

IRI Intelligence Briefing

News and Developments Affecting the Workplace

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A New NLRB -- Anticipated Decisions

With Democrats' loss of power in the wake of the 2014 mid-term elections, many pundits anticipate a strong pro-labor push by the White House and the National Labor Relations Board (NLRB) before Republicans take control of Congress early next year.

Labor unions spent a fortune getting President Obama elected in 2008 and again in 2012; The Service Employees International Union (SEIU) alone spent \$60.7 million to put Obama in office. Since pro-union legislators could not get the Employee Free Choice Act (EFCA) through Congress, the White House has been using executive branch powers through the NLRB, Department of Labor, Equal Employment Opportunity Commission and other agencies to pay back its debt to unions. The NLRB, in particular, is expected to continue its activist agenda to employers' detriment.

The Senate Committee on Health, Education, Labor & Pensions (HELP) voted to recommend Senate confirmation of Lauren McFerran, Obama's nominee to the NLRB, on December 2. Voting 12-10 along party lines to clear McFerran, the committee acted less than two weeks after her confirmation hearing. The current lame duck Senate is expected to approve her to replace Board Member Nancy Schiffer, whose term expires December 16. Such approval by the Senate will permit organized labor to maintain a 3-2 Democratic majority on the Board, likely continuing to further labor's agenda with major labor policy rulings. McFerran's nomination comes on the heels of the President deciding to withdraw his

original choice – Sharon Block – fearing she would not get confirmed after her controversial recess appointment. If Schiffer's seat is left vacant, the NLRB will have two Democrats and two Republicans, which could cause gridlock as so many recent Board decisions have been partisan.

When Republicans take control of the Senate in January, Sen. Lamar Alexander (R-TN) is expected to become HELP's chairman. In the past, he has sponsored legislation to change the Board's composition to six from five Members, creating an even split of Democrats and Republicans. His bill also proposed cutting the NLRB's budget if it did not compromise and issue timely decisions. Sen. Alexander's legislation never came up for a vote during Sen. Harry Reid's (D-NV) tenure as majority leader, but Republicans are likely to introduce similar proposals in coming months.

Use of Employer email

Employers also will continue to be impacted by the NLRB's General Counsel, Richard F. Griffin. He has attempted to have the Board overrule the *Register Guard* decision and find that employees have a statutory right under the NLRA to use an employer's email and other electronic communication systems to engage in union organizing activity. This would be a departure from decades of Board precedent holding that employees have no right to use employer equipment for union election campaigns.

Joint Employer

In another case, *Browning Ferris*, Griffin also has pushed the Board to abandon its current joint employer standard for a much broader,

expanded doctrine. The potential impact of this initiative is that virtually all relationships between one or more employers may constitute a joint employment situation. As a result, those employers would be responsible for unfair labor practice charges filed against any party to the relationship. The employer also would lose the ability to decide whether they want to do business with a union or non-union contractor.

Expedited Elections

A highly anticipated and controversial decision is the forthcoming expedited election rule. It is expected the NLRB will exercise its rulemaking authority for only the second time since 1935 to shorten the time period between when a petition is filed and an election occurs. The NLRB's proposed rule would shrink the current 42-day petition-to-election timeline to what many believe will be 10 to 21 days by:

- Requiring representation hearings to be held within seven days of the filing of a union petition and allowing NLRB hearing officers to limit pre-election hearings only to matters relevant to whether an election should be held. The hearing officer will have the authority to limit testimony, and to decide whether or not to accept hearing briefs. Before these changes, an employer's legal counsel could use the pre-election period to thoroughly investigate and research that the petitioned-for group was appropriate, and to provide the employer with additional time to communicate its campaign messages.
- Prohibiting pre-election appeals and consolidating and reviewing all appeals until after the election is held.

The changes also would:

- Require employers to directly provide the union with all targeted employees' telephone numbers, email addresses, work locations and shifts within two days of the direction of election so the unions can more easily contact employees; and

- Eliminate the mandate for the NLRB to review hearing officers' decisions. Additionally any reviews that are conducted will be allowed only after the election is held, leaving more final decisions in the hands of career civil servants.

It is expected to approve a final version before Schiffer's term expires, in mid December 2014.

Micro Bargaining Units

Another major NLRB decision affecting employers is the permissibility of micro-bargaining units. These fragmented voting units make it easier for unions to organize, and the smaller the unit, the higher the union success rate. The NLRB ruling against Specialty Healthcare and Rehabilitation Center of Mobile, Alabama, applies to all employers except acute healthcare organizations. Since the decision, there already have been cases where the NLRB ruled in favor of unions claiming a "community of interest" among employee population carve-outs. It will have consequences even more serious than the shortened election rules. For example:

- If a union realizes it doesn't have the support needed to win an all-employee election, this ruling allows it to cherry pick small groups of employees it thinks it can organize.
- Because it permits an increased number of bargaining units, the ruling could allow several unions in the same workplace, each representing a handful of employees and with different collective bargaining agreements.
- The *Specialty Healthcare* decision will make it far easier for unions to get their foot in an employer's door. Instead of having to rely solely on external organization, unions will use the micro-unit employees to organize their peers throughout the workplace.

These expedited election rules coupled with micro-bargaining units are a one-two punch that deliver a lot of power unions sought to attain through the failed EFCA. Additionally,

the unions have strengthened their position with the support of the Department of Labor (DOL) and its recommended Federal Contractor Black Listing. Obama proposed an Executive Order to monitor federal contractors' and sub-contractors' compliance with a dozen labor laws. Failure to comply could disqualify these contractors from bidding on new work. What's more, the proposal would create a new federal bureaucracy within the DOL and impose extensive reporting requirements on the contractors.

How to prepare

Employers must be proactive and take steps to maintain an environment of positive employee relations. We recommend:

1. **Planning:** Prior preparation, long before unions show up, will be needed to maintain a direct working relationship with employees and provide the steps you should take if a petition is filed.
2. **Education & Training:** In order for your organization to remain union-free, your management team needs to fully grasp the risk and how best to manage it. This means understanding union organizing strategies, management's responsibilities and stakeholder roles, the NLRB election process, and preventive steps to take to reduce vulnerabilities a union may leverage.
3. **Assessing Vulnerabilities:** IRI uses sophisticated diagnostic tools to help gauge employee engagement and issues that could trigger a union organizing attempt in your

workplace. Those tools include IRI's Union Vulnerability Assessments, Issue Identification and Improvement Focus Groups, and Corporate Campaign Vulnerability Assessments.

4. **Communications:** A strong culture of communications is a strategic advantage in the event of a union organizing effort, particularly in the case of an expedited election. This strategy includes improving stakeholder communications and advocacy, developing rapid-response teams to deal with union activity and card signing, training managers in effective leadership and communication skills, and tracking and assessing union activity on social media.
5. **Employee Engagement:** For employees, engagement means feeling they are an essential part of the organization and are valued and respected. Strengthening employee engagement minimizes interest in union representation and empowers employees to take ownership of their performance.
6. **Leadership Training & Development:** All leaders can benefit from targeted training and individualized skill development to help them achieve greater results. IRI's training equips managers and supervisors to initiate dialogue, keep open lines of communication, and manage rumors, conflict and change. Strong leadership is the best bridge to better-engaged, fulfilled and committed employees.



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