A YEAR IN REVIEW

Labor Relations Today

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Labor Law in 2011:
A Very Active Year in Review

With the election of President Barack Obama in November 2008, most within the labor-management relations community understood there would be significant changes to the nation's labor laws. Although some changes made their way through the system during the first two years of the Obama administration, developments in 2011 were more dramatic.

Fueling many of the changes in 2011 were the impending departures of National Labor Relations Board (NLRB) Chairman Wilma Liebman and Member Craig Becker. With only four members on the Board for most of 2011, the loss of Liebman and Becker would drop the Board below the three member minimum needed to issue decisions in pending cases and pass regulatory changes. With no certainty as to when Liebman or Becker might be properly replaced, the Board acted aggressively while it still held a pro-labor majority *and* a quorum. In addition to the Board's activity, the Acting General Counsel pursued an expansive agenda. Republican opposition in Congress attempted to rein the Board in via additional oversight and legislative efforts that failed to gain much traction.

We submit this Year in Review to summarize the most noteworthy developments in 2011 – the most dynamic year in the area of traditional labor law in quite some time. Additional information on these topics and more is available at our *Labor Relations Today* blog (www.laborrelationstoday.com), where we will continue to chronicle and alert readers to significant changes in the law as they unfold in 2012 and beyond.

NEW LAW ANNOUNCED VIA NATIONAL LABOR RELATIONS BOARD CASE DECISIONS

In 2011, an active Board issued numerous case decisions overruling and reversing precedent. These included decisions changing its unit determination standards, strengthening its recognition and successor bar doctrines, greatly expanding the scope of "protected, concerted activity," and allowing greater union access to employer and third-party private property for union activity.

Specialty Healthcare: The Board Redefines the "Appropriate Unit" Standard to Permit Proliferation of Smaller Bargaining Units

On NLRB Chair Wilma Liebman's last day in office, the Board issued a decision allowing unions to organize sub-units of an employer -- such as employees of one department -- as opposed to an entire facility. In *Specialty Healthcare,* 357 NLRB No. 83 (Aug. 26, 2011), the Board overruled 20 years of practice regarding how it determines the "appropriate unit" in non-acute health care facilities. More importantly, however, the NLRB endorsed Member Becker's long held belief that smaller units -- such as units that consist of only one department, or perhaps even one job classification -- should be permitted, rather than the current NLRB preference of favoring "wall to wall" units.

In a departure from precedent, the Board reversed its 1991 decision in *Park Manor Care Center*, and held that its traditional "community of interest" test would now be applied to non-acute health care facilities. More importantly the Board's decision unambiguously states that when a group of employees or union petitions for an "identifiable" group of employees, that unit should be an appropriate unit unless the

employer (or another interested party like another union) demonstrates that excluded employees in a larger unit share "*an* ***overwhelming*** community of interest with those in a petitioned for unit."

In other words, the NLRB clearly signaled that a union's expressed desire to represent some subset of the employee population – such as one job classification, or one department -- should control absent overwhelming evidence that the requested unit would constitute a "fractured" unit. As an example, in *Specialty Healthcare*, the Board noted that a fractured unit "might" exist only if some, but not all, of the certified nursing assistants (CNAs) petitioned for a union. The Board's decision rejects the claim that one classification of employees was an inappropriate unit just because other employees could be included to make a more appropriate unit.

Former Chairman Peter Schaumber publicly questioned whether the Board was bound to follow the APA's rulemaking procedures, "including conducting cost benefit assessments and providing the public notice and a full and fair opportunity to comment." Arguing against the principles that were ultimately set forth in the *Specialty Healthcare* decision, former Chairman Schaumber declared:

> A proliferation of small units presents the specter of an unending series of union organizing campaigns, NLRB proceedings, and the attendant litigation costs and disruption to the employer's operations. Moreover, fragmentation of the workforce does not enhance collective bargaining, it undermines it. As the Board has recognized, it can give rise to conflicts of interest and dissatisfaction among constituent groups, impose the time and expense of continuous and repetitious bargaining, and lead to wage whipsawing, more frequent strikes, work stoppages and jurisdictional disputes. … That is why the NLRB, since its inception, has sought to avoid the proliferation of bargaining units and it is why the National Labor Relations Act specifically states that the extent to which the union has succeeded in organizing employees shall not be controlling in determining the appropriate unit

Recent decisions by NLRB Regional Directors issued following the Board's decision in *Specialty Healthcare* confirm former Chairman Schaumber's concerns:

- **In *First Aviation Services, Inc.*, Case No. 22-RC-061300 (Sept. 13, 2011)**, the union petitioned for a unit of line service technicians and line service technician leads. The employer argued that the smallest appropriate unit also had to include its customer service employees, security and transportation employees, aircraft cleaners, aircraft maintenance employees, inventory parts employees, building service employees, and a vehicle mechanic. Despite finding some common duties with other classifications and some permanent interchange, the Regional Director found that the petitioned-for unit was an appropriate unit because the line service technicians had other more substantial duties requiring training, certification, and a special license; and there was no temporary interchange between the line service classification and other classifications.

- **In *Print Fulfillment Services LLC*, Case No. 9-RD-063284 (Sept. 29, 2011)**, the union sought to represent 20 out of 76 employees at the employer's facility working in the press department, but excluding all other employees such as bindery employees, UV coating employees, maintenance employees, and shipping and receiving. The employer argued that the only appropriate unit was a wall-to-wall unit. The Regional Director found that even if the petitioned-for unit was not a craft unit, it was separately identifiable under *Specialty Healthcare* because the press department employees were in a separate department, they had extensive specific training and experience, they were the only employees engaged in printing, there was minimal interaction with the other employees, and they had separate supervision.

- **In *Nestle Dreyer's Ice Cream*, Case No. 31-RC-066625 (Nov. 23, 2011)**, the union petitioned to represent only the maintenance employees and to exclude the production employees at the employer's production facility. The employer contended, however, that an appropriate unit had to include all production employees as well. The Regional Director found the smaller petitioned-for unit of maintenance employees appropriate because the maintenance employees were in their own department, in different job classifications, had different skills, performed different functions from production employees, and shared a community of interest with each other.

