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UNITED STATES HOUSE OF REPRESENTATIVES

THE PRACTICAL IMPLICATIONS OF PRESIDENT OBAMA'S RECESS APPOINTMENTS TO THE NATIONAL LABOR RELATIONS BOARD IF SUCH APPOINTMENTS ARE DEEMED INVALID

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Statement:

I wish to thank you Chairman Kline, Ranking Member Miller, and Members of this Committee for inviting me to testify before you on this important topic.

My name is Stefan Marculewicz, and I am a Shareholder in the Washington, DC office of the law firm of Littler Mendelson, P.C. With nearly 900 attorneys, Littler is the largest law firm in the world dedicated exclusively to the practice of labor and employment law. The views I express to you here today in this testimony are my own. I am not appearing here today on behalf of any client or other organization.

My testimony today will focus on the practical implications of President Barak Obama's January 4, 2012 appointments of NLRB Members Richard Griffin, Sharon Block, and Terrence Flynn should those appointments be deemed invalid because of the manner in which the President made them. I am not here to comment on the process followed by the President making these appointments, or its constitutionality. I will leave that to others. However, as a labor lawyer who spends much of his day advising companies on the in's and out's of compliance with the intricacies of the National Labor Relations Act, and the decisions of National Labor Relations Board, I do feel I have a certain understanding of the confusion and uncertainty that will result from decisions of this new Board, particularly given that the quorum may ultimately be determined invalid by the courts. That uncertainty will be seen far and wide. Moreover, I believe it will have a particularly disparate impact on small businesses which often lack the resources in both time and money to pursue rights they might otherwise legitimately have.

Only a few years ago, the United States Supreme Court issued its decision in New Process Steel, L.P. v. NLRB.[1] In that case, the Court concluded that Congress had not conferred authority to allow a two member Board to decide cases. During the period of time that New Process Steel was making its way through the courts, the two member NLRB decided nearly 600 cases. For the most part, those cases consisted of routine determinations by the Board on which the two members, one a Democrat and the other a Republican, could agree on the applicable law. Controversial matters were left for another day. Once the Supreme Court issued its decision in New Process Steel, each of those decisions were rendered invalid. Each one had to be revisited by the Board once it had a proper quorum. Suffice it to say this created a significant amount of uncertainty within the ranks of those whose cases had been decided by the two member panel. For a period of time, that uncertainty remained. Then eventually, the NLRB established a process to revisit each of those decisions and worked through the cases. Because the cases decided by the two member panel were generally non-controversial and ones on which they could agree, the NLRB was able to revisit and resolve them without lasting effects.

In the current situation, however, with a full complement of five members, the NLRB is likely to rule on many substantive points of law. Some of these points of law are highly controversial. Not only will such decisions impact the parties involved in the cases themselves, but because NLRB decisions become the law of the land, they will also directly impact other employers, labor unions and even individuals. If President Obama's recent nominations are

[1] 130 S.Ct. 2635 (2010).

determined to be invalid, the lasting effects could be substantial. Every decision issued by this Board will be accompanied by the very real possibility that it might not be sustained. Companies trying to comply with the law will face a dilemma of whether to comply with decisions issued by this Board or refuse to do so. For many, waging a lengthy legal battle will prove too costly in time, money and other resources to justify the expenditure. Many employers will simply comply. However, if the law created by this Board is ultimately annulled in the courts, it will be very difficult indeed to pick up the pieces.

An overwhelming majority of NLRB cases are settled or resolved at the Regional Office level. They never reach the full NLRB. Yet Regional Office action is premised upon the current state of the law as defined by the NLRB. If this practice holds true even in light of the current composition of the Board, then that same portion of cases are likely to be resolved. Only now they will be resolved pursuant to precedent that is unstable. When a party resolves a matter at the Regional Office level, typically that party commits to taking action in furtherance of that resolution. That action is relied upon and followed by those it affects. Such action could include the agreement upon the scope of a bargaining unit that may exclude certain employees, it could include creation and dissemination of a new company policy on social media or email usage that affects an entire workforce, or it could include permitting non-employee access to an employer's property whether it is the employer's premises or is email system. The reality is that NLRB doctrine becomes part of the fabric of labor relations in our economy quickly as employers seek to comply with the law. Moreover, it impacts employers of all types, large and small. If such doctrine is annulled in its entirety, as is possible here, its effects will be difficult and costly to remove.

One might argue that any decision by an NLRB panel, even one where each member has been confirmed by the Senate, is subject to being overturned by the courts. That is true, but such situations are addressed on an individual and case-by-case basis. What distinguishes the current scenario we are facing, is that a determination by the courts that the current NLRB does not have the authority to issue *any* decisions will potentially render *every single decision* made by the panel null and void. Each year, the Board decides hundreds of cases, and the impact of those decisions is widespread. A decision that nullifies all of those cases will have real impact on employers, unions and workers.

One of the hallmarks of our legal system is the fact that it provides a certain degree of predictability to those parties who are subject to its laws. Given the fact that the current Board's composition, may be determined invalid, there is a risk that we will lose that predictability and certainty in our labor relations law for what could be an extensive period of time. That loss will have a direct impact on the many people who are subject to the nation's labor laws administered by the NLRB. I ask that the members of this Committee take these practical effects into consideration in your deliberations.

Thank you for giving me this opportunity to present my views.

