

**By a Thousand Cuts-
The Agenda of the Obama NLRB**

Breakfast Briefing
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Introduction

- Traditional labor law has experienced some radical changes in the last two years, occasioned not only by a change in administration, but also through developments in Congress, the courts and the federal agencies. This presentation discusses those changes and the shift in direction brought on by President Obama and his administration, the Supreme Court decision in *New Process Steel v. N.L.R.B.*, the current National Labor Relations Board and potential legislation.

How Did We Get Here? – The Bush Board

Between 2004 and 2007, the so-called "Bush Board," utilizing a 3-2 Republican majority established several precedents favorable to employers and reversed several Clinton-era Board decisions.

The Obama Administration- Leveling the Playing Field?

- **Executive Orders Change the Balance of Power**
 - Executive Order 13494: “Economy in Government Contracting”
 - Executive Order 13495: “Nondisplacement of Qualified Workers Under Service Contracts”
 - Executive Order 13496: “Notification of Employee Rights Under Federal Labor Law”
 - Executive Order 13502: “Use of Project Labor Agreements for Federal Construction Projects”

The Employee Free Choice Act: Is it Dead or Alive with the Obama Board?

- **Substantive Provisions:**
 - **Section 2. Streamlining Union Certification.** If a majority of employees sign authorization cards “designating the individual or labor organizations specified in the petition as their bargaining representative,” the Board shall immediately certify the individual or labor organization as the representative without a secret ballot election.
 - **Section 3. Facilitating Initial Collective Bargaining Agreements.** Requires that the parties meet within 10 days after a written request for collective bargaining, and if, within 90 days, no agreement is reached by the parties, either party may request arbitration through the Federal Mediation and Conciliation Service (“FMCS”).
 - **Section 4. Strengthening Enforcement.** Stiffens penalties for violations that occur during organizing campaigns and first contract negotiations **for employers only**. Unions are not subject to the increased penalties.

The Obama Board

- Chairman Wilma Liebman
- Member Craig Becker
- Member Mark Gaston Pearce
- Member Brian Hayes
- Nominee Terrence F. Flynn

Acting General Counsel Lafe Solomon

- Memorandum GC 10-07 “Effective 10(j) Remedies for Unlawful Discharge in Organizing Campaigns” (September 30, 2010)
- Memorandum GC 11-01 “Effective Remedies in Organizing Campaigns” (December 20, 2010)
- Memorandum GC 11-05 “Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) Cases” (January 20, 2011)
- Memorandum GC 11-09 “Report on the Midwinter Meeting of the ABA Practice and Procedure Committee of the Labor and Employment Law Section” (March 16, 2011)
- Memorandum GC 11-07 “Guideline Memorandum Regarding Backpay Mitigation” (March 11, 2011)
- Memorandum GC H-08

NLRB and The Supreme Court- New Process Steel

- June 17, 2010
- 5-4 decision
- Question Presented: Whether, following a delegation of the Board's powers to a three-member group, two members may continue to exercise that delegated authority once the Board's membership falls to two?
- Held: No

Decisions of the Obama Board

**What Has Happened Already and
What is on the Horizon**

Rulemaking

- Posting of NLRA Rights
- Electronic Voting

Employee Access to Employer Property

- *Guard Publishing Co. d/b/a Register-Guard v. N.L.R.B.*, 571 F.3d 53 (D.C. Cir. 2009)
- *Roundy's, Inc.*, 356 NLRB No. 27 (2010)

Elections and Voluntary Recognition

- **Voluntary Recognition**

- *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966)
- *Dana Corp.*, 351 NLRB 434 (2007)
- *Rite Aid Store #6473/ Lemon Gasket Co.*, 355 NLRB No. 157 (2010)
- *Dana Corp.*, 356 NLRB No. 49 (2010)

- **Representation Elections**

- *Mastec N. Am. Inc. d/b/a Mastec Direct TV*, 356 NLRB No. 110 (2011)

Duty to Bargain

- *E.I. DuPont De Nemours*, 355 NLRB No. 176 (2010)

Successor Employer

- *St. Elizabeth Manor*, 329 NLRB 341 (1999)
- *MV Transportation*, 337 NLRB No. 129 (2002)
- *UGL-UNICCO Service Company*, 355 NLRB No. 155 (2010)

Mandatory Subjects of Bargaining

- **Dues Checkoff**

- *Hacienda Hotel, Inc., Gaming Corp. d/b/a Hacienda Resort Hotel and Casino*, 355 NLRB No. 154 (2010)

- **Donning and Doffing**

- *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209 (4th Cir. 2009)

Bannering

- *United Brotherhood of Carpenters and Joiners of America, 335 NLRB 159 (2010)*

Protected Concerted Activity

- *Media Gen. Operations, Inc. d/b/a The Tampa Tribune v. N.L.R.B.*, 560 F.3d 181 (4th Cir. 2009)
- *Trump Marina Associates*, 354 NLRB No. 123 (2009)
- *Parexel Int'l LLC*, 356 NLRB No. 81 (2011)

Supervisors

- *N.L.R.B. v. Kentucky Rover Community Care, Inc.*, 532 U.S. 706 (2001)
- *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006)
- *Golden Crest Healthcare Center*, 348 NLRB 727 (2006)
- *Croft Metals, Inc.*, 348 NLRB 717 (2006)

Temporary Employees and Graduate Students

- **Temporary Employees**

- *H.S. Care LLC d/b/a/ Oakwood Care Center, 343 NLRB 659 (2004)*

- **Graduate Students**

- *Brown University, 342 NLRB No. 42 (2004)*
- *New York University, 356 NLRB No. 7 (2010)*

Social Media

- *Am. Medical Response of Connecticut, Inc.*,
No. CA-12576 (Oct. 27, 2010)