There have also been at least two notable cases where Regional Directors rejected the smaller petitioned-for units because the employees shared a community of interest with the excluded employees *and* the petitions would have fractured groups of employees in the same job classifications:

- **In *The Boeing Company*, Case No. 19-RC-15419 (Nov. 1, 2011)**, the union sought to add 92 of the employer's 226 field service representatives (FSRs) to a unit of professional employees. The Regional Director found the petitioned-for unit to be inappropriate on several grounds, including the fact that the petition ignored "the larger manner in which the Employer has structured the workplace in which [the professional employees and the FSRs] work." As such, the Regional Director found that the group of FSRs that the union sought to represent was inappropriate because it did not constitute an "employer unit, craft unit, or subdivision thereof."

- **In *Home Depot U.S.A., Inc.*, Case No. 20-RC-067144 (Nov. 19, 2011)**, the petitioner sought to represent a smaller unit consisting of sales associates in various departments, but excluding all other classifications as well as other sales associates in other departments. The employer maintained that the only appropriate unit was a wall-to-wall unit that included cashiers, sales associates from other departments, pro account sales associates, and so forth. The Regional Director found that "the petitioned-for unit would be a fractured unit, an arbitrary grouping of employees in this retail setting" because not all sales associates were included.

Although this sample size is very small to date, it certainly appears that *Specialty Healthcare* will provide unions more opportunities to fragment employers' workforces with the proliferation of smaller bargaining units.

Lamon's Gasket Co. and *UGL-UNICCO Service Co.*: The Board Revives and Expands its Recognition and Successor Bar Doctrines

As Chairman Wilma Liebman's term wound down to a close, the Board issued a number of significant decisions reversing Board decisions from earlier administrations. Two of these -- *Lamon's Gasket Co.*, 357 NLRB No. 72 (Aug. 26, 2011) and *UGL-UNICCO Service Co.,* 357 NLRB No. 76 (Aug. 26, 2011) -- make it more difficult for employees to challenge a union's status as their exclusive bargaining representative in the workplace.

A year after granting review and inviting briefs, in *Lamon's Gasket Co*., the Board reversed the decision of the Board in *Dana Corp*., 351 NLRB No. 28 (Sept. 29, 2007), holding that a decertification petition will be barred "for a reasonable period of time after voluntary recognition." In addition, the Board clarified the standard for determining a "reasonable period of time" in connection with this analysis.

In *Dana Corp*., the Board had held that an employer's voluntary recognition of a union bargaining representative would not bar the processing of a decertification (or other conflicting) petition filed during the first 45 days after recognition. Thus, employees seeking a decertification election (or a rival union seeking certification for that matter) could file a petition soon after an employer voluntarily recognized a

union, and in a departure from its past practice, the Board would not dismiss the petition as barred. Following the 45-day period, the recognized union would still enjoy a presumption of majority status for a "reasonable period of time."

Regarding that 2007 decision, the *Lamon's Gasket* majority declared:

> [T]he extraordinary process established in *Dana* was, fundamentally, grounded on a suspicion that the employee choice which must precede any voluntary recognition is often not free and uncoerced, despite the law's requirement that it be so. The evidence now before us as a result of administering the *Dana* decision during the past 4 years demonstrates that the suspicion underlying the decision was unfounded. Without an adequate foundation, *Dana* thus imposed an extraordinary notice requirement, informing employees only of their right to reconsider their choice to be represented, under a statute commanding that the Board remain strictly neutral in relation to that choice.

As empirical evidence that the *Dana* "suspicion" was unfounded, the Board cited that during the last four years, employees decertified the voluntarily-recognized union under the *Dana* procedures in just 1.2 percent of the 1,133 cases in which *Dana* notices were requested from the Board. Thus, *Lamon's Gasket* announces the standards now revert back to the pre-*Dana* rules set forth in *Keller Plastics*, 157 NLRB 583 (1966), as they could see no reason for departing from the Supreme Court explanation in *Franks Bros. Co. v. NLRB,* 321 U.S. 702, 705 (1944), that:

> [A] bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.

Likewise, *UGL-UNICCO Service Company* overruled the Board's 2002 *MV Transportation* decision. Regarding the notion of a "successorship bar," *MV Transportation* had created a time period following a sale or merger for a union's representative status to be challenged by 30% of employees, the new employer, or a rival union. Now, the Board criticized that holding:

> The *MV Transportation* Board distinguished successorship from voluntary recognition on the basis of the union's preexisting relationship with employees, 337 NLRB at 774. That distinction, however, does not come to terms with the basic fact of the successorship situation: that the bargaining relationship is an entirely new one.

Based on a clear preference to preserve that "new" relationship, in *UGL-UNICCO,* the Board announced it would adopt the basic statement of the "successor bar" rule set forth in *St. Elizabeth Manor*, 326 NLRB No. 36 (1999), thus:

> The "successor bar" will apply in those situations where the successor has abided by its legal obligation to recognize an incumbent union, but where the "contract bar" doctrine is inapplicable…. In such cases, the union is entitled to a reasonable period of bargaining, during which no question concerning representation that challenges its majority status may be raised through a petition for an election filed by employees, by the employer, or by a rival union; nor, during this period, may the employer unilaterally withdraw recognition from the union based on a claimed loss of majority support, whether arising before or during the period.

The two decisions also modify the Board's definition of "a reasonable period" under these circumstances. In the case of voluntary recognition, the bar will range from six months to one year, depending on the

circumstances. In a successorship situation, the relationship will be protected for six months if the new successor adheres to the existing contract; and, for up to a year if the new employer imposes new terms and conditions.

Member Brian Hayes dissented that both these 3-1 decisions reflect “a purely ideological choice,” by the majority. In each, he expressly invited “strict scrutiny upon judicial review.”

