
LEGAL ALERT

Nuclear Stand Down: Senate Compromise Paves Way for Full Complement of Pro-Labor Controlled NLRB

A bold threat by Senate Majority Leader Harry Reid (D-Nev.) to change Senate filibuster rules to reduce the number of votes necessary to approve Executive branch nominees – the so-called “nuclear option” – helped to ensure that the National Labor Relations Board will continue to advance its pro-labor agenda, at least through the current Administration’s term.

On July 16, 2013, Sen. Reid backed away from this threat, announcing a bipartisan agreement under which the pending nominations of two controversial NLRB recess appointees would be withdrawn and replaced by two new Democratic nominees, in exchange for an agreement by Senate Republicans to forego any further challenges to the confirmation process.

How Did It Get To This?

In recent months, the five-member NLRB had been on proverbial life-support, functioning with only three members, two of whom (Sharon Block and Richard Griffin) have been deemed unconstitutionally appointed by federal appellate courts, and a third (Chairman Mark Pearce) whose term was set to expire on August 27th. Members Block and Griffin were appointed by the President back in January 2012, during what he considered to be a “recess” of the Senate.

Those appointments have since been invalidated by the U.S. Courts of Appeals for both the D.C. Circuit and the 3rd Circuit on the basis that there was no valid recess when the appointments were made. The U.S. Supreme Court has accepted the D.C. Circuit case for review, but a decision is not expected until early next year. In the meantime, hundreds of decisions issued by the three-member Board over the past two years are now vulnerable to being reversed.

Republicans have steadfastly objected to the nominations of Block and Griffin, along with those of several other key federal agency posts, including Labor Department nominee Thomas Perez. Confronting the threat of a rule change that would upset decades of parliamentary procedure and effectively give Democrats what they wanted anyway, Republicans seemingly had little choice but to compromise. Shortly after



reaching the agreement, the President nominated Nancy Schiffer and Kent Hirozawa to replace members Block and Griffin.

Schiffer is a recently retired associate general counsel for the AFL-CIO, and Hirozawa is currently serving as chief counsel to Chairman Pearce. The Senate Health, Education, Labor, and Pensions Committee is scheduled to hold a confirmation hearing on the new nominees on July 23. The full Senate is expected to swiftly consider and approve the nominations, along with those of Pearce and two pending Republican nominees (Harry Johnson and Philip Miscimarra), as early as next week. Johnson, Miscimarra, and Pearce have already been approved by the committee.

What It’s Likely To Mean

Tuesday’s political showdown was a win-win for unions, breathing new life into a Board that has already shown a distinct predilection toward organized labor. While this development does not necessarily impact the challenges pending before the Supreme Court or the spate of decisions issued up to now, it does clear the way for the Board to exercise legitimized authority in a number of areas.

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Consequently, the agency can be expected to continue down the path of increasingly regulating union and nonunion business alike by scrutinizing policies and procedures for any perceived encroachment on protected concerted activity. It also has the opportunity to reexamine and potentially reverse decades of long-standing precedent governing such items as representation rights in a nonunion setting, the voting eligibility of temporary employees, and the contractual obligations of successor employers. Last, but certainly not least, the Board could conceivably revisit its previously proposed “quickie election” rules, which had been temporarily enjoined due to procedural hurdles that have now arguably been overcome.

Put simply, this development is likely to empower the Board to continue down a “reformist” path by overturning long-standing precedent, engaging in pro-union rulemaking, and otherwise implementing the agenda of Big Labor.

We’ll be carefully monitoring changing legal developments emanating from this agency over the next several months. In the meantime you should ensure that your supervisors are properly trained to administer any new requirements. Should you have any questions about these developments or their implications for your business, please feel free to direct them to your Fisher & Phillips attorney.

This Legal Alert provides information about a specific development related to the National Labor Relations Board. It is not intended to be, nor should it be construed as, legal advice for any particular fact situation.

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