Legal Alert: EFCA by Fiat? What a Becker Confirmation to the NLRB Could Mean for Employers

2/5/2010

On February 4, 2010, the Senate Health, Education, Labor and Pensions Committee voted 13-10 to approve the nomination of Craig Becker to be a member of the National Labor Relations Board. It was a party line vote, with all 10 Republicans on the committee voting against Becker's nomination. Becker must next be confirmed by the entire Senate. With Senator Scott Brown already sworn in as the 41st Republican, there is a real possibility that Becker's confirmation could be blocked by a filibuster. If that were to happen, Senate Majority Leader Harry Reid said the Obama Administration may use a recess appointment to get Becker on the NLRB, which would not require Senate approval.

Becker's nomination has generated unprecedented opposition from business groups. They fear that Becker will not enforce the National Labor Relations Act evenhandedly, but will instead radically slant the playing field in favor of unions, particularly the organizing process. Becker has been the Associate General Counsel for the SEIU since 1990 and a staff counsel for the AFL-CIO since 2004. Past and current members of the NLRB have worked for unions and have been confirmed with little opposition. Becker's employment history is not what has business groups and some Senators questioning his impartiality. The concern stems primarily from some of Becker's past writings, particularly a 1993 Minnesota Law Review article entitled *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 Minn. L. Rev. 495. This Legal Alert summarizes Becker's article and what employers could expect if Becker becomes a member of the NLRB. ***Article Highlights***

Employers should not be parties to union elections nor should they be accorded the rights of candidates. Because Becker opined that employers are not parties to elections, he further asserted that:

• Only employees and unions should be parties to pre-election hearings to determine matters such as what constitutes an appropriate unit.

• Employers should be barred from placing observers of their choosing at the polls.

• Employers should not be entitled to charge that unions' campaign conduct coerced employees.

• Employers should not be allowed to refuse bargaining in order to get a U.S.

Court of Appeals to review the Board's election rulings.

In his article Becker stated that employers have some right to campaign, but such rights should be greatly curtailed.

• Employers should always be prohibited from conducting mandatory employee meetings to campaign. The current rule states that such meetings are only prohibited during the 24-hour period prior to the election.

• Employers should be bound by their own solicitation and distribution policy when campaigning. Thus, employers may only distribute campaign material in non-work areas and only during non-work time. Employer solicitation may only occur during the employees' non-work time.

Card check is the process by which an employer recognizes a union without an election if a union has obtained signed authorization cards from a majority of the employees. Becker appeared to acknowledge that mandatory card check could not be implemented by the NLRB, but would instead require amendment of the NLRA by Congress.

When the NLRB determines that an employer has committed widespread, hallmark violations during a campaign it sometimes has the authority to issue a Gissel bargaining order, which compels the employer to recognize and bargain with the union even though it did not win an election. A Gissel bargaining order is an extraordinary remedy, and one the NLRB rarely issues. Becker stated, however, that Gissel bargaining orders should be transformed from the exception to the general rule.

What Employers Should Expect

If Becker is appointed, the question becomes, "How much of his wish list would the NLRB try to accomplish on its own without Congressional amendment of the NLRA?" Recent events could embolden the NLRB to go even further than what Becker thought possible in his 1993 law review article. The National Mediation Board, the federal agency that oversees labor law for railroads and air carriers, is on the verge of completely overturning an election process that had been in place for 75 years. This change will dramatically favor unions and was put in motion shortly after the Senate approved President Obama's Democratic nominee to the NMB. The concern is that if Becker is appointed, the NLRB could follow suit and implement mandatory card check.

At the very least, employers should expect that the NLRB will limit their rights to campaign and be a party to the election process as discussed above. The NLRB could also require employers to offer "equal access" so that unions could enter employers' property and campaign. If employers are deemed to have run afoul of these new mandates, the remedy is more likely to be a bargaining order to recognize a union that did not win an election. It is safe to say we will see significant – and unfavorable – changes should Becker become a member of the NLRB. We will keep you apprised of developments as they happen.

If you have any questions regarding this Alert or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work or the author of this Alert, Don Lee, a partner in our Atlanta office at dlee@fordharrison.com.