Paraxel Industries: The Board Introduces the New “Preemptive Strike” Doctrine

Early in the year, the Board issued a decision establishing the novel precedent that an employer violated Section 8(a)(1) of the Act for terminating an employee *before* she engaged in protected "concerted activity." In *Paraxel Industries, LLC*, 356 NLRB No. 82 (Jan. 28, 2011), the ALJ had concluded that there was no violation of the Act when the employer fired employee Theresa Neuschafer because she had not consulted with other employees about her workplace complaints, nor had any other employee encouraged her to speak up regarding her issues. The Board, however, reversed, holding that the employer's termination was a "pre-emptive strike to prevent her from engaging in activity protected by the Act.”

The Charging Party was an individual Licensed Practical Nurse (LPN). She asked a co-worker, who had recently returned to work after having quit earlier, about her wages. The co-worker lied, leading Neuschafer to believe that the co-worker and spouse who worked with them were paid a higher wage rate, in part because they were South African like certain key management personnel. Neuschafer complained to her immediate supervisor about her wages, remarking that perhaps everyone should quit and come back with a raise. Higher management later interviewed Neuschafer who reiterated her complaint, but indicated clearly that she had not discussed the issue with any co-workers. She was subsequently terminated.

In concluding that her termination violated Section 8(a)(1) of the Act, the Board reasoned:

> Neuschafer’s discharge had the obvious effect of restricting her own further protected discussions of wages and possible discrimination with other employees, thus interfering with her Section 7 rights. As discussed above, the discharge also had the effect of keeping other employees in the dark about these matters, thus preventing them from discussing, ***and possibly inquiring further or acting in response to, substandard wages or perceived wage discrimination.*** We therefore find that the Respondent’s discharge of Neuschafer violated Section 8(a)(1) of the Act. (emphasis added)

The Board expressly declined to determine whether or not her behavior constituted "protected, concerted activity." But in this holding, the Board has clearly and broadly expanded the range of conduct protected by the National Labor Relations Act. Nearly any individual complaint by an employee might ***possibly***, maybe, potentially one day provide the basis for concerted behavior if enough employees subsequently become aware of it so that perhaps one more employee discovers -- or subsequently decides -- he or she may share a similar concern.

To be sure, there were troubling facts alleged in this case with regard to activity protected by other federal employment statutes -- most notably, Title VII's anti-retaliation provisions. But now an employer who terminates an employee who has in the past complained about ***any particular individual work issue*** may also face 8(a)(1) exposure -- notwithstanding the fact that the employee never took any concerted action regarding the issue.

New York New York Hotel & Casino: The Board Reaffirms Greater Access Afforded Off-Duty Contractor Employees to Third-Party Property

In *New York, New York LLC d/b/a New York New York Hotel & Casino*, 356 NLRB No. 119 (March 25, 2011), the Board adopted a new standard allowing greater access to the employees of a contractor wishing to engage in union activity on the private property of a third party where they regularly work. The Board held:

> We address only the situation where, as here, a property owner seeks to exclude, from nonworking areas open to the public, the off-duty employees of a contractor who are regularly employed on the property in work integral to the owner's business, who seek to engage in organizational handbilling directed at potential customers of the employer and the property owner.
>
> We conclude that the property owner may lawfully exclude such employees only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline. . .

The employees at issue worked for a food service contractor that operated three restaurants and a food court outlet in the interior premises of a Las Vegas casino. Employees of the contractor working on the casino's premises began organizing efforts on behalf of the union representing the casino's own food service workers. Off-duty employees of the contractor began entering the casino's public areas -- mostly in front of the contractor's outlets -- and distributing handbills to patrons, asking them to urge the contractor to recognize and bargain with the union. The casino regularly called Las Vegas police to remove these individuals from the premises.

The Board recognized that the contractor's employees' Section 7 interests were most compelling, as they were involved in organizing themselves directly. Balancing this against the property owner's property and managerial rights, the Board concluded that the property owner's interests must give way. While acknowledging that the property owner absolutely had state property law rights to exclude the off-duty individuals from its property, the Board suggested that the property owner failed to fully protect those rights against the contractor's employees' interests by obtaining language in its leases to address the issue.

Member Hayes filed a dissent asserting that the majority's analysis "pays only lip service to the owner's property interests, and gives no consideration to the critical factor of alternative means of communication." He would have found a violation only where the casino ejected off-duty employees from the porte-cochere area near the casino's main entrance.

Sheet Metal Workers Local 15: The Board Approves the Use of Inflatable Rats to Pressure Secondary Employers at Their Place of Business

In *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 356 NLRB No. 162 (May 27, 2011), a 3-1 Board majority declared lawful the union practice of displaying large inflatable rat balloons at a secondary employer’s premises to protest the labor practices of a separate non-union contractor. The decision extended the rationale set forth in *Carpenters Local 15006 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (2010), which found a union's display of large stationary banners at a secondary employer's premises was not unlawful.

Section 8(b)(4) of the National Labor Relations Act prohibits conduct found to “threaten, coerce, or restrain” a secondary employer not directly involved in a primary labor dispute, if the object of that conduct is to cause the secondary to cease doing business with the primary employer. "Picketing" that seeks a consumer boycott of a secondary employer is generally considered unlawfully coercive. Simple handbilling with the same object is, on the other hand, generally protected speech.

The Board majority here found that the balloon display -- a giant, rabid rat -- placed outside the entrance of the employer – a hospital -- did not involve "confrontational conduct," and was thus unlike picketing. The majority noted that the union agents did not move, shout, impede access, or otherwise interfere with the hospital’s operations. The Board concluded that much as ***the mock funeral procession with coffin and costumed Grim Reaper*** that the union also staged outside the hospital:

> [the] rat balloon itself was symbolic speech. It certainly drew attention to the Union’s grievance and cast aspersions on [the contractor], but we perceive nothing in the location, size or features of the balloon that were likely to frighten those entering the hospital, disturb patients or their families, or otherwise interfere with the business of the hospital.

By the combination of holdings in *Eliason & Knuth*, its progeny, and now this case, the Board has eviscerated the secondary boycott provisions of the Act. Now, so long as the union does not place the signs or huge protest objects on sticks or include "moving" supporters in connection with the display, the Board appears content to allow a union to apply pressure upon neutral employers at their places of business – no matter how offensive, misleading or confusing the message may be.

