

Push for Pro-Union Federal Policies Moves to Regulatory Arena

When President Barack Obama was elected in 2008, one of the main pieces of legislation he promised to push through Congress was the Employee Freedom of Choice Act (EFCA). The EFCA was introduced in Congress in 2009 and was one of organized labor's top priorities as it would allow the unionization of employees through "card check," rather than the traditional secret ballot election. Although the EFCA passed the U.S. House of Representatives, it was unable to make it out of the U.S. Senate. With the defeat of the EFCA, critics warned that organized labor would seek other avenues to increase its ability to unionize employees, including through the National Labor Relations Board (NLRB). As evidenced by the NLRB's activity over the last year, this prediction seems to have materialized.

Current Make-Up of the National Labor Relations Board

The NLRB is a five-member board with a General Counsel, all of whom are generally appointed by the President and confirmed by the Senate. The President, however, does have the authority to make "recess appointments" to the Board when the Senate is in recess, which bypasses the Senate confirmation requirement. However, any appointee added by a "recess appointment" can serve on the Board only until the next Senate session ends.

On January 1, 2012, Brian Hayes (R) and Mark Pearce (D) were the only members on the Board, due to the expiration of Craig Becker's recess appointment on December 31, 2011. On January 4, 2012, President Obama announced the recess appointments of Sharon Block (D), Richard Griffin (D) and Terence Flynn (R), to the NLRB. Several Republicans have argued these appointments were improper, as the Senate had not yet been in recess for three days, which was the presumed time frame for a "recess appointment." With these three new additions to the NLRB, it will be the first time the board has been staffed with five members since August 2010.

NLRB Proposed Regulations in 2010–2011

One clear example of the union-friendly direction of the NLRB is recent proposed regulations that seem to encourage union representation, as set forth below.

Mandatory Poster Requirement

On December 22, 2010, the NLRB proposed a regulation that would require every employer subject to the National Labor Relations Act (NLRA) to prominently display a poster in the workplace that informs employees of their rights under the NLRA, including their right to unionize. During the comment period, the NLRB received more than 7,000 comments regarding this proposed regulation, most of which objected to all or a part of the regulation.

A large California business coalition led by the California Chamber of Commerce submitted comments objecting to the proposed regulation, including whether the NLRB had exceeded its statutory authority to impose such a requirement on employers. Despite the numerous comments received, the NLRB issued a final rule on August 30, 2011 that made only minor changes from the original proposed regulation.

Initially, this new posting requirement was scheduled to go into effect on November 14, 2011. On September 10, 2011, however, the National Association of Manufacturers filed a lawsuit in the U.S. District Court for the District of Columbia, alleging that the posting requirement exceeded the jurisdiction of the NLRB. Approximately a week later, the U.S. Chamber of Commerce and South Carolina Chamber of Commerce filed a lawsuit against the NLRB in the U.S. District Court of South Carolina, alleging that the posting requirement exceeds the NLRB's authority, and violates the First Amendment, Regulatory Flexibility Act and Administrative Procedures Act.

On October 5, 2011, the NLRB announced that it was delaying implementation of the

posting requirement until January 31, 2012, “in order to allow for enhanced education and outreach to employers, particularly those who operate small- and medium-size businesses.” On December 23, 2011, the NLRB announced that it was postponing the implementation date of the posting requirement until April 30, 2012 “at the request of the federal court in Washington, D.C. hearing a legal challenge regarding the rule.”

