BY-LINED ARTICLE

EFCA by the Back Door

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 Organized Labor gets it. Employers should, but many don't.
EFCA, the Employee Free Choice Act had one purpose: Make it easier for unions to acquire new members.
Employers got that part.

Whether through the concerted efforts of organizations such as the Chamber of Commerce or because of countless individual contacts with members of Congress, EFCA was stalled in 2009 and 2010 and, finally, iced by the 2010 mid-year elections.

Employers are just now beginning to recognize that organized labor has found another way to get payback for the $400+ million it spent in the political campaign of 2008 and $200+ million it spent in the political campaign of 2010: Have President Barack Obama stack the National Labor Relations Board with pro-union activists to remake the rules without any legislative involvement.

This has been accomplished.

Wilma Liebman has been named as the new chairman of the board. Before her appointment by President Clinton in 1997, she had been labor counsel for the Bricklayers and Teamsters.

As a minority member of the Board during the Bush years (she was reappointed twice to new five year terms by President George W. Bush), she was a vocal dissenter to many of the Board's decisions, especially those relating to union organizing. Her term will expire on Aug. 27, 2011, but it is widely expected that the President will reappoint her.

Craig Becker, whose nomination in July 2009 was held up by a threatened filibuster by Senate Republicans, was given a recess appointment by President Obama on March 27, 2010. His term will end at the close of the Senate Session in January 2011.

If his nomination continues to stall in the Senate, he is widely expected to receive a new recess appointment for yet another session.

The controversy about Becker's nomination is not hard to understand. Both as an academic and as associate general counsel to the AFL-CIO and the Service Employees International Union, Becker has authored numerous articles on labor law arguing for extremely pro-union interpretations of the National Labor Relations Act, including that employers should be prohibited from having a role in union organizing drives and representation elections (*See Democracy in the Workplace: Union Representation Elections and Federal Labor Law, 77 Minn. L. Rev. 495 (1993)*.

Mark Pearce, whose nomination was coupled with that of Becker's and was similarly blocked in the Senate, also was given a recess appointment by President Obama in March of 2010.

Unlike Becker, however, he was subsequently confirmed by the Senate in June and has a term that will extend into August 2013. Pearce is a union-side lawyer who is not likely to moderate the extreme views of either Leibman or Becker.

This newly reconstituted Board has responded predictably and as organized labor has wanted.

Numerous decisions in cases that negatively impact the ability of employers to combat union organizing already have been made and more pro-union decisions appear to be on the way. As things look today, organized labor may get nearly everything that it wants to make organizing easier without the bother or delays of the legislative process.

Already, the new Board has overturned elections for the following reasons:

- Company observer was too closely aligned to management.
- Employer's supervisors were too close to voting area.
- Security guards watched employees who were engaged in union activity.
- Employer unlawfully restricted the wearing of union T-shirts even though the employer presented evidence that it had consistently maintained a strict uniform policy.
- Management solicited grievances, even though the process was consistent with practice in effect before union-organizing activity.
- Prohibited an employer from refusing to hire a union "salt," even though the employer had a good faith belief that the salt did not intend to have long-term employment with the employer.

In addition, one or more of the NLRB, including Leibman herself, has already indicated an intent to rule in future cases:

- To restrict the definition of "supervisor," making it more difficult to have individuals who perform supervisory functions excluded from proposed bargaining units.
- To require the inclusion of employees of staffing agencies into voting units of regular employees.
- To eliminate the charitable exceptions from no solicitation/no distribution rules.
- To prohibit supervisors from joining discussions between employees on the merits of unionization.
- To prohibit restrictions on the use of e-mail for union-organizing purposes.
- To prohibit employers from having rules prohibiting undesirable conduct such as making false or abusive statements or criticizing the company to other employees or the public because the prohibition "chills" union organizing.
- To prohibit employers from keeping union organizers off its property.

Of equal concern is that one or more of the new majority on the Board also has indicated the need for new administrative rules, unrelated to specific cases. Some of the new rules being discussed would dramatically affect an employer's ability to respond to union organizing:

- Shorten the time between the date of petition for an election and the election itself. Currently, internal Board rules provide that the period should not exceed 45 days. As a result, even an unprepared employer has at least six weeks to develop and implement a plan to educate employees prior to a secret ballot vote. The proposed new rule would key off the shortest time necessary for the Board to set up the mechanics of an election, probably 14 days. Thus, unprepared employers will have too little time to respond effectively.

- Prohibit "captive audience" meetings. Currently, an employer can require employees to attend meetings at which the employer "campaigns" against union representation. This advantage would disappear.

- Require employers to permit union representatives to enter the employer's facility to campaign to employees. As if a union campaign is not disruptive enough, the presence of union organizers on your property would all but force an employer to suspend operations until after the election. Further, the presence of professional union organizers inside a company's facility would spawn direct confrontation between union and company representatives, resulting in even more lost production time and create a "circus" atmosphere dominated by personalities and not reason.

- Limit or eliminate the employer from the process of determining an appropriate unit of employees for a vote and the time and place of the balloting, leaving all such discussions to the union and Board only.

The best thing for an employer that wishes to remain union-free is never to have union activity.

Once organizing activity has started, the new majority of the Board will inhibit effective employer campaigning as much as possible. If you don't know why employees may be interested in union representation, what employee systems best neutralize employee interest in unions and what behaviors of managers and supervisors stimulate employees to seek representation, you are at risk of an accidental union-organizing drive that the Board will have made difficult to combat.

The next best thing for an employer that wishes to remain union-free is to be able to respond quickly and effectively at the first bona fide sign of union activity.

The likely new rules of the Board will severely limit the amount of time an employer will have to design and implement an effective union-free campaign. Therefore, your supervisors and managers need to be ready to react at any moment, with little or no advance warning or preparation.

The worst thing for an employer that wishes to remain union-free is to do nothing.

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