

Labor Day memo: Elections have consequences

The Democrats are beefing up labor law enforcement and installing pro-labor regulators.

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As we observe Labor Day, it is appropriate to look for signs of what to expect from President Obama's administration and the Democratic-controlled Congress in labor-management relations. Since the president's inauguration, his administration has actively moved toward labor reform through legislative measures, by strengthening the already expansive compliance and enforcement authority of the Department of Labor (DOL) and by nominating former union lawyers to the National Labor Relations Board (NLRB). Early indications thus point to a paradigm shift to the left during the next four years and potentially beyond.

The most highly publicized measure looming is the Employee Free Choice Act (EFCA), a bill introduced in the 111th Congress in March 2009 after a failed attempt to pass the measure in the 110th Congress in 2007. As an original co-sponsor of the bill, Obama supports its passage and promised during his campaign that he would sign it

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as president. The bill in its current form has three main provisions: "card check" certification in lieu of secret-ballot elections; mandatory interest arbitration after 120 days of bargaining over a first contract without reaching agreement; and enhanced penalties for employer, but not union, misconduct — triple back pay for illegally discharged employees and up to \$20,000 in fines for willful and repeated violations.

In spite of a 60-vote filibuster-proof Democratic majority in the Senate, supporters of EFCA are wary that the bill will not pass, at least in its current form. This concern arises from the expressed hesitation of 10 senators, including Sen. Arlen Specter (D-Pa.); the failing health of Sen. Robert Byrd (D-W.Va); and recent death of Sen. Edward Kennedy (D-Mass.). Due to the reluctance of some Democratic senators to support the bill as written and the health of Byrd, many believe that the Democrats may be able to garner only 52 to 54 votes for the bill in its current form — not enough to stave off a Republican-led filibuster.

In response to concerns that EFCA will not pass the Senate in its current form, potential compromise measures

are under consideration. One proposal reportedly drops the controversial "card check" certification provision in favor of shorter election periods, allows greater access by unions to employer property and includes either a ban on "captive audience" meetings (in which the employer can hold mandatory meetings during the work day about remaining a union-free workplace) or a provision to allow the union to hold pro-union meetings on the employer's premises.

When the details of this compromise proposal appeared in the media, however, the labor lobby was quick to deny the existence of any such deal, and EFCA's sponsor, Sen. Tom Harkin (D-Iowa), would not confirm whether such compromise measures are being considered by the Democratic leadership in the Senate.

INCREASED REGULATORY ACTIVITY

In other areas, Obama has, within the first 200 days of his presidency, taken unilateral steps to bolster the position of organized labor. Shortly after his inauguration, the president issued four pro-labor executive orders that affect labor relations for federal contractors. These orders, collectively, prohibit federal contractors from using federal funds to engage in "persuader" activities; require contractors replacing previous contractors to offer employment to the predecessor's employees, thus ensuring the representational status of any predecessor union; require federal contractors to post notice of employee rights under the National

Labor Relations Act (NLRA); and encourage federal agencies to use project labor agreements (those setting terms and conditions of employment for all employees) on all construction projects worth more than \$25 million.

The DOL, led by staunch union supporter Hilda Solis, has indicated its intent to support these pro-labor policies. The DOL recently issued proposed regulations implementing the president's executive order requiring federal contractors to notify employees of their rights under the NLRA. The DOL's proposed rules outline its articulation of employees' rights under the NLRA, including requiring all federal contractors and all subcontractors to post the DOL notice.

There also are indications that, as part of the DOL's changing leadership, the agency will significantly step up its compliance and enforcement activities, due in part to the Obama administration's commitment to spending accountability as part of the American Recovery and Reinvestment Act, the government's economic stimulus plan. In May, Solis issued the agency's budget for 2010. The Office of Federal Contract Compliance Programs, an entity within the DOL, received a budget increase from \$82.1 million to \$109.5 million.

The compliance office expects to hire as many as 213 new employees to further its responsibility of ensuring that federal contractors do not discriminate in hiring, compensation and promotion. Such contractors also must implement affirmative action plans to address potential discrimination in these areas. Under a new directive issued in July, the compliance office announced that it will substantially intensify its focus on contractors receiving stimulus funds and that it will significantly increase its audit activities.

The Wage and Hour Division of the DOL also received a substantial budget increase for 2010 — an additional \$30.86 million. It expects

to hire an additional 288 employees, including as many as 200 new investigators. (This dramatic budget and staff increase is in response to what was seen as the previous administration's alleged de-emphasis on wage-and-hour enforcement.) The Government Accountability Office released a study in July 2008 revealing that enforcement actions by the division had fallen by around one-third since 1997, from 47,000 in 1997 to 30,000 in 2007. The increased size and budget for 2010 will have one outwardly obvious effect — a meaningful increase in compliance and enforcement activities by the DOL.

The DOL is undergoing structural change as well. In June, the department announced that it is abolishing the Employment Standards Administration, the umbrella organization over four subordinate agencies of the DOL (the Office of Workers' Compensation Programs, the Wage and Hour Division, the contract compliance office and the Office of Labor-Management Standards). This organizational change means that the heads of these four subagencies will report directly to the secretary of labor. With Solis' direct oversight, the work of these agencies likely will be influenced by her pro-labor agenda.

CHANGES EXPECTED FROM THE NLRB

The DOL is not the only agency in which dramatic change is anticipated. The appointment of Wilma Liebman as chairwoman of the NLRB and the likely confirmation of three new board members, including two Democrats who are former union attorneys, presumably will result in significant changes in the state of labor law. Liebman has, throughout her tenure on the NLRB, been a vocal champion of union rights, prolifically dissenting in decisions perceived by organized labor to be "employer friendly." Liebman's perspective

is not surprising considering her background as a union-side labor attorney. Under her leadership, a number of decisions of the Bush NLRB are likely to be reversed or narrowed significantly.

Specifically, the Obama NLRB, when given a chance, likely will reconsider whether an employer can ban outright its employees' use of company-provided e-mail systems for union-related communications; give more scrutiny to workplace rules that could affect employees' Section 7 right to engage in protected concerted activity in the workplace (such as rules banning profane language or harassment); expand the availability of *Weingarten* rights (the right to have a representative accompany an employee to an investigatory interview that could lead to disciplinary action; see *NLRB v. J. Weingarten Inc.*, 420 U.S. 251 (1975)) to nonunion employees; and narrow the definition of "statutory supervisor" to enlarge the pool of possible bargaining-unit employees.

In addition, the Obama NLRB has pending before it several cases involving nonemployee access rights and union "banning" — a form of picketing whereby union members station themselves outside worksites holding banners attacking management. Based on the background of the Democratic nominees to the NLRB and Liebman, these major issues are likely to be resolved in favor of the unions — allowing nonemployees greater access to an employer's private property and allowing unions to pressure neutral employers by engaging in stationary banning activities.

From all indications, the Democratic-controlled Congress and the Obama administration have embarked on a decidedly pro-union direction in government policy. While that may be cause for celebration for those in organized labor this Labor Day, its effect on the country's fragile economy may be another matter.