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## Recess Appointments to NLRB Present Major Concerns for Employers

By: Vincent T. Norwillo, Esq.

Organized Labor is celebrating a significant development in Washington - and it has nothing to do with the much-discussed Employee Free Choice Act ("EFCA"). On March 27<sup>th</sup>, President Obama made two recess appointments to the National Labor Relations Board (NLRB or Board): Service Employees International Union (SEIU) General Counsel Craig Becker and union-side labor attorney Mark Pearce, who serves on the board of directors of the Lawyers Coordinating Committee of the AFL-CIO. The NLRB is the five-member regulatory agency that oversees relations between labor unions and employers in the private sector. These controversial recess appointments fill two of the three vacancies on the Board, and combined with current Chairwoman Wilma Liebman - former counsel for both the International Brotherhood of Teamsters and the International Union of Bricklayers and Allied Craftworkers - establish a pro-union majority. The Board is now poised to issue a number of decisions reversing many of the pro-management doctrines adopted by the Board under President Bush. Moreover, and of even greater concern to employers, is the prospect that this Board will engage in an unprecedented exercise of its rulemaking authority. Collectively, these Board actions are expected to implement changes that will include many of the controversial provisions of EFCA, and employers should be just as concerned now as when the "card check" legislation was first proposed.

Prior to these recess appointments, the Board had operated with only two members - Liebman (a Democrat) and Peter Schaumber (a Republican) - for over two years as the Senate declined to confirm any appointments to the Board that included Becker. Lacking a quorum, the two-member Board declined to rule

on significant pending cases, causing a backlog of more than 200 matters. With Becker and Pearce now seated, the Board is expected to move quickly through this backlog, changing the landscape of federal labor law in the unions' favor on a range of issues. Specifically, the Board is expected to provide union organizers with access to an employer's property - and employees - during organizing campaigns. Many commentators also predict the Board will require employers to allow company email systems and other technology to be used for broadcasting pro-union messages and the direct solicitation of employees. In addition to expanding union access to employees, the Board is likewise expected to increase the number of workers eligible for union membership by restricting the statutory definition of "supervisor," expanding the definition of "employee," and making contingent workers easier to organize by relaxing the rules on what constitutes an appropriate bargaining unit.

The reversal of precedent by a new Board is not unexpected. In fact, because the composition of the Board changes with every presidential administration, federal labor law is almost always in some state of flux. However, in addition to the decision making process, recess appointees Becker and Pearce are expected to implement radical changes to federal labor law through the Board's little-used administrative rulemaking authority. Areas expected to be affected include: the manner in which union elections are held, the ability of employers to conduct union avoidance campaigns, and the penalties imposed on employers for violations of the National Labor Relations Act ("Act"). Specifically, rumored changes include shortening the time frame for Board certified elections, mandating first contract arbitration and authorizing instant union certification through the "card check" procedure. In other words, the Board could unilaterally implement the provisions of EFCA, and substantively amend the Act, through rulemaking - bypassing any public political battle on Capital Hill.

Although it is not unusual for Presidents to use the recess appointment to fill NLRB vacancies - President George W. Bush made seven such recess appointments during his two terms - the impact of these recent appointments may prove to be historically significant. Messrs. Becker and Pearce will serve through the end of 2011, at which point they must be voted on by the full Senate. Until then, employers should anticipate an active Board issuing decisions and promulgating rules that project to be labor friendly. Gonzalez Saggio & Harlan will keep our clients and friends apprised of any NLRB decisions or rule changes that affect employers and stand by to answer any questions or concerns that may arise.

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