Expedited Elections

Shortly following the poster proposal discussed above, the NLRB introduced another union-friendly regulation on June 21, 2011 regarding the timeline for union elections. The proposal sought to:

- Hold pre-election hearings within seven days after an election petition is filed. Currently, regional offices generally conduct pre-election hearings within 14 days after a petition is filed, although the practice varies by region.
- Require employers to identify all issues they would like considered at a pre-election hearing before the hearing is conducted, and offer proof to support any of its positions. Given the proposal above to hold a pre-hearing election within seven days after a petition is filed, the impact of this reform would be fewer issues raised at any pre-hearing election and less delay until the election.
- Delay any voter eligibility issues that deal with less than 20% of the employees in the proposed bargaining unit until after the election has occurred. This reform would likely eliminate the need for most pre-election hearings, which would again reduce any delay between the filing of the petition and actual election.
- Delay the review of any pre-hearing election decisions until after an election has been conducted, which would also reduce any delay between the filing of the petition and actual election.

- Require employers to provide the regional office and union organizer with an eligible list of voters, including the names, addresses, telephone numbers, and email addresses, within two days after receipt of any pre-hearing election decision. Currently, employers are required to provide only the names and addresses of employees within seven days after a pre-hearing decision.

The NLRB claimed that this proposed reform “fix[ed] flaws in the Board’s current procedures that build in unnecessary delays, allow wasteful litigation, and fail to take advantage of modern communication technologies.” As numerous opponents to the proposed regulation have pointed out, however, this claim is largely undermined by the NLRB’s own statistics showing that in 2010, 95.1% of all initial elections were conducted within 56 days of the filing of any petition and 86.3% of all cases were closed within 100 days of the filing of the petition. Overall, in 2010, the average amount of time from the date the petition was filed to the election was 31 days. While there

are certainly examples of elections that took longer than these average times, such examples are not the norm.

In his dissent to the proposed regulations, NLRB Member Hayes estimated that these reforms would reduce the period from when a petition is filed to when an election is held to as little as 10 days. Member Hayes commented that “the principal purpose for this radical manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer’s legitimate opportunity to express its views about collective bargaining.” Basically, if these proposed regulations are adopted, a union seeking to organize a workforce would have an unlimited amount of time to express its views on the benefits of unionization and influence the employees before they file the petition, while the employer would have only potentially 10 days or fewer after the petition is filed to express its views regarding unionization.

The public comment period on this proposed regulation closed on September 6, 2011. The NLRB received more than 65,000 comments, many of which opposed the regulation. Despite this, the three-member board scheduled a vote for November 30, 2011 on whether to finalize the proposed regulations. Member Hayes threatened to resign from the board to prevent the vote from going forward, as the board would be unable to act with only two members. Representative John Kline (R-Minnesota) also introduced a bill to combat the regulation that would specify no election could be held until 35 days after the petition was filed.

On November 30, 2011, the NLRB decided to vote only on portions of the proposal that would limit litigation surrounding union elections. The vote was 2-1, with Member Hayes opposing. On December 21, 2011, the NLRB released a copy of the final provisions of the rule that basically:

- limit the scope of regional hearings to only those issues relevant to whether an election should be conducted;
- delay the appeal of any regional director decision until post-election;
- provide the NLRB with discretion as to whether to review regional director decisions.

The U.S. Chamber of Commerce and Coalition for a Democratic Workplace immediately filed a lawsuit against the NLRB in the U.S. District Court of the District of Columbia, challenging the legality of this new rule. As this article went to print, this rule is set to go into effect on April 30, 2012.

Aggressive Application of National Labor Relations Act

Complaints/cases filed by the general counsel of the NLRB have also indicated that the board is taking a much more employee-friendly approach to its enforcement of

the NLRA. The two cases below are recent examples of the NLRB's aggressive enforcement.

• **Boeing Case.** Boeing Co. has operated primarily at an assembly plant in Washington. In March 2010, however, Boeing decided to open a second assembly line in South Carolina for the 787 Dreamliner aircraft. This decision to place the production of this aircraft at the South Carolina assembly plant did not result in any job loss for any employee at the Washington assembly plant. Moreover, the transfer of this assembly line to South Carolina created at least 4,000 new jobs in the state. Additionally, South Carolina provided Boeing with a \$750 million investment package to locate its assembly plant in the state, including tax incentives and low-interest loans. In commenting on the move to South Carolina, Boeing President, Chairman and CEO Jim McNerney stated that the company was dealing with strikes at the Washington plant every three to four years and could not afford to have continual interruptions in the company's work.

