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IN THIS ISSUE

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NEWS & ANALYSIS

"Noel Canning*? Never heard of it!"** – In response to the potentially devastating D.C. Circuit "recess appointment" ruling in ***Noel Canning, President Obama recently nominated Members Sharon Block and Richard Griffin, both Democrats whose appointments were ruled invalid in *Noel Canning*, to regular terms on the National Labor Relations Board. However, the Senate has yet to consider the nominations and may be in no hurry to take them up. Other purported recess appointments from past years, including that of former NLRB Member Craig Becker – appointed by President Obama in 2010 – are now under scrutiny and subject to challenge.

Given the current composition of the NLRB and the expressed intent of Chairman Mark Gaston Pearce to continue "full speed ahead" despite the court's ruling, em-

ployers may be cursed with interesting times. The NLRB under Chairman Pearce will be issuing decisions until it stops or is stopped. Meanwhile, one employee has already filed a lawsuit, trying to stop the NLRB from acting in her case. Employers subject to NLRB jurisdiction will have to ready themselves for some continuing uncertainty.

Ultimately, though, the NLRB will get a valid quorum back. When that happens, there is no reason to expect that any panel with a majority of members appointed or nominated by Obama will change course. In other words, employers should be prepared for a continued pro-labor tilt for at least the next four years and even beyond as members' terms continue into the administration of the next president.

In sum, although *Noel Canning* has been an important short-term win for employers, the Constitution and the courts appear to be the only checks on the NLRB, absent legislative action from Congress, which is unlikely.

NLRB plows ahead with aggressive approach – against union and non-union employers. – So far this year, the NLRB is not backing away from its aggressive positions regarding employee speech, and it's continuing to go after employers, inlcuding non-union employers. For example, on January 25, the day of the *Noel Canning* decision, the Board issued a **decision** finding that DirectTV unlawfully interfered with employees' rights under the National Labor Relations Act by maintaining four work rules in an employee handbook: (1) prohibiting employees from communicating with the media; (2) requiring employees to contact the company's security department if contacted by any law enforcement agency; (3) requiring employees to maintain confidentiality of details about the job, company business, or projects, customers or employees; and (4) prohibiting employees from blogging, chat room chatting, posting messages on public websites, or otherwise disclosing company information that is not already disclosed as a public record. The rules apparently applied to both union and non-union employee groups at DirectTV. The NLRB ruled that these policies could reasonably chill employees' protected concerted activity under the NLRA, including the right to speak to the NLRB or protest conditions at the company.

More recently, on February 15, **the NLRB found** that a non-union Texas engineering firm, Jones & Carter, Inc., violated the NLRA by discharging an employee for violating its company rule forbidding employees from discussing salary information with co-workers. The employee, a training coordinator, was not engaged in union activity. The remedy in that case included rescission of the rule, posting of an NLRB notice, and make-whole relief to the employee, including reinstatement and $107,000 in back pay and benefits.

These recent decisions are consistent with a growing string of decisions (and positions taken by NLRB Regions in investigations of unfair labor practice charges) taking aim at employer rules or policies, including those in employee handbooks, that the NLRB determines could be read by employees as restricting their rights to engage in protected concerted activity of various sorts. For example, employer policies and requests for **confidentiality in investigations**, anti-bullying and loyalty policies, and **at-will employment policies** have all come under attack by the Board. In this way, the NLRB is expanding its influence in union and non-union workplaces and improving the landscape for union organization.

Strategies to promote organizing: micro-bargaining units, union access, and . . . independent contractors? – For at least the first part of 2013, the NLRB will be following its ***Specialty Healthcare*** decision, which is on appeal to the U.S. Court of Appeals for the Sixth Circuit. Under *Specialty Healthcare*, the NLRB will continue finding petitioned-for bargaining units suggested by unions, which can be as small as a single job classification (such as shoe department salespersons in a department store), to be presumptively appropriate for an election and bargaining.

Another likely development is greater union access to employee information such as email and "snail mail" addresses, and to employer property. Although the NLRB expressly declined to do so in the *DirectTV* decision, at some point it may consider giving employees full access to employer email and messaging systems for purposes of union organizing.

Finally, the NLRB may also consider narrowing the definition of "independent contractor." This classification has long been scrutinized by the Internal Revenue Service and the U.S. Department of Labor (for wage-hour purposes), but it's an issue for organized labor as well because the National Labor Relations Act does not apply to independent contractors. Therefore, to the extent that an employer has misclassified as "independent contractors" workers who are really "employees," there are that many more opportunities for organizing.

