HUNTON& WILLIAMS

CLIENT ALERT

UPDATE FROM THE LABOR & EMPLOYMENT TEAM

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Contacts

If you have questions or would like more information, please contact any of the attorneys listed at the end of this Alert. Hunton & Williams' labor and employment law practice covers the entire spectrum of labor and employment litigation, arbitration, administrative practice before the NLRB, EEOC, and the DOL, federal contract compliance, wage-hour standards, workplace safety and health standards, workers' compensation, contractual rights and remedies, Sarbanes-Oxley and whistleblower claims, workplace investigations and client counseling under federal and state labor and employment laws.

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The New NLRB: Legislation Through Rulemaking and Case Decisions

By all accounts, the Employee Free Choice Act (EFCA) is temporarily stalled, taking a backseat to the economy, health care reform and who knows what else. Make no mistake, EFCA is not dead … just ask newly installed AFL-CIO president Richard Trumka, who declared just last week at the federation's annual convention that EFCA remains big labor's top priority. For sure, EFCA is delayed. But for how long, what a compromise (if there is one) may look like, and what may happen in the interim are anyone's guess.

The NLRB has always had the authority to engage in the kind of extensive "rulemaking" exercised by other federal government agencies. Traditionally, the Board has not used this authority to overhaul policy but instead has established the rules governing labor — management relations on a case-by-case basis. But the Board's historical reticence to make policy through "rules" rather than case decisions may be getting ready to change.

Last winter, President Obama elevated Democrat Wilma Liebman from member to chair of the NLRB. Several months ago, he nominated Democrats Craig Becker and Mark Pearce, as well as Republican Brian Hayes, to join Liebman and Republican member Peter Schaumberg on the five-member Board. It is the unwritten rule that the majority of the members of the NLRB be from the sitting president's party, which, in turn, often leads to rulings made by one president's Board being overturned by the Board appointed by a subsequent president. Of course, the cases that raise controversial issues of interest to a new Board must bubble their way up to the Board from the NLRB's regional offices and administrative law judges. To that end, next August the President will also be able to appoint a successor to Ron Meisburg, the Board's current general counsel, appointed by President Bush. The general counsel serves as the agency's chief prosecutor. He decides what cases to pursue and therefore the issues on which the Board will have the opportunity to rule.

Chairperson Liebman, formerly with FMCS, the Bricklayers union and the Teamsters, has made clear through case dissents and public remarks her opinion that "virtually every recent policy choice by the [Bush] board impedes collective bargaining, creates obstacles to union representation or favors employer interests." She has signaled her intention to overturn many of the Board's recent major decisions, either by overruling them when the chance presents itself

or by using the Board's rulemaking authority to effect the policy change.

But it is not the chair's views on the issues that are raising the most eyebrows. Rather, the perspectives of Craig Becker, who has worked for the AFL-CIO and SEIU and taught law at UCLA, Chicago and Georgetown, are causing great concern among employers and commerce groups. Mr. Becker has written extensively about his views on the NLRB, the role of employers in union elections and the problems he sees in our nation's labor-management system. The most widely quoted of his writings is a 1993 *Minnesota Law Review* article in which he argued that:

- The Board has wide, discretionary authority to establish policy and procedures for conducting elections, i.e., rulemaking;
- Employers "should be stripped of any legally cognizable interest in their employees' election of representatives," i.e., employers should not have any role in the union election process;
- Employers should not be permitted to have observers at the polls to challenge potentially ineligible voters;
- Employers should not be able to hold captive-audience meetings with employees;
- Unions should have equal access and elections should be held off-site;
- Gissel bargaining orders (currently imposed only for the worst employer violations) should be the expected remedy, not the exception for employee violations.

While the extent to which the Board can rewrite its rules may be debatable, many (perhaps including Liebman and Becker) believe that the Board can engage in procedural changes or rulemaking that could, among other changes:

- drastically shorten the time frame for holding an election;
- eliminate pre-election procedures to determine who should be in the voting unit;
- require the employer to turn over employee names, addresses and phone numbers early in an organizational drive;
- require equal access for unions during campaigns;
- increase off-site or mail-in ballot elections; and
- require recognition of minority unions.

