CLIENT ALERT

Becker Means Change At The Labor Board

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President Obama has filled two of the three vacancies at the National Labor Relations Board with recess appointments. Joining union-side labor lawyer William Pierce is Craig Becker. Becker is a long-time senior lawyer for the SEIU, and has been a staff attorney with the AFL-CIO since 2004. Becker's appointment has generated enormous controversy. Senate Republicans unanimously joined business groups in opposing the nomination. The principal reason is concern that Becker's views on labor law are outside the historical mainstream. Sen. John McCain (R-Az.) described Becker's appointment as "clear payback by the Administration to organized labor."

There has been plenty of speculation about the effect of these appointments on the labor law landscape. Here's what can be said with certainty. Becker is a widely published academic, having served a stint as a law professor at UCLA. His writings are highly critical of current interpretations of key provisions of labor law. Becker advocates dramatic changes in the law, particularly in the rules governing union organizing elections. In one article, published in the *University of Minnesota Law Review,* Becker argued that employers should have no rights to participate in NLRB election proceedings, and that the Labor Board should eliminate the longstanding right of employers to communicate with their employees during election campaigns. He also advocated that employers should have no right to challenge either the scope of the proposed unit or the eligibility of individuals who attempt to vote in Board-supervised elections. What may be most ominous, for employers, is Becker's view that the Labor Board can implement many of his desired changes without amending the statute.

It also seems likely that Becker will join Board Chairman Liebman in taking a strategic, pro-union approach to the Board's current case backlog. Because the Board has lacked a quorum since 2007, Chairman Liebman and Member Schaumber have agreed to defer many cases raising important and novel issues. Although the backlog is not large by historical standards, the number of cases that could result in reversals of prior decisions is relatively high. And, depending on what happens in the Supreme Court in *New Process Steel*, the new "Obama Board" may have dozens more cases to use as vehicles to push the law in a pro-union direction.

Perhaps the most important question is whether Becker would try to use selective cases, and/or the Board's rule-making authority, to initiate changes that mirror the principal objectives of the Employee Free Choice Act. One could imagine, for example, a scenario by which the Obama Board could conclude that the Board is warranted in certifying a union without an election in a variety of circumstances beyond those currently recognized under *Gissel Packing*.

So, change is coming at the Labor Board. And there may be a lot of it, even if the Employee Free Choice Act remains stalled in Congress. The challenges facing vulnerable non-union employers are both obvious and pressing. Unionized employers should also put their fingers to the wind. An aggressive Obama Board is likely to use selected cases or rulemaking, to implement significant changes that would restrict the rights and flexibility of employers operating under collective bargaining agreements. And no one should be surprised if Becker leads an effort to restrict the ability of employers to use traditional economic weapons, including the use of lockouts and hiring replacement workers during a work stoppage.

Only time will tell if Becker's decisions will justify the critics' alarm bells. Yet there is substantial reason to think they're right. The stakes are extraordinarily high for organized labor. The President's nomination of the Board's next General Counsel, a decision expected this summer, will be another indicator of how aggressively the Administration intends to push the law. As your grandmother probably told you, forewarned is forearmed.

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