

The Pendulum And The Pit

By James Walters (Atlanta)

In late April, less than 100 days after his term began, President Obama appointed a pair of union-side labor lawyers – both Democrats – to fill two of the three vacancies on the National Labor Relations Board (NLRB). Craig Becker currently serves as Associate General Counsel to the Service Employees International Union (SEIU); in addition, he advises the AFL-CIO in a similar capacity. He is a graduate of the Yale Law School, and except for a brief stint teaching at UCLA Law School, he has been a practicing labor lawyer most of his career.

Nominated at the same time was Mark Pearce, a practicing labor lawyer from Buffalo, New York; Pearce has also taught courses in the labor studies program at Cornell University, where he graduated prior to attending law school at SUNY/Buffalo.

A Little Context

The nominations come as no surprise, and both lawyers should be quickly confirmed once the Senate gets around to hearings on their nominations. When that happens, the Board will have a 3-1 Democratic majority.

When the National Labor Relations Act was passed in 1935, the NLRB was established as a quasi-judicial agency ultimately with five members, who serve staggered five-year terms; the Board was to act, in effect, as the “Supreme Court of Labor Law.” For many decades there has been a political tradition (not legally binding) in which the occupant of the White House has been allowed to have three of the five Members from his own party. Presumably, when President Obama nominates someone for the remaining vacancy – and fifth seat – that someone will be a Republican, probably a management labor lawyer.

In the 74 years since the Act was passed, there have been a total of 60 individuals nominated to the Board; 34 have been Republicans, 25 have been Democrats and 1 (confirmed in the waning days of the Carter Administration) was an Independent. Some of these have been recess appointments – unconfirmed by the Senate – lasting as little as 5 weeks. Others have been confirmed appointments and re-appointments, with one individual serving on the Board for 20 years (through four different Administrations).

An interesting and predictable legal pattern has followed this political tradition: the so-called “pendulum effect.” Along with the change of political flags at the White House, and consequent composition of the NLRB, has often come an overruling of precedents established by previous Board panels. Thus, certain controversial legal precedents established between 1993 and 2001 by the “Clinton Board” (many of which overturned earlier Republican-majority decisions), were overruled

in subsequent decisions by the “Bush Board” between 2001 and the end of 2007.

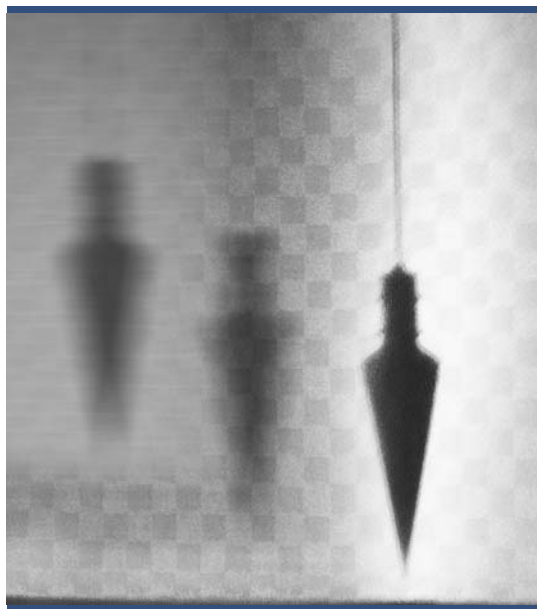
So we can expect that at some point within the next four years, the “Obama Board” will overrule the 2004 decision in *IBM Corp.* (which overruled the 2000 decision in *Epilepsy Foundation of Northeast Ohio*, which overruled the *Sears, Roebuck & Co* decision of 1985). If (when) that should happen, non-union employees will again be allowed to have a “representative,” should they desire, at a disciplinary/investigatory meeting.

That is the way the pendulum would normally swing. However, a political skirmish in late 2007 has given rise to a regulatory quagmire that will no doubt redirect the resources of any newly constituted Board to a more pressing task. In December 2007, the terms of three Board Members (two of them recess appointments) expired. Around that same time, the Democratic leadership of the Senate publicly warned the White House against sending any more nominations – regardless of political species – to Capitol Hill for confirmation; right after that admonishment, the Senate declined to go into recess, thus prohibiting any short-term appointments to the Board or other agencies.