In other words, even if EFCA does not pass, or is substantially watered down when it does, there is reason to believe that much of what organized labor hoped would be accomplished through EFCA may yet be achieved through the rulemaking power of a newly constituted Board.

In addition, many believe that the Board is likely to overturn a number of significant decisions issued by the previous Board. These rulings by the new Board, were they to occur, might narrow the definition of who a supervisor is under the NLRA, restrict an employer's right to limit the use of company email systems for solicitation, restrict a company's right to file a lawsuit against a labor organization, enhance the rights of "salts" and encourage prerecognition agreements between companies and unions.

Confirmation hearings on the new appointments have not yet been held. The U.S. Chamber of Commerce has written the Senate to ask in particular that the Senate carefully review the appointment of Mr. Becker, including whether he continues to maintain the positions outlined in his various writings.

In anticipation of the passage of EFCA, we recommended that employers take a number of steps to prepare. See Client Alert November 2008. The potential that radical reform will be implemented administratively suggests that employers who intended to plan for the passage of EFCA should dust off those plans and implement them now, in anticipation of the "reforms" that could be on the way whether or not EFCA ever makes it to the Senate floor.

Hunton & Williams Labor and Employment Team Contacts

Practice Leaders

Laura M. Franze
lfranze@hunton.com
(213) 532-2131

Gregory B. Robertson
grobertson@hunton.com
(804) 788-8526

Atlanta

W. Christopher Arbery
carbery@hunton.com

Kenneth L. Dobkin
kdobkin@hunton.com

Kurt A. Powell
kpowell@hunton.com

Robert T. Quackenboss
rquackenboss@hunton.com

Brussels

Hervé Cogels
hcogels@hunton.com

Charlotte

A. Todd Brown
tbrown@hunton.com

Wood W. Lay
wlay@hunton.com

Dallas

G. Allen Butler
abutler@hunton.com

W. Stephen Cockerham
scockerham@hunton.com

Laura M. Franze
lfranze@hunton.com

William L. Keller
bkeller@hunton.com

David C. Lonergan
dlonergan@hunton.com

Alan J. Marcuis
amarcuis@hunton.com

Julie I. Ungerman
jungerman@hunton.com

Houston

Fraser A. McAlpine
fmcalpine@hunton.com

Kevin J. White
kwhite@hunton.com

Holly Williamson
hwilliamson@hunton.com

London

Ruth M. Harvey
rharvey@hunton.com

Los Angeles

Emily Burkhardt Vicente
ebvicente@hunton.com

Phillip J. Eskenazi
peskenazi@hunton.com

Laura M. Franze
lfranze@hunton.com

Roland M. Juarez
rjuarez@hunton.com

McLean

Jeffrey B. Hardie
jhardie@hunton.com

Thomas P. Murphy
tpmurphy@hunton.com

Miami

Terence G. Connor
tconnor@hunton.com

Juan C. Enjamio
jenjamio@hunton.com

New York

Shawn Patrick Regan
sregan@hunton.com

Norfolk

Sharon S. Goodwyn
sgoodwyn@hunton.com

James P. Naughton
jnaughton@hunton.com

Richmond

Patricia K. Epps
pepps@hunton.com

Patricia S. Gill
pgill@hunton.com

Gregory B. Robertson
grobertson@hunton.com

Marguerite R. (Rita) Ruby
rruby@hunton.com

C. Randolph Sullivan
rsullivan@hunton.com

Hill B. Wellford, Jr.
hwellford@hunton.com

San Francisco

M. Brett Burns
mbrettburns@hunton.com

Fraser A. McAlpine
fmcalpine@hunton.com

Washington, DC

Ian P. Band
iband@hunton.com

Frederic Freilicher
ffreilicher@hunton.com

Michael J. Mueller
mmueller@hunton.com

Susan F. Wiltsie
swiltsie@hunton.com

Richard L. Wyatt Jr.
rwyatt@hunton.com