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**AGENCY ENFORCEMENT:
THERE'S A NEW SHERIFF IN TOWN**

THE NEW NATIONAL LABOR RELATIONS BOARD

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THE NEW NATIONAL LABOR RELATIONS BOARD

I. The NLRB – Current Members and Nominees

Wilma Liebman serves as the current Chairman of the NLRB. She was first appointed to the Board in 1997 by then-President Clinton, and her current term expires August 27, 2011. She previously worked as a staff attorney with the NLRB and as counsel for the International Brotherhood of Teamsters and the Bricklayers and Allied Craftsmen. She also worked as a deputy director at the Federal Mediation and Conciliation Services immediately prior to her appointment to the NLRB.

Peter Schaumber has served as a member of the NLRB since 2005, and his current term expires August 27, 2010. He worked previously as a labor arbitrator as well as an attorney in private practice and in the public sector.

In July 2009, President Obama nominated the following individuals for appointments to the NLRB:

- Mark Pearce: Pearce practices union-side labor and employment law, and is a founding partner of the union-side law firm of Creighton, Pearce, Johnsen & Giroux in Buffalo, New York. Pearce also worked as an attorney with the NLRB. He received his law degree from the State University of New York and his undergraduate degree from Cornell University. Pearce also has taught at Cornell's School of Industrial and Labor Relations.
- Brian Hayes: Hayes is the Republican labor policy director for the U.S. Senate Committee on Health, Education, Labor and Pensions (Senate HELP Committee). He spent twenty-five years as a management-side attorney practicing labor and employment law. He also has NLRB experience, having worked for the Chief Judge of the NLRB and as Counsel to the Chairman of the NLRB. He received his law degree from Georgetown University and his undergraduate degree from Boston College. Hayes also has served as an adjunct faculty member at Western New England Law School, where he taught classes in labor law, collective bargaining, arbitration, and employment litigation.
- Craig Becker: Becker has worked as an associate general counsel to the AFL-CIO and the Service Employees International Union (SEIU). He received both his undergraduate and law degrees from Yale. Becker has taught law at several law schools, including UCLA, the University of Chicago and Georgetown. He also has written extensively about labor law and the National Labor Relations Act (NLRA).

If all three were confirmed, the NLRB would have a Democratic majority for the first time since December 2001.

Becker is by far the most controversial NLRB nominee in decades. His prolific writings reveal radical leanings with respect to employee rights, union organizing and the future of the NLRB. He has advocated in the past that employers should have no role in union organizing campaigns and union representation elections and proceedings before the NLRB. He has hinted in prior articles that, given the wide degree of discretion Congress bestowed upon the NLRB to establish procedures and regulations, legislative amendments – like the proposed Employee Free Choice Act (EFCA) – are perhaps unnecessary. Rather, he has indicated that the NLRB could achieve the same ends – including certification based on a majority of authorization cards submitted by a union, or “card check” – through rule-making and decision-making, as opposed to Congressional legislative amendments.

Becker’s nomination has had immediately polarizing results. Management groups, including the U.S. Chamber of Commerce, the Society of Human Resource Management and the National Federation of Independent Business, have universally opposed his nomination. Citing his opinions and views as espoused in scholarly journals, they raise concerns that he would unduly restrict employer rights in the workplace and circumvent Congress by implementing portions of the EFCA through NLRB decisions. A number of labor law professors and unions, including the AFL-CIO and the Change to Win Coalition, support his confirmation, arguing that he possesses unparalleled qualifications and would serve the NLRB admirably.

In October 2009, the Senate HELP Committee initially approved Becker’s nomination along with those of Pearce and Hayes. However, Senator John McCain (R-Ariz.) placed a hold on the nomination after Committee Chairman Senator Tom Harkin (D-Iowa) refused McCain’s demand for a full hearing regarding Becker’s appointment. This caused the Senate to send Becker’s nomination back to the White House at the end of the 2009 session. President Obama re-nominated Becker in January 2010. The nominations of Pearce and Hayes remain pending.

The Senate HELP Committee granted McCain’s second request for a hearing, and met on February 2, 2010, to question Becker about his views on labor issues. This move itself had significance, as the Senate HELP Committee seldom holds confirmation hearings for NLRB nominees. In the past twenty-five years, the committee has approved twenty-eight NLRB members and held only one hearing during that timeframe. At the hearing, the Senate HELP Committee approved Becker’s nomination along a straight party-line vote of 13-10.