These political decisions had the immediate effect of taking the Board from five members down to two for the foreseeable future. So on December 20, 2007, faced with a specter of adjudicatory paralysis, the then extant members unanimously voted to delegate the Board’s powers to a triumvirate consisting of Members Liebman (D) and Schaumber (R), who still serve, and to Member Kirsanow (R), whose term expired on 12/28/07. Since three-member panels have been a statutory staple in the decision-making process, and since two concurring members can form a majority opinion, that appeared – in theory – to establish a short-term solution, allowing the Board to issue ‘unanimous’ two-member opinions on non-controversial decisions until at least one vacancy could be filled.

And so they did. From January 1, 2008 through the end of April, 2009, these two Members issued nearly 400 ‘unanimous’ decisions. But not all of these decisions played well with the impacted parties. Some affected employers filed petitions for review with appropriate U. S. Courts of Appeals, seeking to set aside the decisions because they were authored by a non-quorum panel.

On May 1, one week after the nomination of Becker and Pearce, the U. S. Court of Appeals for the District of Columbia decided *Laurel Baye Healthcare v. NLRB*, in effect holding that the Board’s decisions issued during the preceding 16 months were invalid under the National Labor Relations Act, because of “the lack of a quorum of the Board as a



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Trading A Tax Break For Unionization

Analyzing the Patriot Corporation Act

By Joe Gagnon (Houston)

Most of the current focus among pro-management advocates is on the card-check provisions of the Employee Free Choice Act (EFCA). But don't lose sight of the fact that Congress is considering several other pro-labor legislative proposals that warrant scrutiny. One such proposal is the Patriot Corporations of America Act of 2009 (PCA) which, as drafted, provides employers with a Hobson's choice. One thing is clear: if enacted, the PCA will render EFCA moot with respect to the goal of increasing the success of union-organizing drives.

A Corporate Tax Break – With Strings Attached

On its face, the PCA is packaged as a tax reduction for American corporations in exchange for certain conditions primarily designed to increase employee benefits and reduce outsourcing. Designated "Patriot Corporations" will receive a 5% reduction of their taxable income. Additionally, Patriot Corporations will receive preference in the evaluation of federal-contracting bids. So far, so good.

But achieving Patriot Corporation status does not come easily. To be designated a Patriot Corporation, a corporation must meet each of the following requirements during the taxable year:

- produce at least 90% of all goods and services sold by that corporation within the United States;
- compensate the highest paid manager no more than 10,000 percent of the amount paid to the least compensated full-time employee;
- conduct at least 50% of the corporation's research and development within the United States;
- contribute at least 5% of wages paid by the corporation to a portable pension fund;
- pay at least 70% of the cost of a standardized health insurance plan;
- maintain neutrality in employee organizing drives and have such a policy in effect;
- provide full differential salary and insurance benefits for all National Guard and Reserve employees who are called to active duty; and
- incur no violations of federal workplace regulations, including those relating to the environment, workplace safety, labor relations, and consumer protection.

The Department of Labor is charged with responsibility for implementing a certification process which will include defining key terms. Patriot Corporation certification must be renewed annually.

A Trojan Horse

You can perform a cost-benefit analysis to determine whether the health care, research and development, and outsourcing restrictions,



coupled with the pension-funding requirements, justify the 5% tax break for your company. But how can you put a value on the requirement of a neutrality agreement with respect to union-organizing campaigns. This one provision alone may far outweigh any long-term benefit that flows from the Patriot Corporation designation.

With a neutrality agreement in place, management is rendered voiceless both before and during an attempt to unionize its workforce. As a result, employees are deprived of a critical source of information that might have ultimately persuaded the workforce that unionization is not in their best interests. The result is a playing field where the union has no organized opposition. Resistance will be limited to those employees who choose to speak out on their own. Without organized opposition, the union campaign is far more likely to succeed.

Statistics provide sobering confirmation. When employers maintain a neutral position with respect to union campaigns (whether by choice or by agreement), the union win rate approaches 90%, as compared to a roughly 65% win rate in contested campaigns. With a Patriot Corporation designation, the card-check provisions in EFCA will be virtually unnecessary. There will no longer be a need for the stealth campaigns anticipated under card check, and unions will be able to campaign more openly at a Patriot Corporation because they know there will be little to no opposition.