Again, Member Brian Hayes dissented:

> Considered in the abstract, or viewed from afar, the display of a gigantic inflated rat might seem more comical than coercive. Viewed from nearby, the picture is altogether different and anything but amusing. 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.

Ironically, the inflatable rat used by unions in these protests is manufactured in Plainfield, Illinois -- in a non-union shop.

MasTec Advanced Technologies: The Board Expands its Protection of Disloyal and Disparaging Conduct by Employees

The Board has long followed the Supreme Court’s decision in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), to analyze the extent to which employees’ disparaging and disloyal statements to third parties about their employer’s products or services are protected by Section 7 of the Act. In *Jefferson Standard*, the Court upheld the employer’s discharge of employees who publicly criticized both the quality of the employer’s products and its business practices without relating their complaints to any labor controversy. The Court found that the employees’ conduct amounted to disloyal disparagement of their employer and was outside the Act’s protection.

In its decisions since *Jefferson Standard*, “the Board has held that employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act’s protection.” *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000). However, in *MasTec Advanced Technologies*, 357 NLRB No. 17 (2011), the Board

signaled that it is likely to narrow its application of *Jefferson Standard* and thus broaden the Act's protection for employees who publicly criticize their employer's products and business practices.

In *MasTec*, employees went to a local television station to voice their opposition to their employer's new pay formula. Wearing their uniforms, 28 employees were interviewed by the television station regarding the employer's alleged deceptive business practices during which the employees stated that their employer was forcing them to lie to customers to ensure that satellite receivers are connected to a phone line. During the interview, the employees made misstatements or omitted information about when they would be backcharged for failing to make a receiver-phone line connection and, relying upon a joke a supervisor made, falsely represented that they were told to tell employees that the receiver would blow up if it was not connected to a phone line. Despite these and other "departures from the truth," the Board reversed the administrative law judge and found that the employees' conduct was protected because the "departures" "were no more than good-faith misstatements or incomplete statements, not malicious falsehoods justifying the removal of the Act's protection."

More importantly, however, Member Becker issued a concurring opinion asserting that the Board need not follow the Supreme Court's *Jefferson Standard* decision in this case as the Board's application of *Jefferson Standard* has been too broad. Rather, he contends that when employees' disparaging or disloyal statements are directly tied to labor disputes, the statements only lose protection of the Act when they are made with "actual malice." Accordingly, the Board should apply *Jefferson Standard* only when the statements are not directly tied to a labor dispute. In a separate concurrence, Chairman Liebman noted that Member Becker "may well be correct—that the Board's case law since *Jefferson Standard* has too expansively applied that decision." However, since the parties did not ask the Board to revisit the standard, she clarified that the Board's decision in *MasTec* did "nothing to further broaden the Board's reading of *Jefferson Standard*," but also asserted that *MasTec* does not "foreclose a future reexamination of our doctrine, in an appropriate case."

THE NATIONAL LABOR RELATIONS BOARD'S ADMINISTRATIVE RULE-MAKING IN 2011

Not all big changes in 2011 were achieved by the issuance of decisions in Board cases. The Board exercised its rule-making authority last year -- generating considerable controversy and litigation in an effort to block its path.

The Board Begins an Overhaul of its Practices & Procedures to Expedite Union Representation Elections

The labor relations community anticipated that an Obama-appointed Board would make changes to its election procedures. For years, unions have complained that the existing election procedures were regularly abused by employers who were able to create unnecessary delays between the filing of petitions and the actual elections. The delays, the unions asserted, had the effect of eroding initial union support amongst employees resulting in unjustified election losses. The unions also complained that the existing rules led to unnecessary costs and litigation. Following the failure of proponents to effectuate legislative changes via the Employee Free Choice Act, in 2011 the Board finally took the steps to make an impact administratively.

On June 22, 2011, the Board issued a Notice of Proposed Rulemaking recommending extensive changes to the existing election procedures. Among other things, the proposed rules included provisions setting forth new requirements on the employer to submit its positions on all election-related issues within seven

days of a petition and to immediately provide personnel and contact information to the union; the routine deferral of most legal disputes until after the conduct of an election; and broader e-filing procedures.

The Board held public hearings in which over sixty speakers participated and received more than 65,000 public comments. On November 30, 2011, the Board held an unprecedented public meeting, after which it announced it had voted 2-to-1 to adopt a modified version of the initial proposed changes. Chairman Mark Pearce and Member Craig Becker voted in favor of the changes and Member Brian Hayes voted against them. On December 22, 2011, the final changes were published in the Federal Register. They will become effective on April 30, 2012.

The new rules include:

a) giving hearing officers greater discretion to limit the evidence presented at pre-election hearings to evidence that is "relevant to a genuine issue of fact material to whether a question of representation exists";
b) giving hearing officers the discretion to deny requests by parties to submit post-hearing briefs;
c) denying the parties the right to file requests for review with the Board challenging the viability of a regional director's decision and direction of election until after the election;
d) eliminating the 25 day period between the issuance of a decision and direction of election by a regional director and the holding of an election;
e) clarifying the rules regarding a party's ability to seek special permission to appeal a hearing officer ruling to the Board; and
f) giving the Board the discretion to refuse to review a regional director's resolution of pre- and post-election disputes.

Missing from the final rules published by the Board is an official dissent by Member Hayes who voted against the changes, although the Board has indicated that it will publish any dissent by Member Hayes if submitted within 90 days of the rule being published. The absence of an official dissent, or better stated, the failure of the Board to provide Member Hayes sufficient time to submit an official dissent prior to the publication of the final rule, is believed to highlight the political expediency of the new changes. With the expiration of Member Becker's recess appointment at the end of 2011, the Board was set to have only two members which, based on the Supreme Court's decision in *New Process Steel v. NLRB,* __ U.S. __, 130 S.Ct. 2635, 177 L.Ed.2d 162 (2010), would have rendered the Board unable to publish the final rule.