Examples

There are some significant legal issues currently being considered by the NLRB that will have a direct impact on employers, unions and employees. The following are a few examples:

1. Social Media

Social media is the latest means by which much of the population communicates, and as evidenced by the recent news involving Facebook's announced initial public offering, will continue to grow into the fabric of our society and economy. The NLRB has become very active with respect to the interplay between communications through social media and the Section 7 rights of employees to engage in protected concerted activity. The NLRB's activities will impact both the union and non-union workplace. While the NLRB's Office of the General Counsel has been very active in its efforts to mold policy in this area,[2] there has been little in the way of guidance from the Board itself on how it will ultimately settle on what constitutes a proper social media policy as a matter of law. It is possible that within the coming months, the Board, which currently has three cases pending before it on this subject, will make new law.[3] Those decisions, when they come, will be very far reaching and have a significant impact on a large percentage of employers and workers in the United States. Not only will such decisions impact the parties to each of those cases, but employers and workers will be required to reassess their approach to social media with respect to the workplace. Employers will issue new or revised policies, and employees will be subjected to them. If the Board's decisions on this point are later overturned, then all of the work done to comply with the nullified precedent will have been wasted.

2. Property Rights and Email Access

Another key issue pending before the Board relates to access to private property by non-employees. The case currently pending before the Board on this issue is Roundy's, Inc.[4] This case has generated a significant amount of interest among the employer community. In late 2010, the Board requested briefing on certain issues in that case. In particular, the Board sought positions pertaining to the core issue of non-employee access to private property. However, the Board also sought positions related to the law governing the ability of employers to restrict employees from using a company email system for organizing activities.[5] A decision by the NLRB on this topic will have an immediate impact on the daily workplace. Not only will it have a direct effect on an employer's ability to manage access to its property, but there are also indications that it will impact the ability of the employer to manage its internal email systems. A decision by this Board in the Roundy's case will present employers with an immediate dilemma regarding their policies and how they should enforce them. Those employers who are unwilling or unable to challenge the viability of such a decision through the expensive litigation process

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[2] See, NLRB Memorandum OM 12-31 (January 24, 2012) and NLRB Memorandum OM 11-74 (August 18, 2011).
[3] See, NLRB Press Release *Acting General Counsel issues second social media report*, (January 24, 2012), https://www.nlrb.gov/news/acting-general-counsel-isses-second-social-media-report (last visited February 3, 2012).
[44] 30-CA-17185. See also, Roundy's Inc., 356 NLRB No. 27 (November 12, 2010).
[5] Register Guard, 351 NLRB 1110 (2007).

before the Board, will simply comply and that compliance will have ramifications throughout the workplace and beyond.

3. Bargaining Units

In August of 2011, the Board issued a decision in the case Specialty Healthcare. In that case, the Board articulated a new standard for determining the appropriateness of bargaining units of employees. Specifically, the Board stated that groups of employees who were "readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors)" will be found appropriate, assuming they share a community of interest as determined using the traditional criteria.[6] Under the new standard, such a group can only be placed in a larger unit with which it shares a community of interest if the party seeking such placement can demonstrate that the employees in the smaller group share "an overwhelming community of interest" with the rest.[7] Although there have been a few cases that address certain aspects of this case, the full extent and scope of this decision is still not clear. It is therefore likely that this current Board will be called upon to decide cases where issues arising out of Specialty Healthcare must be addressed. Such clarification by the current Board will lend further uncertainty to the process. Elections and unit determinations serve to identify those who are eligible to vote and be represented by a labor union, and those who are not. The law, which is well-developed in the area of defining what constitutes an appropriate unit, is careful to avoid disenfranchising employees. Indeed, it is unlawful for the Board to find a unit appropriate merely because it is coextensive with the extent to which the employees have been organized.[8] Once a unit is established, a majority of that unit has selected an exclusive bargaining representative, and the parties have secured a collective bargaining agreement, it is very difficult to reverse that process. Not only have parties invested time and resources to reach that end, but undoing such a situation can create unstable employee relations that can have a far reaching impact on an employer's operations.

4. Other Important Topics

There are several other items that have been identified by the NLRB as important topics that may well result in significant substantive changes to the law.[9] Examples include, but are not limited to, the following:

- *Cessation of dues check-off*. Currently the law permits an employer to cease dues check-off upon the expiration of a collective bargaining agreement.

- *Information Requests for Financial Records.* Current Board law permits unions to seek financial records of employers in bargaining if the employer pleas poverty or asserts that it cannot afford demands made by the union.

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[6] Specialty Healthcare, 357 NLRB No. 83 (2011).
[7] *Id.*
[8] NLRA §9(c)(5). 29 U.S.C. § 159(c)(5).
[9] See, NLRB MEMORANDUM OM 12-17 (December 7, 2011); NLRB MEMORANDUM GC 11-11 (April 12, 2011)

- *Supervisory Authority to Assign and Direct.* Current Board law regarding the authority of supervisors to assign and direct arises out of the *Oakwood Trilogy* of cases.[10]

- *An employer's right to withhold witness statements from a union.* Current Board law permits an employer to object to producing witness statements obtained during an internal investigation to a union pursuant to an information request.

Decisions by the Board on any one of these cases will be very significant and could have immediate and far reaching implications. That such decisions may be clouded with the risk that they will be nullified, should be avoided.

5. Regulatory Agenda

The NLRB recently published final rules with respect to a notice posting requirement, and amendments to the rules governing representation elections. Earlier this year, NLRB Chairman Pierce indicated that he intended to engage in further rulemaking in the area of representation election procedure.[11] The Chairman's expression of intent is not a surprise given his statements at the November 30, 2011 meeting of the Board in which they adopted NLRB Resolution No. 2011-1. Such regulations, will have a substantial impact on employers, unions and workers, and are likely to be followed immediately upon their implementation.

[10] Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006).
[11] *Labor Board Chief to Push Organizing Rules*, Sam Hananel (January 26, 2012 Associated Press).