If a Board without a quorum issues a rule . . . what then? – The NLRB is also continuing to pursue and defend the rulemaking that it started in President Obama's first term. But the *Noel Canning* decision, which puts even former Member Craig Becker's 2010 intra-session recess appointment in question, means that these rules may not be valid.

* **The NLRB poster regulation**: Readers might recall that in December 2010, the NLRB announced a proposed rule that was to require all employers subject to the Board's jurisdiction, which includes most private sector employers in the United States, to post a notice in all workplaces to inform employees of their rights under the NLRA. In August 2011, the Board, which then included Member Becker, **issued a final notice-posting rule**. Employer groups promptly challenged the rule in several courts on the ground that the NLRB had no power to issue such a regulation. A federal district court in the District of Columbia **struck** a part of the rule making it an unfair labor practice for an employer to fail to post the required notice. A federal court in South Carolina **found the entire rule invalid** on the ground that the Board had no authority under the NLRA to require such a notice. Both decisions were issued before the *Noel Canning* decision and both are on appeal, one before the U.S. Court of Appeals for the District of Columbia Circuit, **which has enjoined the rule**, and one before the U.S. Court of Appeals for the Fourth Circuit. Final decisions in both cases are expected sometime this year. Since *Noel Canning* has intervened, there is a question as to whether the rule was validly issued even assuming for the sake of argument that a Board quorum would have had authority to issue it.

* **"Quickie" elections**: The validity of former Member Becker's appointment became an issue again on February 19, when the D.C. Circuit issued an order holding in abeyance any further consideration of the Board's appeal in a case challenging **the "quickie" election rule**. A federal court in the District of Columbia had held that the NLRB had in 2011 improperly adopted the regulation because its sole Republican member at the time, former Member Brian Hayes, was not actually "present" when the rule was adopted and therefore the Board had acted without a three-member quorum. While the NLRB appealed to the D.C. Circuit, the D.C. Circuit issued the *Noel Canning* decision. One of the two Board members voting in favor of the "quickie" election rule was Becker, so the original issue regarding Hayes may be moot in light of *Noel Canning*. Accordingly, the D.C. Circuit removed the "quickie" election case from its April 4, 2013, oral argument calendar and said that the case would be "held in abeyance pending further order of the court."

If either the notice-posting regulation or the "quickie" election regulation is ultimately struck down, the

Board will probably have a chance to issue new rules in the next four years. The Board may also take on other rulemaking initiatives.

"Persuader" rule is on the horizon, says U.S. Department of Labor (which doesn't need a quorum). – On December 21, 2012, the Obama Administration published its regulatory agenda for 2013, and new "persuader" regulations from the DOL were listed for action with a "final" regulation stage anticipated in April 2013. We reported on the proposed regulations **here**. If adopted, these regulations will significantly change the "rules of business" by requiring employers and labor consultants, including attorneys, to report "persuader" activity under the Labor-Management Reporting and Disclosure Act. Organized labor could hardly be happier.

The Obama Administration's attempt to neutralize employers in union organizing campaigns and in employee communications strategies in collective bargaining has not gotten much press of late, but it is potentially a sleeping giant. The LMRDA has been around for many years, but the DOL has had an interpretation of its "advice" exemption that protected employers and their advisers from some of the law's more onerous requirements: if advisors did not communicate directly with employees, they were considered to be within the advice exemption. But now the DOL is "reinterpreting" the law and taking a much more narrow view of the "advice" exemption, essentially that the advice exemption does not apply if the individual or entity communicates directly *or indirectly* with employees, an interpretation which may be inconsistent with the law itself. The DOL's revised interpretation of the law will have substantial implications for any employers who communicate with their employees about labor relations, as expansively defined by the DOL's new interpretations, and lawyers and labor relations consultants dealing with either union or non-union employee groups. Under the new DOL interpretation, persuader activity will occur, not only in the context of union-organizing activity, collective bargaining, strike situations, and traditional labor relations, but also in routine human resources matters having nothing to do with unions or traditional labor relations issues. The rule is also likely to affect employers' relationships with outside legal counsel providing legal advice regarding labor or employment matters, subject to very narrow exceptions. Whether this part of the rule will withstand a challenge based on attorney-client privilege remains to be seen.

The DOL received thousands of formal comments in response to the proposed "persuader" rule. Employers and employers' associations contended that there was no need to change the regulations that have been working well for approximately 50 years. Labor groups, on the other hand, upset about the decline in union organizing and blaming it on employer interference, have long been lobbying for the change.