In the published rule, the Board acknowledged that its general practice when issuing adjudicatory decisions is to give dissenting members 90 days to submit dissents prior to publication. It attempts to deflect any criticism for deviating from this past practice by claiming that the rulemaking process is sufficiently different from the adjudicatory process to justify the expedited publication of the final rule. It gave no examples, however, showing that the Board had previously deviated from the established adjudicatory procedure for rulemaking. The Board also pointed to the fact that a dissent by Member Hayes was published with the initial Notice of Proposed Rulemaking.

Similarly, the Board acknowledged that by approving the changes to the election procedure it was ignoring its well-established practice of making significant legal, procedural, or policy changes only through adjudication when three members support the change. Again, however, the majority asserted that the adjudication and rulemaking processes are sufficiently different to justify enacting sweeping change through the rulemaking process with only two supporting members. But, it gave no examples showing that the Board had previously deviated from the established adjudicatory procedure for rulemaking.

New Board Rule Directs *All* Employers to Post a Notice Advising Employees of Right to Organize

On August 30, 2011, the Board issued a new final rule requiring private-sector employers subject to the National Labor Relations Act to post a notice to employees informing them of their rights under the Act. Specifically, the new rule requires that employers:

> Post notices to employees, in conspicuous places, informing them of their NLRA rights, together with Board contact information and information concerning basic enforcement procedures....

The extensive notice states:

> Under the NLRA, you have the right to:
>
> - Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
> - Form, join or assist a union.
> - Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
> - Discuss your terms and conditions of employment or union organizing with your co-workers or a union.
> - Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
> - Strike and picket, depending on the purpose or means of the strike or the picketing.
> - Choose not to do any of these activities, including joining or remaining a member of a union.

The notice continues, listing several examples of unlawful behavior under the NLRA, and instructs employees how to contact the NLRB with questions or complaints.

Failure to post the notice may result in the NLRB finding that the employer committed an unfair labor practice under Section 8(a)(1) of the NLRA by interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act. The Board has also asserted that failure to post the notice may lead to the tolling of the six-month statute of limitations for unfair labor practice charges:

> When an employee files an unfair labor practice charge, the Board may find it appropriate to excuse the employee from the requirement that charges be filed within six months after the occurrence of the allegedly unlawful conduct if the employer has failed to post the required employee notice unless the employee has received actual or constructive notice that the conduct complained of is unlawful.

Similar to postings required by the Department of Labor, the NLRB notice must be posted in conspicuous places where they are readily seen by employees, including all places where notices to employees concerning personnel rules or policies are customarily posted. However, the NLRB is also requiring employers to post the notice electronically "on an intranet or internet site if the employer customarily communicates with its employees about personnel rules or policies by such means."

Since the rule's publication, at least two organizations, the National Association of Manufacturers and the National Federation of Independent Business have filed law suits challenging the legal sufficiency of the posting requirement and the Board's authority to implement the rule. The challenges raise four primary points: (1) the NLRA does not expressly authorize the Board to promulgate the notice posting rule; (2) the Board's authority as it relates to employers is triggered after a representation petition or an unfair labor practice charge is filed, not before; (3) the rule creates a new unfair labor practice without statutory authority to do so; (4) the new regulation provides for an exception to the NLRA's 6-month statute of limitation with no defined limits.

The Board issued the final rule on August 26, 2011, with an initial effective date of November 14, 2011. Due to the pending legal challenges to the validity of the rule, the Board agreed twice to postpone implementation of the rule – which now will not be effective before April 30, 2012.

THE ACTING GENERAL COUNSEL'S EFFORTS TO EXPAND THE REACH OF THE NLRA

The Acting General Counsel made equally aggressive efforts to create new labor policy. These intentions are reflected in several General Counsel Memoranda issued this year to NLRB employees outlining his interpretation of case law and the manner in which he intended for it to be applied or challenged. But his efforts were made no clearer than when he issued a complaint against The Boeing Company after it decided to locate a new manufacturing facility outside of the jurisdiction of the union representing many of the company's employees.

The Boeing Company Case

The most widely covered labor issue of 2011 resulted from the Acting General Counsel's decision to issue an unfair labor practice complaint against The Boeing Company. That decision set off a firestorm of public and political attention the Acting General Counsel could not have anticipated. However, the Acting General Counsel opened the door to this level of criticism he received by pursuing a complaint based on an unprecedented expansion of the NLRA.

The Acting General Counsel's complaint centered around Boeing's decision to place a second final assembly line for its 787 Dreamliner airplane in Charleston, South Carolina. He alleged that Boeing had unlawfully decided to locate the second line in South Carolina instead of the State of Washington to retaliate against its Washington-based employees for striking repeatedly. The legal deficiencies of the Acting General Counsel's complaint based on existing case law were readily apparent. For example, the NLRA has routinely held that viable retaliation claims must be supported by a showing that the alleged discriminatees had experienced some harm to their terms and conditions of employment as a result of the retaliation. There was no evidence that any Washington-based employees suffered any harm as result of Boeing's location decision. Additionally, the Acting General Counsel failed to present evidence that Boeing acted with animus toward its employees' union activities when making its location decision. In fact, Boeing and the union bargained for several months about the location decision, yet the Acting General Counsel did not allege that Boeing failed to bargain in good faith during those negotiations. In

sum, the lack of support in existing law clearly revealed this to be an attempted radical expansion of the NLRA's control over entrepreneurial decision-making.

The political magnitude of the Acting General Counsel's complaint against Boeing was apparent from the outset. Congress injected itself in the debate in a manner reserved only for the most controversial issues. In response to the complaint, it conducted hearings to challenge the merits of the complaint and the motivation behind it. The Acting General Counsel gave testimony and produced documents in response to Congressional subpoenas and representatives from Boeing were given the opportunity to voice their concerns about the complaint's viability. Additionally, members of Congress submitted legislation in response to the complaint. They sought to deny the NLRB the authority to close Boeing's South Carolina facility in case there was a ruling adverse to Boeing. The bill passed the House of Representatives by a vote of 238 to 186, but was not voted on by the Senate.

Considering the magnitude of the changes both legally and practically that would have resulted from the complaint if successful, the public and political outcry in response to the complaint was properly measured. Fortunately for all parties, an agreement was reached between Boeing and the union that allowed Boeing to keep its South Carolina facility and caused the Acting General Counsel to withdraw the complaint.

