

Hospitality Labor and Employment Advisory: Stakes Are High for Hospitality Industry as Sides Clash Over Pro-Union Labor Board Nominee

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In recent years, hospitality industry employers nationwide have been a major target of Big Labor's organizing efforts. Unions heavily invested in organizing hospitality industry employees — most notably the Service Employees International Union (SEIU) and UNITE HERE — will get a big boost if they win the battle currently being waged in Congress over one of President Obama's nominees for the National Labor Relations Board (NLRB), Craig Becker.

In fact, many in the business and legal communities believe that the confirmation of Becker, an Associate General Counsel to both the SEIU and the AFL-CIO, **could result in the dramatic curtailment of an employer's ability to oppose union organizing campaigns**, regardless of whether the controversial Employee Free Choice Act (EFCA), and its provision to essentially do away with representation elections, ever becomes law.

Why NLRB Nominees Matter: They Are Political Appointees

Normally, the NLRB consists of five members appointed by the President — three from his party and two from the opposing party — for staggered five-year terms. Currently, there are only two Board members — Democrat Wilma B. Liebman, who President Obama appointed as the Board's Chair on the day he took office last year, and Republican Peter C. Schaumber.

Last July, Obama nominated three individuals to fill the remaining vacancies — **Mark Gaston Pearce**, a labor lawyer and founding partner of a union-side law firm; Brian E. Hayes, a management-side labor and employment attorney and former Republican

People



Allen B. Roberts
Member of the Firm
Employment Litigation
New York
212-351-3780
aroberts@ebglaw.com

labor policy director for the Senate Health, Education, Labor, and Pensions (HELP) Committee; and Becker. ***If affirmed by the Senate, these appointments, along with Chair Liebman, would give the NLRB a pro-labor majority.***

Why the NLRB Matters: The Labor Board Has Broad Discretion to Restrict an Employer's Ability to Oppose Unionization

The NLRB's job is to interpret and administer the National Labor Relations Act (NLRA) and, in doing so, ***the 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, it 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.*

Further, the NLRB determines appropriate bargaining units for elections and the eligibility of voters, in addition to passing on whether employer or union conduct in an election warrants setting aside the results.

Why Becker Matters: Business Groups Question His Impartiality

Business groups immediately opposed Becker's nomination. In its letter to the HELP Committee last July requesting a hearing on Becker's nomination, the U.S. Chamber of Commerce asserted that Becker's affiliation with the SEIU "raises questions about [his] ability to impartially judge cases that may come before the Board." The letter further referenced the SEIU's "record of using questionable pressure tactics with the goal of forcing employers and workers to recognize unions without the democratic protection of secret ballot elections," and questioned whether Becker would seek to implement portions of EFCA "even if it is never enacted by Congress."

Specifically, the Chamber's and other business groups' concerns about Becker center largely on his role in guiding Big Labor's aggressive, well-funded campaigns to pressure employers, *particularly in the hospitality industry*, to sign neutrality agreements (*i.e.*, a promise not to oppose the union's organizing efforts) or to agree to forgo a representation election in favor of recognition of the union based on authorization cards signed by employees (similar to EFCA's controversial "card-check" provision). Moreover, with Becker's guidance, the SEIU, along with other unions, developed sophisticated corporate campaigns and other strategies, which have enabled the unions to make substantial inroads in traditionally non-union areas of the country and in virtually every segment of the hospitality industry.

Indeed, when it comes to restricting employers' rights to oppose unionization, Becker has been strident and vocal, asserting, for example, that **employers should be banned from attending NLRB hearings concerning elections, including those involving allegations of union misconduct**: "The law leaves the Board discretion to determine the appropriate parties to hearings in representation cases. It should exercise this discretion by specifying that the only parties to both pre- and post-election hearings are employees and the unions seeking to represent them." Reportedly, Becker even has gone so far as to claim that **employees should not be allowed to oppose unionization**: "Just as U.S. citizens cannot opt against having a congressman, workers should not be able to choose against having a union as their monopoly-bargaining agent."

The Senate Republicans' Response to Becker's Nomination

The response by Republicans in the Senate to Becker's nomination also was swift. Senator John McCain (R-AZ) put a hold on Becker's nomination, which meant that 60 votes were needed to overcome the hold and allow a vote on confirmation. In October 2009, however, the HELP Committee, with the support of two Republicans, voted 15 to 8 to confirm all three nominees as a group, making it difficult for opponents to challenge Becker's nomination individually. One of the Republican senators who supported Becker's confirmation was Michael B. Enzi of Wyoming, whose labor policy director, Brian Hayes, is one of the three nominees to the Board. By the end of the year, though, when the Democrats held a filibuster-proof majority, the full Senate had failed to vote on confirmation of the Board nominees and Becker's nomination was sent back to President Obama for reconsideration.

On January 20, 2010, President Obama re-submitted Becker's nomination to the Senate, again seeking consideration of all three nominations as a package and setting off the latest round of protests against Becker. The Chamber, the National Association of Manufacturers and other interest groups, wary that Becker, if confirmed, would "implement the Employee Free Choice Act by fiat," again sent letters of protest to the Committee and organized local affiliates to lobby their representatives in Washington.

On February 2, 2010, the HELP Committee held a hearing on Becker's nomination. When confronted with his past statements critical of current labor law and calling for radical reform, Becker sought to minimize those positions as nothing more than intentionally provocative scholarly musings and to assure the Committee members that he would not seek to change, and would impartially apply, current law.

On February 3, 2010, Becker's nomination was voted out of the Committee on a straight party-line vote. Even Sen. Enzi voted against him this time.

Coincidentally, on the same day as the vote, Scott Brown (R-MA) was sworn in as a Senator, giving the Senate Republicans the 41st vote they need to filibuster Becker's nomination. As of this writing, a vote on cloture is scheduled for Tuesday, February 9.

If the Democrats fail to get 60 votes for cloture on Becker's nomination, the fate of the two other Board nominees also may be in doubt, since all three were presented as a package. The NLRB, then, may be operating with only two members for the foreseeable future. Notably, over the past year, challenges to the Board's authority to issue binding decisions with only two members have advanced in federal appellate courts, and the issue is now before the U.S. Supreme Court. A ruling is expected this term.

The Take-Away for the Hospitality Industry

Employers should keep in mind that even if Becker is not confirmed, President Obama will likely nominate another, albeit less controversial but similarly labor-friendly candidate who will guarantee a pro-union Board majority. Thus, employers should prepare now for this eventuality by ensuring that their practices and policies to operate union-free are current and effective and that their supervisors are properly trained in recognizing the early warning signs of union activity.

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For more information about this Advisory, please contact:
Allen B. Roberts in New York.

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