One thing is certain: When these regulations are issued, there will be court challenges based on a number of grounds, including the attorney-client privilege issue and that the DOL does not have the authority to construe the "advice" exemption so narrowly as to essentially eliminate it from the statute. This is yet another labor issue that may very well wind up at the U.S. Supreme Court.

Hoosier right-to-work law beats court challenge, Wolverines still fighting; is the Keystone State next? – **Indiana's right-to-work statute** survived a constitutional challenge, with the case being dismissed in January. Meanwhile, **Michigan's newer right-to-work statute**, which is slated to take effect this spring, is still under fire. In one challenge, filed in Michigan state court late last year by the American Civil Liberties Union, the Michigan Education Association, the Michigan AFL-CIO, and the Michigan Building & Construction Trades Council among others, the plaintiffs claim that the law violates the state's Open Meetings Act because it was passed while the doors to the state capitol were locked (because of near-riot conditions outside stirred up by labor protestors). That case is pending. In mid-February, several Michigan labor unions filed suit in federal court seeking to have

the portion of the law that applies to private employers declared unconstitutional. This lawsuit claims that the law conflicts with federal labor law and therefore violates the Supremacy Clause of the U.S. Constitution.

Of the two lawsuits challenging the Michigan statute, the open meetings suit appears to have more potential for success. The federal lawsuit will probably go nowhere, as many courts – including the court that dismissed the challenge to Indiana's law – have upheld state right-to-work laws as a special exception to federal preemption in the labor law area.

And would you believe it? Right-to-work legislation has now been introduced in Pennsylvania. It doesn't have much chance of success, but on the other hand, who would have predicted that Indiana and Michigan would become right-to-work states?

Pickets allowed on private property. Only in California. – Ralphs Grocery Company tried to keep pickets off the walkway to a store entrance, seeking a state court injunction on the ground that its private property was not a public forum for speech. The case wound its way to the California Supreme Court, which on December 27, 2012, **held** that two California laws – Code of Civil Procedure Section 527.3 (the Moscone Act) and Labor Code Section 1138.1 – gave the union a right to picket on private property. The lower appellate court had held that these two laws violated the U.S. Constitution's prohibition on content discrimination by government regulation of speech because they gave greater rights to speak about labor disputes than about other matters. But the Supreme Court disagreed. Because the case involves a federal constitutional issue, Ralphs could petition for a writ of certiorari to have the case heard by the U.S. Supreme Court. But for now, employers doing business in California should do what they typically do – know that California is just "different," and plan accordingly. Elsewhere, state laws are usually not directly implicated, and federal law permits employers, with some limited exceptions, to keep picketing activity by non-employees off private property that the employer controls and does not open up to the public.

UAW and Ford colluded against Teamsters drivers, NLRB finds. – In a case pitting union against union, an NLRB Administrative Law Judge **found** that the United Auto Workers union colluded with Ford Motor Company at a Ford plant in Louisville, Kentucky, to contract out driving work that had previously been done by employees represented by the Teamsters. The ALJ found that Ford contracted out the work to a corporation that had a prearranged deal with the UAW for a lower wage range of $11-$14 an hour compared with $20 an hour for the Teamsters drivers. The ALJ recommended an injunction, reinstatement of 85 Teamsters drivers, creation of a recall list for 81 more Teamsters drivers, and an award of back pay to the Teamsters drivers, which as of January was close to $6 million, not including benefits.

THE GOOD, THE BAD AND THE UGLY

Labor Secretary Solis heads home to California. – On January 22, Secretary of Labor Hilda L. Solis resigned from office, citing a need to "begin a new future, and return to the people and places I love and that have inspired and shaped my life." There is some speculation that Solis, who was a California congresswoman before being appointed Secretary of Labor, will again seek elective office. The current Acting Secretary is Deputy Secretary Seth Harris who, **according to his biography on the DOL website**, has no private sector labor or employment law experience. Most of his pre-DOL work experience was in academia, with some emphasis on disabilities law, and in the U.S. Department of Labor, having served under Clinton labor secretaries Robert Reich and Alexis Herman,

as well as Obama's Solis. He holds an undergraduate degree from Cornell University and a law degree from New York University. According to **a recent item in the *Washington Post***, Acting Secretary Harris may have his eye on the "non-acting" position as well.

"Thanks for nothing, you guys!" Costs of Affordable Care Act hurt union members, too. – Labor unions that vigorously supported the Affordable Care Act (also known as "Obamacare") have put their actuaries and consultants to work and now realize that the some of the costs of the legislation may be borne by the union rank and file. Provisions of the law raise the cost of some plans, and employers are taking steps to deal with it, including ending employer-sponsored coverage altogether and simply paying the penalty of $2,000; capping their headcounts at 50 to avoid coverage; and capping hours of work to avoid penalties for not providing coverage to full-time employees.

