC

Bannockburn Lake Office Plaza
2201 Waukegan Road, Suite E275
Phone:(847) 948-7130
Fax:(847) 948-06633
www.mickusgroup.com

E-MAIL US AT:

FMERRICK@MICKUSGROUP.COM
TPowell@MICKUSGROUP.COM
TGRIMES@MICKUSGROUP.COM
HKRAUS@MICKUSGROUP.COM
MCHANCE@MICKUSGROUP.COM
INFO@MICKUSGROUP.COM

However, President Obama's appointments did not include his third nominee, a Republican, Brian Hayes. The Obama recess appointments come at a time when the five-member NLRB has three vacancies, and, one of the current member's (Peter Schaumber -- a Republican appointee) and the Labor Board's General Counsel (Ronald Meisberg -- another Republican appointee) will both expire in August 2010. Simple math demonstrates that the composition of the Labor Board has taken a dramatic shift to organized labor that could even include a complete absence of dissenting member opinions, and raises a question of who President Obama appoints as the next General Counsel.

For those unfamiliar with NLRB procedures, the Board's General Counsel can play a significant role in deciding which cases go to hearing for review. In some cases, the General Counsel could facilitate a reversal in a prior NLRB ruling. In addition, consider that the Supreme Court has already heard oral arguments and will soon decide a case (*New Process Steel v NLRB*) that could affect the Labor Board's authority to make decisions with only two sitting members. Over 500 decisions since January 2008 were made by only two sitting Board Members – one Member short of the statutory requirement which states, “*three members of the Board shall, at all times, constitute a quorum of the Board*”. If the Supreme Court voided decisions by the 2-member Board, additional opportunities for precedent-setting rulings by a pro-labor NLRB and General Counsel could result.

Labor's reluctance to use the NLRB's process and procedures is likely to change. The recess appointments mean that the pro-labor majority on the Board can render decidedly unfavorable decisions for employers in the immediate and potentially foreseeable future. Add a pro-labor General Counsel after August 2010, and a major reform shift and rule-making effort by the NLRB is well on its way. We could expect more election petitions seeking union favorable voting units, more ULPs filed, and more post-election objections as unions seek to obtain rulings from the NLRB that are likely to be pro-labor. Whether this pro-labor shift on the NLRB will produce immediate or delayed action for even more reform by the Administration and/or Congress is probably a debate that is best left to “political” pundits, but the shift does at least raise the strong possibility that public debate and lobbying efforts of both pro and anti-labor reform advocates could renew with even greater intensity over legislation and NLRB rule-making. The Mickus Group highly recommends that prudent employers take a “watch, participate and act now” approach. Carefully watch the actions of the NLRB and President Obama regarding:

- the reversal of past NLRB decisions, most notably that organized labor would like to reverse which cover topics such as supervisory status, email policies, the exclusion of certain employees from NLRA coverage, “salts”, standards for burden of proof, Weingarten rights, merged workforces that create a “union minority” status, and other significant topics;
- “non-regulatory” actions (rule-making authority) through the NLRB by the agency, such as: reducing the election timeline; increasing punitive damages for employers in unfair labor practice violations; “members-only” bargaining units that easily create “minority” bargaining units regardless community of interest arguments of the past; and, more controversial issues of card check recognition or arbitration in first contracts. Each of these last two actions potentially represent a more expedited way to clear the legal hurdles legislation like EFCA would create; and,
- actions of the Obama administration when both Member Schaumber and General Counsel Meisberg leave the NLRB in August 2010.

Next, employers are wise to participate in the public debate that could develop through the end of this year. Besides the obvious lobbying and public opinion input that may result, there are also public hearings prescribed under Federal law that could require the NLRB to propose and provide public hearings on certain procedural changes it would like to make. Some NLRB rule-making actions might occur that fall under the Federal requirement for public hearings, and the voice of employers in such hearings is essential to that process.

More than ever, employers need to act now to get their “house in order”. Ensure that the best positive employee relations, programs, policies, and practices are in place long enough to establish a positive and direct relationship with employees. Be sure your level of risk is assessed. Take appropriate actions to minimize the issues that unions typically target to create employee interest and support.

Regardless of the political dynamics that affect the timing of labor reform or the current state of the economy, it should be clear that the time needed to take effective action is rapidly running out. Organized labor is sure to continue pressure on the Obama administration to deliver on its promises, just as it delivered on its promise of health care reform. Labor reform of varying magnitude and timing seems likely. The proverbial “fox” has already entered the “henhouse” of labor relations and public opinion is decidedly less favorable toward corporations and management, in general. If employers hesitate to take action now because of the current economy or due to a false sense of confidence that corporate lobbyists will “win the day”, they might suffer the consequences that labor reform could have on their organization's future economic health and positive employee relationships.