

# Chicago Daily Law Bulletin®

Volume 156, No. 80

Saturday, April 24, 2010

## Employment lawyers weigh in on how appointments will change their practice

By Amanda Robert  
Law Bulletin staff writer

David P. Radelet once counted more than 30 workplace initiatives that Sen. Barack Obama discussed or supported during his presidential campaign.

But in his first year on the job, President Obama pushed aside his potentially broad workplace legislative agenda in favor of economic recovery and health-care reform, said Radelet, a management-side labor and employment lawyer and a partner of Franczek Radelet P.C.

Even though such initiatives as the Employee Free Choice Act have stagnated as a result, a recent conference for employers hosted by Franczek Radelet pointed out that the president will impact labor and employment law through other avenues.

“Does that mean there are no changes that we have to be concerned about?” Radelet said. “The answer to that is an emphatic no. He’s made less legislative changes than some may have predicted, but in terms of his appointments to enforcement agencies, he’s been very active.”

Obama recently reopened the door for dramatic change by making “pro-labor” appointments to the National Labor Relations Board (NLRB).

At the end of March, with Congress out on recess, Obama appointed Democrats Craig Becker and Mark Pearce to the NLRB, the independent federal agency that administers the National Labor Relations Act — the primary law that governs relations between unions and employers.

Becker, a lawyer for the American Federation of Labor and Congress of Industrial Organizations and the Service Employees International Union, failed to win over Republican senators in February. Republicans also opposed the nomination of Pearce, a Buffalo, N.Y., labor attorney.

“The appointment to the NLRB that everyone’s talking about is Craig Becker,” Radelet said. “The implications are huge, because the NLRB as an agency can significantly impact the laws of the workplace.

“Becker has expressed support for some significant changes in the implication of the law as it relates to union election issues, as it



Paul McGrath

David P. Radelet, a founding partner of Franczek Radelet P.C., represents private sector employers in all aspects of labor and employment law. Radelet said President Obama has made few legislative changes involving workplace laws, but has been active in restructuring such federal enforcement agencies as the National Labor Relations Board.

relates to good-faith bargaining, as it relates to the rights of unrepresented workers.”

Bradford L. Livingston, a partner of Seyfarth Shaw LLP who represents employers in all aspects of labor and employment law, affirmed that since Obama’s appointments filled two of three board vacancies and instituted Democratic majority, the NLRB can now make significant rule changes.

What’s even more interesting, he said, is that the lone Republican’s term expires in August, leaving the NLRB with three pro-union Democrats and no dissenting views.

“Normally the NLRB has waited until a case arises and then used the decision in that case to confirm or change an existing law,” Livingston said. “If a Democratic NLRB, with a 3-0 majority and no dissenting view, decides to use rule-making, it could issue broader

pronouncements that are more likely to stick before the federal appellate courts.”

Radelet and Livingston expect the NLRB to enact several significant changes that could impact labor and employment laws, including a narrower definition of “supervisor,” making more employees eligible for union representation; the right to use company e-mail for union organizing; and enhanced remedies for unfair labor practices.

These changes will shift the role of government in the workplace, Radelet said, and will have a major impact on his job and on the clients he represents.

“It’s always a full-time job representing employers, and that’s all I’ve done for 30 years,” he said. “I wouldn’t say it’ll make it any more difficult. It just kind of changes the game.”

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"We have to stay on top of it, as we always do, and make sure we're providing our clients with cutting-edge advice and the newest developments."

Livingston agreed that "these are certainly going to be interesting times for labor lawyers.

"We will need to work hand-in-hand with our clients to carefully access their policies and practices, to try to anticipate changes at the NLRB and ensure that our clients can continue to maintain a positive relationship with their employees while at the same time ... ensure that they can do what they do and do it successfully."

For labor and employment lawyers who represent employees and unions, the recess appointments to the NLRB were a much-anticipated and welcome change.

Marvin Gittler, a labor lawyer and partner in Asher, Gittler, Greenfield & D'Alba Ltd., said organized labor's goal is to return to the legal landscape that existed before the "pro-employer regime of the Bush NLRB."

The new NLRB, he continued, promises to enhance the legal rights of individual and collective workers, including the right to be secure in employment and to employer compliance with laws regarding compensation, health-care and related benefits.

"I think we will be able to return to a legitimate reading of the statute," Gittler said, "which is designed to protect workers' rights, not designed to enhance the employers' ability to treat workers in an arbitrary and discriminatory manner."