On April 20, 2011, the acting general counsel for the NLRB filed a complaint against Boeing, alleging that Boeing had violated Section 8(a) of the NLRA by interfering with, restraining, or coercing employees in the exercise of their rights under the NLRA. Basically, the NLRB alleged that Boeing decided to pursue a second assembly line in South Carolina because it is a non-union workforce and the company was seeking to retaliate against or punish unionized employees in Washington for exercising their rights under the NLRA.

The case received national attention and was even an issue of discussion in the presidential campaign. On or about December 9, 2011, the NLRB dismissed the case against Boeing as a result of a new labor agreement that was negotiated with Boeing by the International Association of Machinists and Aerospace Workers that expanded production at the plant in Washington.

• **Social Media Postings.** Hispanic United of Buffalo, Inc. (HUB) is a non-union, non-profit organization that provides social services to its clients. One of HUB's employees, after work hours, posted comments on her Facebook page regarding another coworker, stating that she was unhappy with the criticisms of the coworker and asking for comments from fellow employees. This Facebook posting generated several comments from fellow employees, some of whom complained about the coworker mentioned as well as the working conditions at HUB. The coworker at issue in the Facebook postings found out about the comments and complained to the executive director of HUB. Three days later, five of the employees who made Facebook postings regarding the coworker were terminated from their employment with HUB on the grounds that they had engaged in harassing and bullying behavior that violated HUB's policies.

The five terminated employees filed a charge with the NLRB, alleging that the termination of their employment was unlawful. On May 9, 2011, the NLRB filed a complaint against HUB, alleging that the terminated employees had engaged in protected concerted activity under the NLRA when they voiced their work-related concerns on Facebook and that HUB had violated the NLRA when terminating their employment. After a three-day trial, an NLRB administrative law judge ruled in favor of the employees, confirming that their termination was unlawful. HUB was ordered to reinstate the employees and pay them back pay for any lost wages.

This case is significant as it reflects the NLRB's recent interest in social media and its aggressive application of the NLRA to employee-related communications on such Internet sites. The decision in HUB surprised many employers that may not previously have considered Facebook postings to be potentially subject to the NLRA, specifically with regard to protected concerted activity.

California Activity

In addition to the recent NLRB activity that has tipped the balance in favor of unions, there also has been legislative activity in California that has sought to do the same. Specifically, in 2011, the following two pieces of union-friendly legislation were introduced:

• SB 104 (Steinberg; D-Sacramento): This bill would have provided agricultural employees under the Agricultural Labor Relations Board with the opportunity to unionize through a "card check" method instead of a secret ballot election. The bill was vetoed by Governor Edmund G. Brown Jr.

• AB 350 (Solorio; D-Anaheim): This bill would have ensured continued union representation of a workforce despite any change in the employer, by forcing the successor contractor of property services to hire the prior contractor's employees. The bill failed passage in the Senate.

CalChamber Position

The CalChamber does not oppose the unionization of employees when both the employer and union have an equal opportunity to express their views, and employees are independently allowed to make the informed decision as to unionization in a secure and secret ballot election. Any legislative or regulatory action that seeks to undermine this process and stack the deck in favor of one side versus the other unfairly forces the issue and may not reflect the true interests of the employee. Moreover, the CalChamber believes that despite the NLRB's political make-up, in order to retain its legitimacy, the board must seek to remain balanced and fair in its approach to applying and enforcing the NLRA.



Staff Contact
Jennifer Barrera
Policy Advocate

jennifer.barrera@calchamber.com
California Chamber of Commerce
P.O. Box 1736
Sacramento, CA 95812-1736
(916) 444-6670
www.calchamber.com
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