

## National Labor Relations Board Update

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February 2012

The NLRB finished 2011 preparing to operate as a two-person board with the departure of board member Craig Becker, whose recess appointment expired on January 3, 2012. Because the Senate had not approved President Obama's nominations to the board, and Senate Republicans threatened to hold pro forma session throughout the Christmas holiday break, it appeared that the board would be reduced to two commissioners for the duration of 2012.

### ***Obama Makes Recess Appointments to Fill the Board***

However, on January 4, 2012, President Obama made three recess appointments to the NLRB. These appointments are subject to legal challenge, primarily on the basis that U.S. Senate Republican leaders held pro forma sessions of the legislature during the holiday recess specifically to prevent the President from making recess appointments. Appointed to the board were Sharon Block, Terence Flynn, and Richard Griffin. They join current members Brian Hayes and Mark Pearce to form the five person, majority Democratic (3-2) board.

Prior to the appointments, the board acted on the following major issues:

### ***The NLRA Rights Posting Requirement***

On December 23, 2011, the National Labor Relations Board (NLRB) further postponed the implementation of its new employee rights posting requirement. The posting rule requires employers to post a notice, which in addition to unionized employers, reaches most non-unionized employers as well.

Employers should be aware that the NLRB considers failure to post the notice to be an unfair labor practice (ULP). According to the NLRB, failing to post the notice interferes with employees' rights to engage in concerted activity under sections 7 and 8(a)(1) of the Act. 29 U.S.C. §§ 157-158. The NLRB expects most failures to post will be due to the employer's unawareness of the rule, and that charges will usually be dropped upon compliance. Any failure to meet the posting requirements may still allow the NLRB to extend the six-month statute of limitations for employees to file other kinds of ULP charges, unless the employee otherwise knew about his or her rights.

The decision to postpone the implementation date was made after oral argument on December 19 in consolidated lawsuits brought by the National Association of Manufacturers and National Federation of Independent Businesses, among other groups opposing the posting requirement. U.S. District Court Judge Amy Berman Jackson asserted that the previous January 31 deadline did not provide her enough time to thoroughly review the arguments and specifically requested that the NLRB postpone the implementation date. The new effective date of the posting requirement is April 30, 2012.

### ***Election Rule Changes***

On December 22, 2011, the NLRB issued final rules designed to reduce delays and litigation relating to representation elections. The rules will become effective April 30, 2012. The changes include seven primary amendments to the election rules. They include:

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1. Amending board regulations to state that the purpose of pre- election hearings described in Section 9(c) of the National Labor Relations Act is to determine whether a question concerning union representation exists that should be resolved in a secret ballot election .
2. Giving NLRB hearing officers authority to limit the presentation of evidence in such a hearing to genuine issues of fact material to the existence of a question concerning representation.
3. Providing for post-hearing briefs with the permission of a hearing officer, rather than as a matter of right.
4. Amending Section 102.67 and Section 102.69 of the board's rules to eliminate a party's right to seek board review of regional directors' pre- election rulings while allowing a party to seek post- election review of such rulings.
5. Eliminating language in the NLRB's current statement of procedure that recommends a regional director not schedule balloting within 25 days of directing an election .
6. Amending Section 102.65 of the board's rules to provide that requests for special permission to appeal a regional director's pre- election ruling will be granted only in extraordinary circumstances.
7. Amending board rules to make NLRB review of postelection disputes discretionary.

### ***Impact on Automotive Companies***

While all three of these issues are being challenged in the courts, they significantly impact the landscape of federal labor law. The recess appointments will keep the board functioning and able to issue decisions throughout 2012, which it would not have been able to do without the appointments. The NLRB rights posting will require employers, union and non-union alike, to display the posting or risk being charged with an unfair labor practice and/or extending the statute of limitations for unfair labor practice charges. Finally, the election rule changes will require employers to maintain a higher level of vigilance and to react to a union election petition in a very tight time frame. The election changes also provide fewer avenues to challenge election petitions, so employers will need to be prepared to present a quick, coordinated response to union organizing campaigns.

Miller Canfield will continue to update these and other board actions as they and the legal challenges play out.

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