He hopes that by helping workers join labor organizations, or to otherwise improve their conditions, labor lawyers will experience a progressive shift in their profession.

"Until now, the work has been primarily defensive, trying to retain what we've sought over the years," Gittler said. "If the legal scene changes, we can shift to a more positive and more aggressive protection and organizing of working folks."

David L. Lee, of the Law Offices of David L. Lee, agreed that Obama's appointments will give the previously paralyzed NLRB the ability to make decisions that are more pro-employee and pro-union. As a labor and employment lawyer who represents individual employees, Lee also agreed that the change will be good for his practice.

"For me, it's a good thing," he said. "And for lawyers who represent unions and individual employees, it's a good thing. It will be helpful to our clients and helpful to employees in general, whether or not they

are union members."

The Obama administration has also implemented changes in other federal enforcement agencies, such as the Equal Employment Opportunity Commission (EEOC) and the United States Department of Labor, which will affect the laws of the workplace.

Obama recently made three recess appointments and established a quorum in the five-member EEOC, which is responsible for implementing federal laws that make it illegal to discriminate against potential or current employees because of their race, color, religion, sex, national origin, age, disability or genetic information.

One of the EEOC appointments is Chai Feldblum, an openly gay law professor who helped draft the Americans with Disabilities Act and the ADA Amendments Act, who was openly opposed by Republicans who stalled her confirmation since December. She has also worked on the Employment Non-Discrimination Act, a new bill that seeks to ban employment bias based on sexual orientation or gender identity.

Obama's two other appointees were Jacqueline Berrien, the associate director-counsel of the NAACP Legal Defense and Education Fund Inc. in New York; and Victoria Lipnic, a labor and employment lawyer with Seyfarth Shaw LLP in Washington, D.C., and assistant secretary of labor and employment standards for former President George W. Bush.

By law, the NLRB and EEOC recess appointees can serve until the next Senate finishes its term in 2011.

Radelet expects to see more enforcement from the EEOC as a result of its new appointees, as well as its increased federal budget dollars and increased number of attorneys and investigators.

He said commission members will most likely focus on systematic claims, which are claims adopted by employers relating to policies that affect all applicants and employees; accommodation of workers with disabilities; and age discrimination issues.

The U.S. Department of Labor will also boost its enforcement activity, Radelet predicts, due to greater budget dollars and staff. The department is especially interested in handling law provisions involving employers' classification of workers as exempt or non-exempt and employers' use of non-employee contractors, he said.

As federal agencies become more receptive to employees, more charges will be filed against employers, Radelet said, leading

to a larger workload for labor and employment lawyers.

"The agencies have been allocated more budget dollars, and are changing their enforcement focuses and their interpretations of the rules and the laws," he said. "It's a lot different than the Bush administration."

The next question for labor and employment attorneys is whether Obama will renew his focus on the Employee Free Choice Act, or EFCA, which has seen no legislative action since April 2009.

This bill would make it easier for unions to organize workers using "card check" certification instead of secret-ballot elections, meaning that employers would be required to enter contract talks when a majority of their workers sign union cards. The bill also holds that an arbitrator could impose the terms of the contract if employers and employees do not come to an agreement within 120 days.

Joseph M. Gagliardo, managing partner of the labor and employment law firm Laner, Muchin, Dombrow, Becker, Levin & Tominberg Ltd., advises employers about possible trends and changes related to their workforce.

Gagliardo said businesses are concerned that EFCA would not only give unions an unfair advantage, but that it would also affect their ability to make their own decisions.

But, he said, EFCA and other potential laws relating to workforce changes, are designed to ensure that employees do not face discrimination. If companies maintain positive relationships with their workers, they shouldn't feel significantly burdened by changes introduced under new laws.

"I talk to employers, and tell them that this is another reason why you should strive to have good labor/ employee relations," Gagliardo said. "That should be your goal whether there's a law like this pending or not."

If EFCA passes, Gagliardo said within the next five years, labor and employment lawyers will see a greater number of unionized clients and a greater focus on negotiating union contracts.

Radelet, however, predicts that labor and employment lawyers won't have to wait that long to feel the effects of the president's union-friendly agenda.

"Obama has sort of created the possibility that some of the changes included in EFCA may now be made by the NLRB without having to have a new law," he said. "I think it may well turn out that some of the results of the EFCA will actually be achieved by virtue of [Becker's] appointment."