On February 9, 2010, however, the full Senate defeated Becker’s nomination. By a vote of 52 to 33, Senate Democrats fell far short of the 60 votes needed to overcome a Republican-led filibuster and advance the nomination. Two Democrats, Senators Blanche Lincoln of Arkansas and Ben Nelson of Nebraska, broke party ranks and voted against Becker’s nomination.

There are indications that the White House could still appoint Becker to the NLRB without Senate approval through a recess appointment. This move appears more likely after Senator Richard Shelby (R-Ala.) placed a “blanket hold” on all of President Obama’s pending nominees for positions throughout the federal government. This “blanket hold” was placed February 4, and prohibits the Senate from acting on any of the seventy nominees – including Becker – who are now pending on the executive calendar.

II. Potential for Change – NLRB Case Law

The following decisions have the greatest potential for change and reversal by an Obama NLRB:

- **Voluntary Recognition**: In Dana Corp., 351 NLRB 434 (2007), the NLRB considered whether neutrality and card check agreements should act as bars to election petitions, and if so, for what period of time. It ultimately held that an employer’s voluntary recognition of a labor organization did not bar a decertification petition or an election petition by a rival labor organization that is filed within forty-five days of the notice to employees of the voluntary recognition. The NLRB based its holding on findings that card check is not as reliable an indicator of employee preferences as an NLRB-conducted election, and thereby undermined the popularity of the neutrality/card check agreements increasingly used by organized labor and endorsed under the proposed EFCA. An Obama NLRB likely will target this precedent for reversal.
- **Email Solicitation**: In The Guard Publishing Co., 351 NLRB 1110 (2007), the NLRB addressed the issue of employee use of an employer’s e-mail system for union-related communications. The NLRB majority found that the employer could lawfully bar employees from using its e-mail system for non-work related purposes, unless the employer enforced the policy to discriminate against union activity. Prior to this decision, the NLRB had uniformly held that where an employer allowed its employees to use company property to communicate regarding *any* non-work-related matters, such as baby showers or church bake sales, the employer must then permit its employees to use the same property to communicate regarding union-related matters. In The Guard Publishing Co., however, the NLRB majority ruled that an employer does not need to permit union communication even if it permits communication for other personal matters, as long as the distinction made by the employer is not simply to prohibit union activity. Faced with a scathing dissent led by now-Chairman Liebman, this decision is widely regarded as ripe for reversal by an Obama NLRB.



- **Supervisory Status:** In Oakwood Healthcare Inc., 348 NLRB 686 (2006), the NLRB issued new guidance for determining whether an individual qualified as a statutory supervisor exempt from the protections of the NLRA. Central to the NLRB’s analysis was its application of the terms “assign,” “direct” and “independent judgment” – terms that are explicitly included in the NLRA’s definition of “supervisor.” The dissent argued for a much narrower interpretation of these statutory terms, a view that may become the prevailing trend by an Obama NLRB. It is worth noting as well that the Oakwood decision could be drastically limited by passage of the Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers Act (the “RESPECT” Act) by Congress. This bill would amend the NLRA to remove the terms “assign” and “direct” from the supervisor definition, and require that supervisors exercise supervisory authority a majority of their work time.
- **Weingarten Rights for Non-Represented Employees:** In 2004, the NLRB overruled Clinton-era precedent established by Epilepsy Foundation, and reverted to prior NLRB cases that held that the Weingarten right to union representation at an investigatory interview does *not* extend to employees who are not represented by a union. Expect an Obama NLRB to reverse course yet again, and allow nonunion employees to once again be allowed representation by coworkers or others at a meeting the employees believe may possibly result in disciplinary action.
- **Union Salts:** In Toering Electric Co., 351 NLRB 225 (2007), the NLRB modified the scope of job applicants who qualify as employees under the NLRA and therefore are protected from anti-union discrimination. The issue of whether an applicant is an employee typically arises when an employer refuses to hire, or consider for hire, union “salts” – individuals sent by a union to an unorganized workplace to obtain employment and then organize the workforce. Prior to Toering, all applicants, regardless of their true intentions or actions during the interview process, were presumed to be employees and therefore protected from discrimination on the basis of their union activity. The NLRB narrowed this considerably in Toering when it held that a job applicant is considered to be a statutory employee only if he or she submits an employment application and evidences a “genuine interest” in establishing an employment relationship with the hiring employer. This decision may likely be targeted by an Obama NLRB for reversal as well.