The designation as a Patriot Corporation will undoubtedly encourage unsuspecting corporations to wave the flag and use this status for marketing purposes. Small corporations looking to grow or maintain good community relations, or corporations in highly competitive industries, may see it as irresistible, even necessary, to tout their "patriot" credentials to attract customers and gain a market edge. But advertising this status is the marketing equivalent of a company placing a "Unionize Me!" sign in its storefront window. Union organizers will be watching for such advertisements, and will identify those corporations as easy targets where they can be assured that management has already agreed to present no opposition.

Even if a corporation does not advertise its patriot designation, the Labor Department may do it for them. Depending on the certification

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process to be formulated by DOL, expect the registry of designated Patriot Corporations to be a matter of public record. To the extent it is a public record, union organizers will be able to obtain their target list straight from the government with little effort.

Additional questions are raised by the nature of the neutrality agreement and what will constitute true neutrality. Will it be sufficient for management to simply remain silent before and during an organizing campaign? Will it require employers to allow access to its premises by union organizers? Will it require a neutrality agreement with a card check feature for determining union representation as opposed to permitting an actual secret-ballot election where employee opposition can be expressed in private? Since the DOL controls the certification process, it will define what constitutes neutrality. The definition will likely be construed broadly, and if it encompasses a card-check requirement then, at least with respect to Patriot Corporations, EFCA's key provision will be achieved through the regulatory process even though it could not survive the legislative process.

Beyond Neutrality

Another troubling aspect of the neutrality agreement is that, presumably, the certification process will require some sort of affirmation that the corporation has met and will meet the requirements to achieve patriot status. What, then, if a manager speaks out and violates the neutrality agreement? The corporation has not simply *agreed* to remain neutral, it has promised under oath to do so. Whether criminal prosecution for perjury is realistic may depend on the circumstances and the extent to which the neutrality agreement was violated, but the mere prospect or threat of prosecution may lead some corporations to make concessions and avoid negative publicity or the possibility of a legal proceeding.

If the Patriot Corporation designation is forfeited, the neutrality agreement still leaves the entity exposed to a higher risk of unionization. For example, if a corporation loses its patriot status because it relies too heavily on overseas production of goods and services, the neutrality agreement – by virtue of the PCA-mandated written policy – will remain in effect unless and until the corporation formally changes its position. Corporations that choose to withdraw the neutrality policy upon losing patriot status will need to move quickly to avoid remaining a union target without the benefit of the tax break and contracting preferences conferred by the PCA.

Supporters of the PCA may point out that by agreeing to neutrality in advance, corporate campaigns designed to coerce a neutrality agreement by subjecting corporations to public, economic, political, legal, and regulatory pressure will be a thing of the past, at least for Patriot Corporations. For a corporation that may see unionization of any part of its workforce as inevitable, this argument may be persuasive. But for those corporations that wish to remain union free, the argument not only rings

hollow, it can plausibly be viewed as circular blackmail: accept a tax break and contracting preferences in return for virtual certainty that you will be unionized without the troubles that accompany a corporate campaign; or be subjected to the troubles that accompany a corporate campaign that may well lead to unionization while you are at the same time deprived of a tax break and contracting preferences.

A Need For Clarity

Apart from the neutrality requirement, the PCA as currently worded contains several puzzling provisions. First, does the PCA apply only to corporations? Prior incarnations of the bill, known previously as the Patriot Employer Act, applied to any taxpayer designated a Patriot Employer. The language of the PCA, however, refers only to corporations, suggesting that other business forms, such as partnerships and sole proprietorships, are not covered. If the PCA only applies to corporations, non-corporate entities potentially stand on an unequal footing in federal-contracting preferences simply because of the nature of their non-corporate identity.

Another question relates to the funding requirement for a “standardized health insurance plan.” No definition is provided. Previous versions of the bill simply obligated the employer to pay a percentage of the employee’s health care premiums. Clarification is needed as to what constitutes a standardized plan, what standards are required, and whether certain types of coverage are mandated. This clarity will be essential for any corporation to properly analyze whether it can afford to pay 70% of the required premium.

The requirement to steer clear of regulatory violations is another question mark. Clarification is needed as to what constitutes a “violation.” If a violation is defined as an administrative cause finding or the mere issuance of a citation, patriot status will be far more difficult to maintain than if some type of evidentiary process is required.