Social Media Cases

In late 2010, the Board jumped into the public spotlight by issuing a complaint against a Connecticut ambulance company for, among other things, terminating an employee following critical postings on her personal Facebook page. In February, on the eve of trial, the Board settled the case, *American Medical Response of Connecticut, Inc.*, 34-CA-12576. But the issuance of the complaint, and the tremendous publicity it generated, was the beginning of a notable, ongoing effort by the Board to adapt and expand existing case law to address new technological developments. According to a report issued mid-year by the U.S. Chamber of Commerce, there were at that point at least 129 NLRB cases which involved social media in some way.

We reviewed many of these cases as they were unfolding, in a chapter in the book, "Think Before You Click: Strategies for Managing Social Media in the Workplace". The Board summarized some of its thought process regarding these cases, when in August, Acting General Counsel Lafe Solomon issued General Counsel Memorandum OM 11-74 (Aug. 18, 2011), a "Report of the Acting General Counsel Concerning Social Media Cases." Moreover, in connection with a series of charges submitted for advice, the Division of Advice reiterated the appropriate Board standards for finding conduct to be protected concerted activity:

> An individual employee's conduct is concerted when he or she acts "with or on the authority of other employees," when the individual activity seeks to initiate, induce, or prepare for group action, or when the employee brings "truly group complaints to the attention of management." Such activity is concerted even if it involves only a speaker and a listener, "'for such activity is an indispensable preliminary step to employee self-organization.'" On the other hand, comments made "solely by and on behalf of the employee himself" are not concerted.

By the end of the year, during which time the first ALJ decisions came down in some of these cases, recognizable patterns had started to emerge in the treatment of these cases:

- The Board will take an aggressive approach toward work rules and policies -- including social media policies -- which are arguably "overly broad," or might be interpreted to restrict employees' in the exercise of protected, concerted activity.
- As noted above, the Board will consider "protected" any social media postings which are either made on behalf of other employees or made with the object of inducing or preparing for group action. This is a broad, and currently expanding, standard.
- Simple personal attacks posted off-the-clock, outside the workplace -- even offensive or profane insults -- may retain the protection of the Act if they even arguably arise out of concerted activity, terms or conditions of employment, or other alleged ULPs.
- The Board will pursue enforcement against unionized and non-union employers alike for alleged violations.

This line of cases appear to be just the beginning of the Board's efforts to adapt and expand longstanding labor law principles to social media technologies.

The Acting General Counsel's Memoranda

The Acting General Counsel also pursued the expansion of employee and union rights under the NLRA by addressing several memoranda to the staff of the Board's Regional Offices. These Memoranda generally clarified or modified procedures and issues deemed of particular importance by the Acting General Counsel -- and many favored employee and union interests.

1. Requiring Summary Judgment Default Language in Settlement Agreements

General Counsel Memorandum GC 11-04, issued January 12, 2011, directed Regional Offices to include onerous default language in all future settlement agreements. The language requires the employer to agree that in the event of alleged non-compliance with the settlement, all factual allegations in a re-issued Complaint would be deemed admitted; and, that the Board could issue summary judgment on all factual allegations in the pleadings. Moreover, it would require the employer to agree:

> The Board may then issue an order providing a full remedy for the violations found as is customary to remedy such violations. The parties further agree that the U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte.

By requiring such a waiver of the employer's rights to defend itself on the substance of the charges, this language puts an employer in a more precarious position after settling than it is in before; and, significantly raises the stakes in a compliance proceeding.

2. Increasing Monetary Remedies Against Employers

Issued March 11, 2011, Memorandum GC 11-08 outlined new methods for calculating back pay in Board cases. First, the Memorandum explains how Regions are to compute back pay to include interest compounded daily, consistent with the Board's change of direction in *Kentucky River Medical Center*, 356 NLRB No. 9 (Oct. 22, 2010). It also instructs Regions to award additional financial offsets to cover the tax consequences of a lump-sum financial settlement, and to reimburse a discriminatee for the costs of any

interim job search. Moreover, it advises Regions to seek language in future remedial orders requiring the employer to advise the Social Security Administration of the allocation of any back pay award to the appropriate timeframes. Finally, it indicates that the Board will be conducting training for Regional staff on these issues.

3. Soliciting Opportunities to Overrule Board Precedent

Also issued on March 11, 2011, Memorandum GC 11-07 urged Board reconsideration of two Bush Board decisions requiring discharged employees to mitigate potential damages promptly. In *Grosvenor Resort*, 350 NLRB 1197 (2007), the Board held that a number of discriminatees did not fulfill their duty to mitigate their damages because they delayed their search for new employment by up to eight (8) weeks. Based upon a review of earlier Board cases regarding mitigation and the circumstances of the case, the Board ruled that anyone in the case who had waited more than two weeks to commence a job search had waited too long. The back pay awards for any such discriminatee was calculated from the beginning of his or her search. In *St. George Warehouse*, 351 NLRB 961 (2007), the Board shifted the burden of production in mitigation cases to the General Counsel to establish that a discriminatee took reasonable steps to seek equivalent jobs in the relevant market. The Memorandum expressly authorizes Regional Offices to identify cases that may be proper vehicles for overruling these two cases.

This Memorandum most overtly manifests one of the most significant trends that defined the Board's 2011 -- its intent to overturn case law from the prior administration and to expand the Board's remedial powers.

4. Circumventing Limitations on the Employer's Duty to Provide Financial Data to Union During Bargaining

In General Counsel Memorandum GC 11-13, dated May 17, 2011, the Acting General Counsel instructed Regional Offices to conduct a broader analysis in determining whether an employer is required to provide financial and other information to a union during bargaining. He acknowledged that the Supreme Court has concluded that the NLRA limits the employer obligation to provide financial information to unions to occasions when the employer claims an "inability to pay."