There is no escape from the fact that that increasing benefits and restricting cost-sharing, both important parts of the ACA scheme, adds significant costs to health plans that someone has to pay. Apparently, several unions have realized now that health insurance plans they jointly sponsor with employers (called joint plans) under collective bargaining agreements have expensive coverage and that the increased premiums associated with making the plans ACA-compliant will have a severe impact on the lower-paid workers the unions represent. Realizing this, a number of labor unions this year have sent lobbyists to the White House to seek relief, which includes federal subsidies to members covered by joint plans. (Currently, the ACA provides that subsidies are available only to employees who have no employer-sponsored coverage.) The unions' proposed subsidies would not be available to low-wage, non-union workers with comparable insurance plans and costs.

For now, the White House has said "no" to the unions' request but says that regulations to address the problem are in the works. Although the unions could move workers off the plans "and onto private coverage subsidized by the government," **the *Wall Street Journal* reports** that labor leaders fear that "dropping insurance altogether would undermine a central point of joining a union." Couldn't have that! Whatever happened to the campaign call, **"if you like your health care plan, you can keep your health care plan"**?

"I don't want to say I told you so," Boeing said, "but . . . I told you so!" You may recall the NLRB **unfair labor practice complaint against the Boeing Company** in connection with its opening of production lines for the 787 Dreamliner at a facility in North Charleston, South Carolina, instead of its Puget Sound facility near Seattle. At issue in the case were statements made by Boeing executives that the facility was being built, in part, because the Puget Sound employees had a history of striking. Were the statements unlawful threats or evidence of retaliation? We'll never know for sure because **the case eventually settled**. But Boeing ought to be feeling somewhat vindicated now. Contract offers recently went out to two large bargaining units in Washington State, and one has authorized a strike. Although a unit of approximately 15,600 engineers approved a final offer from Boeing, another unit consisting of about 7,400 technical employees rejected the offer by a close vote and authorized a strike. (Both units are represented by the Society of Professional Engineering Employees in Aerospace.) The dispute centers on the elimination of a pension for future employees and possible reductions in benefits for current employees.

Whether a strike will actually be called remains to be seen: a Boeing spokesman has indicated that the company has strike plans in place but is focused on getting an agreement. According to **a local news report**, the last Boeing strike, in the year 2000, lasted 40 days and "slowed airplane production to a crawl and prevented Boeing from delivering aircraft."

South Carolinians are no doubt watching this drama closely.

Union share of workforce for 2012 was at lowest level since Woodrow Wilson was president. – According to data released January 23 by the Bureau of Labor Statistics, workers represented by labor unions in both public and private sectors fell to 11.3 percent of the workforce, the lowest reported level since 1916. The percentage was 11.8 percent in 2011. According to ***The New York Times***, the decline has been attributed to (1) new laws that reduce unions' power in states like Wisconsin and Indiana; (2) increasing movement of large manufacturers (including Boeing) into right-to-work states; and (3) growth in traditionally non-union service sectors, such as restaurants and retail. In the private sector alone, union share fell to 6.6 percent from 6.9 percent in 2011.

Starbucks just can't win. – Late last year, the U.S. Court of Appeals for the First Circuit upheld a lower court's ruling against Starbucks' tip-sharing policy. Starbucks required that baristas share their tips with shift supervisors, which the courts said violated Massachusetts state law to the tune of $14 million. Starbucks announced that it disagreed with the courts' decisions but would abide by them, and it eliminated tip-sharing as of January 7. Now, a so-called **IWW Starbucks Workers Union** is promoting a petition signed by more than 300 Starbucks baristas and shift supervisors in Massachusetts, asking for Starbucks to increase the pay of the shift supervisors to make up for the loss of their share of the tips. According to the union, the court decisions resulted in a *de facto* wage reduction of 10 to 20 percent for the shift supervisors, who have all the duties of the baristas and additionally count cash and schedule workers' breaks. Starbucks, when asked for comment on the union petition, said that it "is devising a new operations structure for company-owned Massachusetts cafes that will seek to address the issues of supervisors, or partners," as the company calls them. Sounds like $14 million in "restructuring" savings may be in the works and found somewhere in the Massachusetts cafes.

Does Starbucks sell *Irish* coffee? If not, then maybe this is a good time to start.

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