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## Labor & Employment

### Alert

# Appointments Signal New Era in Employment Law Enforcement

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Employers likely have not noticed a significant shift in the enforcement of labor and employment laws under the Obama administration. That is about to change. This month, the president announced recess appointments to fill 15 top spots at critical government agencies, including the National Labor Relations Board (“the Board”) and Equal Employment Opportunity Commission (“EEOC”). With the influx of left-leaning leadership at these key agencies, employers will face far harsher enforcement efforts and a markedly pro-union, pro-employee regulatory environment.

### The Most Pro-Union Board in Memory

The most controversial recess appointment is of Craig Becker to the Board, the agency charged with enforcing the National Labor Relations Act. Becker has served as attorney to the AFL-CIO and the SEIU; not surprisingly, he is strongly backed by unions and strongly opposed by employers. Opposition to Becker has centered on his public comments, notably his stated belief that employers “should be stripped of any legally cognizable interest in their employees’ election of representatives.” Becker is also a staunch supporter of the Employee Free Choice Act. Though this bill has stalled in Congress, employers fear Becker will attempt to effectively put the law in place through the Board’s decisions and rules.

As if Becker were not enough to tilt the labor-management balance in favor of unions, Obama has also announced the recess appointment of Mark Pearce to the NLRB. Although his nomination hasn’t proved as public or controversial as Becker’s, Pearce, who has also represented union leaders, is not likely to champion the management side of labor disputes. Indeed, unions have cheered Pearce’s appointment no less than Becker’s, and employers should be no less concerned despite his under-the-radar status.

Becker and Pearce will join Chairman Wilma Liebman (a Clinton appointee promoted to the chairmanship by Obama) and Peter Schaumber (a Bush appointee). Barring congressional appointment of a fifth member in the upcoming year, the most important labor cases will be decided by a Board that is, generally speaking, three to one more disposed to unions than to management.

### The Board’s Expanding Powers Over Policy

With its membership again expanded beyond two members, the Board’s once-disputed decision-making authority has been restored. Under this new Board, much of the pro-employer precedent from recent years is in jeopardy. For instance, the Board is expected to overturn recent decisions regarding who qualifies as a “supervisor,” narrowing that definition and thus expanding union membership. The Board is also

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likely to overturn a recent decision that granted employers wide leeway in setting their email and communications policies; the Liebman Board is likely to limit employers' discretion in these areas, effectively outlawing any policies based on the earlier decision. In fact, Liebman's record of dissents from her tenure in the minority suggests that very few pro-employer decisions are safe. Liebman herself readily acknowledges this, having stated that she "certainly expect[s] a difference in decision-making from the Bush board years" which she has described as harmful to employee rights.

Further, given the favorable makeup of the Board, savvy unions may bring cases for the express purpose of prompting new policies. For instance, unions may bring cases seeking recognition based on various forms of the card-check process. Should the Liebman Board rule against employers in such cases, unions could effectively win their most sought-after EFCA provision by fiat.

Perhaps even more troubling for employers, Chairman Liebman has announced her intention to expand the authority of the Board beyond mere decision-making. Traditionally, the Board has used its "rulemaking" power very sparingly, and only to issue narrow rules. Liebman has promised to be far more aggressive, and has spent considerable time and money training the Board in rulemaking and preparing to issue rules. Rules that she has publically endorsed, or which experts expect she could seek, include:

- *Shortened elections.* Chairman Liebman has announced that one of her priorities is dramatically expedited union elections, perhaps lasting only five to 10 days. She would achieve this through rules limiting an employer's ability to challenge the eligible voting pool, and removing other procedural rights employers currently enjoy.
- *Access to employee information.* The Board could also issue a rule requiring employers to hand over employees' contact information at early stages of an organizing drive.
- *Access to employer property and employees.* Board rules could grant unions' greater access to both the employers' property and

to the eyes and ears of the employees themselves.

With such broad rulemaking power being wielded by the most pro-union Board in memory, the results could be dramatic. Realizing this, many unions have embraced rulemaking over legislation as the most promising means to the end of expanding membership nationwide. Indeed, Chairman Liebman's stated goal is no less than what she calls the "revival of American labor law."

### Aggressive Anti-Discrimination Enforcement at a Rejuvenated EEOC

The EEOC is responsible for investigating charges of race, sex, age, disability and other types of workplace discrimination. Due largely to a lack of resources, the EEOC has been somewhat stagnant in recent years. As the economy went into its recessionary spiral, the EEOC languished under an enormous backlog of complaints brought on by the wave of lay-offs across the country. The Bush administration showed little inclination to invest in the kind of funding or staffing that would enable the EEOC to resume a forceful role in enforcing civil rights laws.

President Obama, by contrast, has called civil rights enforcement a priority of his administration. Among his campaign promises were to appoint a chairperson and commissioners who would pursue a more aggressive agenda at the Commission. Obama appears to have made good on that promise, appointing NAACP director-counsel Jacqueline A. Berrien as chair of the EEOC, and civil-rights advocate Chai Feldblum as a commissioner (among others). Perhaps more importantly, Obama has already increased funding to the agency and intends to further increase it in upcoming budgets.

With aggressive new leadership and increased resources, the EEOC will likely take a far more proactive role in upcoming years. Employers used to "rubber stamp" EEOC investigations have already noticed a shift towards more thorough follow-up questioning and document requests than they had previously experienced. With the new chair, new senior leadership, and

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increased funding in place, employers can expect the EEOC to issue more “cause” findings and pursue more cases in court.

### New Legal Landscape

In this rapidly changing and increasingly hostile legal environment, employers cannot rely on their status quo labor practices. Collective bargaining strategies that had been legal and effective last year could trigger serious liability in 2010. For instance, management directives and negotiating techniques that were permitted under existing precedent may soon become unlawful, and many employees previously classified as “supervisors” will likely soon be reclassified as union eligible. There will undoubtedly be other, less foreseeable shifts, and all of these changes pose significant risks for unwary employers.

Similarly, employers may find themselves litigating discrimination complaints that the EEOC may have ignored in the past. Employment laws have remained relatively static in the past decade. Employers no longer have the luxury of being complacent; they need to keep abreast of each new development. Employers who do so will be in far better positions than those who seek advice only after they find themselves the target of one of the newly empowered federal agencies.

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