As per the new instructions, however, Regional staff is nevertheless to consider whether any specific statements regarding any employer's financial situation give rise to an obligation, even if the statements do not specifically rise to the level of a claimed "inability to pay." The Acting General Counsel supported his direction by citing to two Board cases -- one a recent Obama Board case. The ultimate direction from the Acting General Counsel:

> …Regions should consider both general claims of an inability to pay and other more limited claims that could be subject to specific verification. Regions should examine the particular information requests at issue and determine whether they are targeted to the bargaining claims made by the other party and are specifically tailored to those claims.

With a divided Congress in an election year, and an unclear immediate future regarding the authority of the Board itself to issue decisions or rules, many expect the Acting General Counsel to continue to attempt to effectuate changes and expand Board reach administratively by the issuance of these types of Memoranda.

LEGISLATIVE OPPOSITION TO BOARD AND WHITE HOUSE ACTIVITY

House and Senate Republicans reacted strongly to the aforementioned efforts of both the Board and the Acting General Counsel in 2011. They pursued legislation that would have limited the NLRB's authority in both a general sense and on more specific issues while also exercising oversight via the committee hearing process. The legislation has not advanced in any significant way to date.

An Appropriations Amendment to Defund the NLRB

In January 2011, Rep. Tom Price (R-GA) introduced an amendment to H.R. 1, the Full-Year Continuing Appropriations Act, to defund the NLRB for the remainder of the 2011 Fiscal Year. In response to an inquiry about this proposal, Rep. Price told *Labor Relations Today* on February 17th:

> The spending spree in Washington has put our nation on a perilous path to fiscal ruin. House Republicans understand we need to cut spending immediately to help get our economy growing and more Americans back to work. Every step we can take to responsibly rollback the cost of government is important. By striking $233 million in funding for the National Labor Relations Board, we can save taxpayer dollars and help protect American job creators from an out-of-control agency bent on installing 'card check' (Secret Ballot Destruction Act) via regulations and circumventing the will of the American people.

The defunding amendment was defeated in a voice vote and was not revisited for a roll call vote as requested.

National Right to Work Law

Senator Jim DeMint (R-SC) introduced a National Right to Work bill in the Senate, joined by seven Republican original co-sponsors: Tom Coburn (R-OK), Orrin Hatch (R-UT), Mike Lee (R-UT), Rand Paul (R-KY), James Risch (R-ID), Pat Toomey (R-PA) and David Vitter (R-LA).

"Right-to-Work" laws generally prohibit "union security" agreements -- or contract provisions between unions and employers making membership or payment of union dues or fees a mandatory condition of employment. A union security agreement is generally a permissible exception to the National Labor Relations Act's prohibition against discrimination based on union membership or support. The 1947 Taft-Hartley amendments to the Act, however, added subsection 14(b), allowing *states* to pass "right to work" laws to prohibit unions and employers from agreeing to "union security" clauses -- contract provisions which require union membership as a condition of employment. There are currently 22 so-called "right to work" states in the U.S.

The National Right to Work Act would strike the provisions of Section 8(a)(3) and Section 8(b) of the NLRA, and Section 2(11) of the Railway Labor Act, which exempt "union security" agreements from prohibitions against discrimination based on union membership or support. In introducing the bill, the Senators point to a recent poll by the National Right to Work Foundation which reported:

> Eighty percent supported the Right to Work principle that union membership and dues payment should be voluntary and not required as a condition of employment.

Toward the end of 2011, and beginning of 2012, a legislative battle was being waged in Indiana over a proposed state Right to Work bill.

Secret Ballot Protection Act

Senator Jim DeMint (R-South Carolina) also introduced the Secret Ballot Protection Act (SBPA), a bill intended to "guarantee the right of every American worker to have a secret ballot election on whether to unionize." The bill has been introduced repeatedly in previous Congresses during legislative battles over the Employee Free Choice Act. Seventeen Republican cosponsors have joined Sen. DeMint to introduce the bill. Representative Phil Roe (R-TN) introduced the same bill in the House of Representatives (H.R. 972).

In an introductory press release, Sen. DeMint referenced EFCA directly:

> Last Congress, union bosses and their Democrat allies tried their best to deny workers their basic American right to a guaranteed secret ballot election.... Secret ballot voting is a basic American value that we must protect. This bill ensures every American worker gets to cast a secret ballot vote without pressure and fear of retribution from union organizers and coworkers looking over their shoulder. No American should be forced to join or pay dues to a union just to have the opportunity to work and provide for their family.

The Senator's release also made express reference to a letter sent by the Acting General Counsel of the NLRB to four states – South Carolina, Arizona, South Dakota and Utah -- regarding recent state constitutional amendments making secret ballot elections mandatory:

> The threatening letter was written by acting NLRB general counsel, Lafe Solomon, who has not been confirmed by the Senate. Today, the states responded to the board in a letter stating: “These state laws protect long existing federal rights and we will vigorously defend any legal attack upon them. That the NLRB would use its resources to sue our States for constitutionally guaranteeing the right to vote by a secret ballot is extraordinary, and we urge you to reconsider your decision.”

Government Neutrality in Contracting Act

Representative John Sullivan (R-OK) introduced a bill designed to reverse President Obama's Executive Order 13502. That Executive Order, one of four issued during the President's first month in office in 2009, allows federal executive agencies to require contractors on large-scale government construction projects to enter into a project labor agreement as a condition of being awarded a contract. A “project labor agreement” (PLA) is a pre-hire collective-bargaining agreement – often involving multiple employers and multiple unions – designed to systemize labor relations at a construction site.

Rep. Sullivan's Government Neutrality in Contracting Act (H.R. 735) and a similar Senate bill (S. 119) would largely invalidate the President's Order in the absence of special circumstances. Section (a) of the bill states:

> (1) GENERAL RULE - The head of each executive agency that awards any construction contract after the date of enactment of this Act, or that obligates funds pursuant to such a contract, shall ensure that the agency, and any construction manager acting on behalf of the Federal Government with respect to such contract, in its bid specifications, project agreements, or other controlling documents does not—

> (A) require or prohibit a bidder, offeror, contractor, or subcontractor from entering into, or adhering to, agreements with 1 or more labor organizations, with respect to that construction project or another related construction project; or
>
> (B) otherwise discriminate against or give preference to a bidder, offeror, contractor, or subcontractor because such bidder, offeror, contractor, or subcontractor—
>
>> (i) becomes a signatory, or otherwise adheres to, an agreement with 1 or more labor organizations with respect to that construction project or another related construction project; or
>>
>> (ii) refuses to become a signatory, or otherwise adhere to, an agreement with 1 or more labor organizations with respect to that construction project or another related construction project.

