

Recent Appointments to the National Labor Relations Board: Implications for the Health Care and Life Sciences Industry

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Recently, President Obama bypassed the Senate confirmation process and recess-appointed two union-side lawyers, Craig Becker and Mark Pearce, to the five-person National Labor Relations Board (“NLRB” or “Labor Board”). While, understandably, employers in the health care and life sciences industries have been focused on the enactment of federal health care reform, these appointments by the Obama Administration also may have significant implications for their businesses.

The appointment of Becker is a huge boost to organized labor and is of particular concern to non-union employers. Many in the business community believe that Becker, formerly an Associate General Counsel to both the SEIU and the AFL-CIO and an outspoken critic of the current representation election process, will use his position as a Labor Board Member to implement, through administrative means, crucial aspects of the highly controversial pending legislation called the **Employee Free Choice Act (“EFCA”)** and dramatically curtail an employer’s ability to oppose union organizing campaigns.

Health Care and Life Sciences as a Preferred Target

While this development has far-reaching implications, it is more disconcerting for these businesses in the health care and life sciences industry of our economy. As unions have turned their attention to increased organizing over the last decade, companies have sent jobs off-shore and abroad for a variety of reasons. However, the **jobs in the health care and life sciences sector** dealing with patient care, by their very nature, cannot be moved. Yet, the efforts of labor to focus on these companies needed greater legislative and regulatory support. Indeed, a primary benefit of EFCA was to organize these US-based health care jobs. Now with a **3-1 pro-union majority at the NLRB**, the focus of EFCA towards organizing the health care industry can more easily be realized by the decision-making and regulatory authority permitted under the National Labor Relations Act (“NLRA”).

Why the Becker and Pearce Appointments Matter: The Labor Board Can ‘Implement’ Many of EFCA’s Goals

One of the primary goals of the proposed Employee Free Choice Act is to amend the NLRA to essentially eliminate secret-ballot representation elections. In its role as interpreter and administrator of the NLRA, the Labor Board **exercises broad discretion, particularly in the area of union representation elections**. For example, if the NLRB decides that an employer has violated the NLRA and that those violations are so egregious that a fair election cannot be held, the Labor Board can issue what is known as a *Gissel* bargaining order. Such an order forces the employer to recognize and bargain with the union, **without the holding of a secret ballot election**.

A pro-union NLRB may be more easily persuaded that a fair election cannot be held and issue a *Gissel* order. Thus, consistent with EFCA’s aim, the secret ballot election process may be bypassed.

Further, the NLRB determines appropriate bargaining units for elections and the eligibility of voters. Labor Board decisions as to the proper composition of a bargaining unit can be outcome determinative of a representation election. Moreover, the NLRB can significantly **speed up the timing of an election** which often works to the union’s advantage by giving employers precious little time to counter a union’s potential misinformation about the significance of signing authorization cards, as well as the union’s often exaggerated and potentially misleading promises of what it can deliver for the employees.

Finally, President Obama’s Labor Board is expected to overturn many of the pro-employer decisions rendered by the NLRB under the Bush Administration, including some that directly affect representation elections. For instance, in a series of cases, President Bush’s Labor Board liberalized the NLRA’s definition of “supervisor” to include more categories of employees who qualify as “supervisors.” As “supervisors” are not allowed to unionize under the NLRA, the rulings narrowed the pool of employees eligible to vote in a union election. The newly constituted NLRB may well reverse these decisions and restrict the definition of supervisor, thereby potentially excluding many employees from the roster of eligible voters in a representation election.

Thus, employers in the health care and life science industries should be prepared for potentially significant changes in labor law, even if the pending Employee Free Choice Act fails to win passage in Congress.

How Can Employers Protect their Non-Union Status?

The recess appointment of these two members to the Labor Board is only the most recent – and certainly not the last – effort by organized labor to further tip the scales of labor law in its favor. With the potential of bargaining orders replacing elections, the time for elections significantly reduced, and the bar for the commission of unfair labor practices lowered, there may be little opportunity for senior management to respond effectively and in a compliant manner to a union organizing campaign once it is underway. In this environment, it is more important than ever for employers who wish to preserve their non-union status to be proactive.

There are prudent steps that health care and life sciences employers can take, which are good labor relations policies as well, to ensure that their companies are prepared. In this regard, EpsteinBeckerGreen’s Health Employment And Labor (“HEAL”) Initiative includes attorneys who

have specific experience addressing these labor and employment law issues for health care and life sciences companies. We have developed 3 resources for employers who wish to preserve their non-union status:

1) Implement an **8-Step Defensive Plan** – Understanding both the "traditional" and "contemporary" issues of organizing; recognizing the signs of a union organizing campaign; ensuring that no-solicitation policies are valid; training managers and supervisors on how to avoid unfair labor practices, what to do "when the union knocks," and how to respond to employee questions; and avoiding "voluntary recognition" are all covered in this EBG HEAL 8-Step Defensive Plan.

2) Attend a **Strategic Roundtable Forum** – Throughout the United States, attorneys from EBG's HEAL Initiative will be holding Forums with like-minded employers to discuss how to be prepared to stop, and if need be defend, a union organizing drive under these changed circumstances.

3) Hold **In-House Educational Sessions** for Managers and Supervisors – Even if you have generally held these sessions before, the new dynamic of a pro-union NLRB changes the length and width of the playing field. Employers that seek to exercise their rights need new and creative approaches to avoid unionization. Meeting with managers and supervisors to advise on the "new rules," answering detailed questions in "real time," participating in scenario training and identifying specific vulnerabilities are all crucial to this process.

For more information about this HEAL Advisory, please contact:

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