Temps Nation

BIG LAW FIRMS DON'T OFTEN PREDICT ANYTHING, MUCH less broad social trends affecting the structure of the economy. But timing, as they say, is everything. Early last year Littler Mendelson stuck its neck out in a report titled "The Emerging New Workforce: Employment and Labor Law Solutions for Contract Workers, Temporaries, and Flex-Workers."

Barely six months after the Crash of '08, principal author and shareholder Garry G. Mathiason wrote, "Littler predicts that … 50% of the workforce added in 2010 will be made of up in one form or another of contingent workers. As a result, approximately 25% to as high as 35% of the workforce will be made of temporary workers, contractors, or other project-based labor."

> **"This is labor law reform by a thousand cuts. What management needs most is flexibility."**

The April 2009 report was no ordinary client alert. To buttress its conclusions Littler relied on data provided by Staffing Industry Analysts of Los Altos and a multi-year research project by the MIT Sloan School of Management "aimed at envisioning scenarios for future organizational structures." Littler also addressed the falling away of "certain prior barriers" to contingent hiring—such as workers' reliance on their employers for health insurance, pension benefits, and a venue for social interaction. "President Obama has pledged both to decrease health care costs and to provide at least limited universal health care," Mathiason wrote, noting that "many insurance companies have increased their promotion of affordable health insurance for individuals." As for the social perks of the job site, the report touted "instant communication and virtual social networking" as a replacement. The predicted result? A workforce of "free agents," devoid of benefits or paid time off, supplied to users on a just-in-time basis like any other commodity.

So far, Mathiason is batting 1,000. The Bureau of Labor Statistics reported that the staffing industry supplied more than 40,000 new jobs in March, marking its sixth consecutive month of growth. Contributing to the trend were the usual pattern of temp hiring after a recession, a drop in organized labor to just 7.2 percent of the private workforce, and years of employer-friendly rulings from a Republican-controlled majority at the National Labor Relations Board (NLRB).

But there's many a slip between prediction and reality. By early 2010 the five-member NLRB had been reduced to just two members—one Democrat and one Republican. With his board nominees stymied by Congress, Obama in late March made two recess appointments: labor lawyers Craig Becker and Mark Pearce. Democrats, who now dominate the panel 3–1, will have it all to themselves in August, when the terms of Republican Peter Schaumber and board general counsel Ronald Meisburg expire.

"You will have the most pro-labor board since 1947," says employment lawyer Michael J. Lotito, a partner at Jackson Lewis. "Case after case may be overthrown. If labor doesn't celebrate *this* Labor Day, it never will."

The dramatic shift in board members should produce a series of policy reversals at the agency made possible by several U.S. Supreme Court rulings. Decades ago the Court promoted deference to administrative agencies when they interpret statutory language, if it determines that Congress was ambiguous or silent on the point at issue (*Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). A more recent ruling permits agencies to change course if an alternative interpretation of the statute is reasonable (*National Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967 (2005)).

For labor lawyers, the priorities for reinterpretation include union recognition by card-check, defining which supervisory positions are excluded from bargaining units, and the right of nonunion employees to be represented in disciplinary hearings. The most nettlesome staffing industry case is *Oakwood Care Center* (343 NLRB 659 (2004)), which reinterpreted an earlier, Clinton-era ruling in *M.B. Sturgis* (331 NLRB 1298 (2000)).

Sturgis had permitted staffing agencies' temps to organize with permanent workers on the job site if the two groups

could show a "community of interest." But *Sturgis* coincided with the election of President George W. Bush, who appointed employer-friendly members to the NLRB. The new majority held in *Oakwood* that under the joint employer doctrine, unions had to win the consent of both the supplier and user employers to force multiemployer bargaining. That ruling effectively killed organizing at job sites that have a mix of temporary and permanent employees.

To its credit, "The Emerging New Workforce" predicted a return to *Sturgis*. "Anticipate that the Obama-appointed NLRB may again include contingent workers in bargaining units with regular employees," Mathiason wrote. Now, he says in an interview, "I would *guarantee* a return to *Sturgis*." But Mathiason adds, "It's a historical fiction to pretend the employee provider and buyer are independent. I believe joint employer liability should be contractual—accept that both parties are employers, and then apportion the responsibility."

A return to *Sturgis,* however, doesn't address underlying issues related to contingency labor. Independent contractors, for instance, work entirely outside of employee protections. Whether other contingency workers—direct-hire temps, staffing agency employees, leased employees, or in-home workers—are "employees" protected by labor law varies by statute. The National Labor Relations Act, ERISA, and OSHA, for instance, use a 13-factor "agency test" to define covered individuals. The Fair Labor Standards Act uses a broader economic realities test, and the federal anti-discrimination statutes use a hybrid test. Other determinants are contractual relationships between supplier and user employers, and the organization of the job site.

"The NLRB only governs certain employees," says David A. Rosenfeld, a labor lawyer at Alameda's Weinberg Roger & Rosenfeld and an adjunct professor at UC Berkeley's School of Law. "So you have to look to legislative solutions. The core issue for us is the right to organize."

With so much at stake before the new NLRB, advocates for both management and labor already are spinning out alternative scenarios. "Obama might approach the Republicans and agree to appoint two pro-management members in return for five-year appointments for Becker and Pearce," says Don Lee, a partner in the Atlanta office of Ford & Harrison who writes the firm's NLRB client alerts. "The downside for management is that those two would be on the board longer."

Another possibility for employers would be to accept a 3–0 labor majority, but file repeated recusal motions against Becker because of his past positions at the Service Employees International Union and the AFL-CIO. Within days of Becker's recess appointment, the National Right to Work Legal Defense Foundation had filed 12 such motions. "You can't require Becker to recuse himself," says Lynn R. Faris, a labor lawyer with Leonard Carder in Oakland. "But you could ask him, as former assistant general counsel to the AFL-CIO, to recuse himself in every case involving the federation."

If Becker agreed to withdraw in such cases, 2–0 decisions could then be challenged as nonbinding, for lack of a quorum. At least 60 challenges to the validity of two-member rulings already have been filed in the appellate courts; in November, the U.S. Supreme Court granted cert to resolve the matter (*New Process Steel, LP v. NLRB,* pending as No. 08-1457). The danger, says Lee, is that Obama could respond by making two more recess appointments to the board, creating a 5–0 labor majority.

Jackson Lewis's Lotito is unhappy about any such prospects. "This is labor law reform by a thousand cuts," he says. "The board will find that *people* are employees, eligible for representation in whatever role they are employed, and whatever they are called. But enhancing union interference in your workforce does *not* promote job growth. What management needs most is flexibility."

As in contract employees, temps, and flex-workers.

"Temps Nation" originally published in the June 2010 issue of ***California Lawyer***.
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