President Obama's Executive Order 13502 encouraged federal agencies to use PLAs on any construction project worth more than $25 million, but did not require them. It did also require the OMB to investigate expansion of the use of PLAs on federal construction projects. The White House's related statement of policy explained the goals of the Executive Order as follows:

> The use of a project labor agreement may prevent these problems from developing by providing structure and stability to large-scale construction projects, thereby promoting the efficient and expeditious completion of Federal construction contracts. Accordingly, it is the policy of the Federal Government to encourage executive agencies to consider requiring the use of project labor agreements in connection with large-scale construction projects in order to promote economy and efficiency in Federal procurement.

Rep. Sullivan described the Executive Order as an "'anti-competitive and costly measure encouraging federal agencies to mandate union favoring" agreements that raise construction costs from 12 to 18 percent. He said:

> In short, government-mandated PLAs are nothing more than schemes to repay big labor bosses for political support by steering lucrative federal construction contracts to unionized companies and their unionized workforces. . . Instead of pandering to special interests, Congress should be doing all it can to ensure fair and open competition on federal construction contracts, and help deliver to taxpayers the best possible construction project at the lowest possible price.

The House Committee on Oversight & Government Reform held a hearing entitled "Regulatory Impediments to Job Creation: The Cost of Doing Business in the Construction Industry." A main focus of the hearing was the bill introduced by Rep. Sullivan and President Obama's Executive Order 13502.

LOOKING TOWARD A SIMILARLY ACTIVE 2012

On January 4, 2012, President Obama announced three purported "recess appointments" to the NLRB in an effort to ensure that the Board continues to operate with a full quorum throughout 2012. The President's action has been criticized, however, and is certain to invite legal challenge as the appointments arguably violate the Constitution's Advice and Consent mandate. The three new Board members named and subsequently sworn in were Sharon Block (D), Richard Griffin (D), and Terence Flynn (R).

On December 27, 2011, the recess appointment of Craig Becker expired leaving only two members on the Board, Chairman Pearce, Democrat, and Member Hayes, Republican. Based on the Supreme Court's decision in *New Process Steel v. NLRB,* __ U.S. __, 130 S.Ct. 2635, 177 L.Ed.2d 162 (2010), the Board must consist of at least three members to a constitute a quorum. A quorum is necessary for the Board to issue adjudicatory decisions or approve regulatory changes through rulemaking. The two-member Board consisting of only Chairman Pearce and Member Hayes did not meet this minimum requirement.

Frustrated with recent activist actions taken by the NLRB, including an unpopular complaint against The Boeing Company and expedited changes to the Board's long-standing election procedure, Republicans had threatened to filibuster President Obama's nominees to the Board. It had also taken measures to prevent recess appointments by keeping the Senate in *pro forma* session over the holiday break. Traditionally, the President has not made recess appointments unless the Senate recesses for 10 days or more. The *pro forma* session ensured that no recess by the Senate would last more than two days. Much to the consternation of the Senate, however, President Obama discarded that tradition and made the recess appointments in spite of the Senate's reliance on historically accepted tactics to prevent them. Although the legality of the appointments is in dispute and legal challenges will follow, President Obama has done what he can to ensure the NLRB is properly positioned to continue to pursue the labor-friendly agenda it advanced in 2011.

Presumably, this Board will continue to implement the remainder of the proposed "quickie elections" rule designed to facilitate union representation elections, and the notice posting rule also discussed above. The portions of both rules which have been issued by the Board to date are the object of numerous lawsuits, but absent injunction or invalidation, will become effective April 30, 2012.

Moreover, the Board is certain to continue to limit employer prerogatives and increase employee and union rights in the area of social use. Expect Board decisions to expand the scope of protected concerted activity in this context, as well as exploration of the Board's doctrines regarding surveillance and agency in social media cases.

And, as the Democrat majority arguably now has the three votes traditionally needed to overrule precedent, expect the Board to continue to reverse principles announced in cases during the Bush administration (2001-2008). These may well include:

- *IBM Corp.*, 341 NLRB 1288 (June 9, 2004), in which the Board returned to its precedent of not extending Weingarten rights to non-union employees.

- *Guard Publishing Company, d/b/a The Register-Guard*, 351 NLRB No. 70 (December 16, 2007), which held an employer did not violate Section 8(a)(1) of the NLRA by maintaining a policy prohibiting employees from using the employer's e-mail system for any "non-job-related solicitations."

- The "*Kentucky River*" cases (2006), in which the NLRB clarified the definition of "supervisor" under the National Labor Relations Act -- triggering great consternation among labor unions and their friends in Congress who accused the Board of attempting to disenfranchise employees by exempting them from the Act as "supervisors."

- *Grosvenor Resort*, 350 NLRB 1197 (2007), and *St. George Warehouse*, 351 NLRB 961 (2007), as discussed above, which shifted the burden onto the General Counsel to establish that discriminatees had made reasonable efforts to mitigate their damages.

- *Lutheran Heritage Village - Livonia,* 343 NLRB 646 (2004), in which the Board announced the entirety of a workrule and its context must be analyzed to determine whether a reasonable employee would construe it as an unlawful limit on protected conduct.

- *Brown University*, 342 NLRB 483 (2004), which held that graduate student teaching assistants are not "employees" covered by the National Labor Relations Act.

CONCLUSION

This was the most active year for the NLRB in quite some time. The Board took aggressive strides toward effectuating significant changes to long established Board law and procedure. With President Obama's attempted recess appointment of three new Board Members to fill out a fully-seated Board, absent successful legal challenge, this trend will likely continue apace in 2012. We will continue to keep you informed of future developments.

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