

## Labor Alert

Nov-13-2009

### Supreme Court Takes Up Authority Of Two-Member NLRB

On November 2, 2009, the U.S. Supreme Court agreed to consider whether the National Labor Relations Board (the "Board") has the authority to issue two-member rulings in unfair labor and representation cases. Designed to function as a five-member body, the Board has operated with only two members since January 2008. In the twenty-two months since that time, the two members, Wilma B. Liebman (D) and Peter C. Schaumber (R), have issued approximately 500 rulings. While a number of parties have accepted the Board's rulings, others have challenged the legality of the rulings, and there are currently nearly 80 federal court cases pending.

In *New Process Steel LP v. NLRB*, the Court will resolve a split among the federal appellate courts which hear petitions for enforcement of and appeals from Board decisions. The First, Second and Seventh Circuits have upheld the authority of the two-member Board to act, albeit for slightly different reasons. The D.C. Circuit, in *Laurel Baye Healthcare of Lake Lanier Inc. v. NLRB*, however, ruled that the two-member Board is not "properly constituted" and lacks decision-making authority.

Given that parties can seek review and/or enforcement of Board decisions in the D.C. Circuit regardless of where they are located, the *Laurel Baye* decision effectively precludes consistent enforcement of the National Labor Relations Act across the country. The urgency of the issue is further highlighted by Senate gridlock over President Obama's nominees to the Board, Craig Becker (D), Associate General Counsel, Service Employees International Union, Mark Pearce (D), founding partner of labor firm Creighton, Pearce, Johnsen & Giroux, and Brian Hayes (R), Republican Labor Policy Director for the U.S. Senate Committee on Health, Education, Labor and Pensions. With Senator John McCain (R-AZ) threatening to place a "hold" on Becker's nomination and Democratic Senators calling for "all or nothing" confirmation of the full slate of nominees, the Board may not be fully constituted for the foreseeable future (although President Obama could exercise his authority to make temporary recess appointments).

While a decision either way will not necessarily favor labor over management, the prospect that the Court will agree with the D.C. Circuit will be a significant and possibly expensive setback for any party who has been successful in front of the two-member Board. Put simply, if the challenged two-member Board decisions are vacated or sent back to the Board for reconsideration, parties, through no fault of their own, may be required to go through the expense of re-arguing their cases to a fully-constituted Board **with no assurance that the outcome will be the same.** We will continue to keep you apprised of developments on this important issue.

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For more information, please contact Paul Garry, Anna Wermuth or any other MBT labor and employment lawyer at (312) 474-7900.

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