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LEGAL ISSUES

Recent NLRB Rulings Complicate Employer-Worker Relations

by  [Marc Bloch](#) on Jul 12, 2011, 10:55 AM | [0 Comments](#)

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By Marc Bloch

Labor always has been a big supporter of the Democratic Party. Lately, with little to show for that support, it's reflected in the fact that the current private sector unionization rate is less than 7 percent.

The [National Labor Relations Board](#) (NLRB) under the current administration – as always during a Democratic administration – is trying to reverse that trend through both “rule making” and pro-union activism.

The union movement hoped that a Democratic president, Senate and House of Representatives in 2010 could pass the misnamed [Employee Free Choice Act](#) (EFCA). When that failed, the union movement hoped for, and apparently received, a revival from recent actions of the NLRB.



Expediting the union election process

Earlier this year, the NLRB moved to expedite the union election process. Under the new proposed NLRB expedited election rule the following changes have been proposed:

Elections and petitions may be filed electronically;

Pre-election hearings will be scheduled seven days after notice; and,

Post-election hearings will be scheduled 14 days after the votes are tallied.

Most importantly, under this new proposed rule all election-related litigation will be put off until after the election. Clearly this will expedite the time between the filing of the petition and the initial election, a period that is critical for management to put out its counter arguments to the union's attempt to organize.

Additionally, the NLRB also proposed to revise the guidelines on bargaining unit composition. Typically, it is difficult to organize a large number of employees spread over a large hospital or corporate campus, even if they are often doing the same work.

The proposed rule change, however, would make it possible to organize a discrete group of employees culled out of a larger group, even if the employees are doing similar work. This, in conjunction with the expedited election process, will make it much more complicated for employers to stop small disgruntled groups of employees from being unionized.

Facebook as "protected concerted" activity

In case law development, the NLRB has wrestled with its increasing irrelevancy to the working world in several ways. It has extrapolated its mandate to oversee "protected concerted" activity to social media commentary made by employees. Employees, union or non-union, are protected if they act in concert for a collective reason.

In 2009, however, the NLRB general counsel provided a narrow definition of what should be considered "protected concerted" activity. [The chair of the NLRB](#), an ex-union lawyer, recently voiced her belief that the 2009 general counsel memorandum was too narrow. Consequently, she has expanded the legitimate concern of employer's overreaction to water cooler talk to include "Facebook" postings sent out to the greater world. Thus, it will be merely a quick moment before almost any unfettered disparaging commentary will be permitted and posted for the entire world to see.

Additionally, the NLRB is trying to re-set the clock on employer relocation decisions. Last year, the NLRB chair signaled in a concurring opinion that she would welcome a review of the 1991 relocation standards. Further, she noted that employers needed to be more forthcoming in their pre-relocation decision making.

The next logical step is seen in the recent case currently at NLRB hearing stage – Boeing.

The NLRB complaint against Boeing

In Boeing, management had plants in the greater Seattle area as well in South Carolina. The Carolina plant did sub-assembly work for the new Boeing aircraft, the 787. Subsequently, the employees decertified the union, the [International Association of Machinists](#) ("IAM"), in the South Carolina plant. Additionally, the IAM previously "waived" its right to have a say in plant locations.

Further, Boeing experienced serious work stoppages at its Seattle plant during the last several negotiations.

Because of back orders of its new aircraft and the work stoppages, Boeing made a decision to invest in the building of an expanded plant in South Carolina. The IAM filed an unfair labor practice charge about this, which was well received at the NLRB.

Consequently, the NLRB has couched its complaint against Boeing as merely a garden variety "threat" case, in that the employer threatened the union members with retaliation because they exercised their right to strike in the news media. Whereas, the employer, has based its defense in part on its "right" to free speech, as well as the fact that the NLRB is reading more into Boeing's comments that it should have.

Ultimately, this case and the corporate response to the pro-union philosophy of the NLRB will have a significant impact on the decision making process of corporations in determining the placement of new plants, the relocation of old ones and how such decisions are discussed with its unions.

If the case continues (and there have been many settlement discussions) the outcome will not be known for many years and may ultimately be made in a different political atmosphere. However, the current winds from the NLRB are already having a chilling effect on employers to the detriment of the economy.

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