Finally, germane to nothing else in the bill, the PCA contains a so-called “millionaire tax” provision for certain families. For joint returns, the tax rate increases by 4.6% for any amount of adjusted gross income that exceeds the threshold amount of \$1,000,000. For all other returns, the threshold amount is \$500,000.

Conclusion

While the PCA might otherwise be viewed as a fair and honorable exchange – tax relief in exchange for providing needed domestic jobs and employee benefits – the neutrality obligation should be approached with extreme caution by any corporation that wishes to remain union free. The short term benefit of a tax break will be palatable, perhaps irresistible, to many corporations, particularly if they see their tax rate begin to rise. The long term effect of a unionized workforce, which could be an inevitable result of a patriot designation, is a burden that corporations may be neither willing nor able to bear.

For more information email the author at jgagnon@laborlawyers.com or call 713.292.0150.

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whole. . . .” Coincidentally, on the same day that *Laurel Baye* was decided, the U. S. Court of Appeals for the 7th Circuit decided in favor of the Board in the procedurally identical case of *New Process Steel v. NLRB*.

Escaping The Pit

Because of this split in circuit authority, the likelihood of some Supreme Court review would be enhanced. That is normally a very

time-consuming process, however. A far more likely scenario is that the new member-designees, once confirmed, would be assigned the task of quickly revisiting and reaffirming many of those decisions issued by the two-member “majority” in 2008 and early-2009. If that transpires then the pendulum will be temporarily slowed, if only until the pit is taken care of.

For more information email the author at jwalters@laborlawyers.com or call 404.231.1400.

Congress Considers Paid FMLA Leave – And New Taxes To Pay For It

By James Hux (Atlanta)

On March 25, 2009, four House Democrats introduced a bill that would create a new federal insurance fund to provide employees with up to 12 weeks of paid family and medical leave each year.

The bill, called the Family Leave Insurance Act of 2009 (FLIA), would supplement the existing Family and Medical Leave Act (FMLA), which presently provides for such leave on an unpaid basis. As the Family Leave Insurance Act is now constructed, employers and employees would each pay premiums into the fund equivalent to 0.2 percent of each worker's earnings. Those employers with fewer than 20 workers would pay a 0.1 percent premium, and would then have the option of participating in the fund.

The Main Provisions

The fund would provide up to 12 weeks of annual paid leave for workers who need time off to care for a family member with a serious health condition, a new child, or to tend to their own serious health condition. Employees who pay into the fund for six consecutive months and accumulate at least 625 work hours during the prior six-month period would be eligible for benefits.



Other protections under the FMLA would remain intact. For example, employees would retain current FMLA protections, such as benefits continuation and job restoration upon their timely return to work.

The FLIA also prohibits employers from “interference, discrimination, or retaliation” concerning employees’ exercise of their rights under the Act, and gives employees a private cause of action for alleged interference with the exercise of these rights. The Secretary of Labor would have concurrent investigative authority and would be authorized to bring an administrative or civil action. The bill also provides criminal penalties for knowingly submitting false certification in order to fraudulently collect benefits.

According to a study accompanying the bill, an employee making the national median income would pay approximately \$80 a year into the fund. Benefits to employees are tiered based upon their wages. For example, a worker earning \$20,000 per year would receive 100% of weekly pay while on leave; a worker making between \$30,000 and \$60,000 would receive 55%; a worker earning between \$60,001 and \$97,000 a year would receive 45%; and those earning more than \$97,000 a year would receive 40% of their weekly pay.

Where's It Headed?

While proponents of the bill claim the legislation is necessary to expand coverage and benefits currently in place under the FMLA, others see more expansive workplace regulation and taxation. Of potentially greater concern, paid leave of this magnitude could certainly give rise to employee abuse, which is already a challenge for many employers under the current framework.

The legislation is modeled after a current program in California where state law provides employees with access to paid leave of up to six weeks and flexible use of sick days. The bill has been referred to the House Committees on Education and Labor, Oversight and Government Reform, and Ways and Means. In other words, the bill is still in the first steps of the legislative process. Bills introduced in Congress ordinarily go to committees that deliberate, investigate, and revise them before they go to the floor for general debate. We'll keep you posted as any new developments occur.

For more information email the author at jhux@laborlawyers.com or call 404.231.1400.

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