



## **PRESIDENT OBAMA USES RECESS APPOINTMENTS TO FILL VACANCIES AT NLRB AND EEOC**

APRIL 2010

On March 27, 2010, President Obama took advantage of a two-week Congressional break to fill key administration posts with recess appointments. President Obama made a total of 15 recess appointments, filling two vacancies on the National Labor Relations Board (NLRB) and four at the Equal Employment Opportunity Commission (EEOC). By law, the President may install nominees without Senate approval during Congressional recess, although such appointees only serve through the end of the next Congressional session, unless subsequently confirmed by the Senate.

### **Controversial NLRB Appointments**

The two NLRB appointees are Craig Becker and Mark Pearce. Both appointees are controversial. Mr. Becker and Mr. Pearce (along with Brian Hayes) were originally nominated for the NLRB last year, but neither was confirmed by the Senate.

**Craig Becker:** Mr. Becker's road to a recess appointment has been rocky. Senate Republicans and business groups voiced strong opposition to the Becker nomination last year, citing his heavily pro-union background, which they believe will prevent him from being a neutral enforcer of the National Labor Relations Act.

Among other things, Mr. Becker has been a general counsel of the Service Employees International Union since 1990, an AFL-CIO staff counsel since 2004, and a pro-union law professor since 1989. After Senator McCain put a "hold" on the nomination, the Senate returned it to the White House in December 2009 for reconsideration. Instead of withdrawing the nomination, President Obama re-nominated Mr. Becker in January 2010. In February 2010, however, a Republican-led filibuster in the Senate caused the nomination to die without a vote.

**Mark Pearce:** Mr. Pearce's original nomination also had stalled in the Senate. He is one of the founders of a New York law firm that represents unions and employees in discrimination cases. Additionally, Mr. Pearce also is a union member (Cornell Adjunct Faculty -Upstate, New York State United Teachers Local # 37-950) and a noted oil painter.

**Politics in the appointment process:** Recess appointments are not unusual. For example, President George W. Bush made over 170 recess appointments during his presidency, including 7 of his 9 appointments to the NLRB. Similarly, President Bill Clinton made 139 recess appointments. It is unusual, however, that President Obama's recess NLRB



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appointments do not include a full slate of Board Members. Although there are three vacancies at the NLRB, President Obama chose to fill only two of them (with Democratic nominees); NLRB nominee Brian Hayes (a Republican nominee) was not included in the recess appointments. Given that the recess appointments will expire at the end of the current Senate session (beginning of 2011), and given that a full NLRB term is five years, the White House strategy appears to be designed to encourage the Senate Republicans to vote to confirm Mr. Becker and Mr. Pearce for full terms if they also want to see Mr. Hayes nominated and confirmed.

**The Supreme Court and the Two - Member NLRB:** The NLRB decides cases arising under the NLRA, which governs relations between organized labor and private employers. Since January 1, 2008 only two of the NLRB's five seats have been filled (by Chairman Wilma Liebman, a Democrat, and Board Member Peter Schaumber, a Republican). Nevertheless, the NLRB continued to issue decisions (more than 500 during this period). On March 23, 2010 the United States Supreme Court heard oral argument in *New Process Steel v NLRB*; the issue before the Court is whether the NLRB has the "authority to decide cases with only two sitting members, where 29 USC §153(b) provides that 'three members of the Board shall, at all times, constitute a quorum of the Board'".

### EEOC Appointments

President Obama also used recess appointments to fill four vacancies at the EEOC. The appointees include a new Chair, two other Commissioners, and a General Counsel. Combined with the two current Commissioners, the EEOC will have five Commissioners and a full quorum. We expect the EEOC will now move swiftly to issue final regulations implementing the ADA Amendments Act.

**Jacqueline A. Berrien:** President Obama appointed Ms. Berrien to be the Chair of the EEOC. Currently, she is the Associate Director-Counsel of the NAACP Legal Defense and Educational Fund. Previously, she served as a staff attorney with the Lawyers' Committee for Civil Rights and the ACLU.

**Chai R. Feldblum:** Ms. Feldblum was appointed to be an EEOC Commissioner. A noted advocate for gay and lesbian rights, she has been a Professor of Law at the Georgetown University Law Center since 1991. Previously she served as ACLU Legislative Counsel and was instrumental in drafting of the Americans With Disabilities Act of 1990.

**Victoria L. Lipnic:** Ms. Lipnic, who was appointed to be an EEOC Commissioner, is an attorney in the Washington, DC area. From 2002 to 2009 she served as Assistant Secretary of Labor for Employment Standards.

**P. David Lopez:** President Obama appointed Mr. Lopez to be the EEOC General Counsel. Currently, he is a



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Supervisory Trial Attorney in EEOC's Phoenix office. Prior to joining the EEOC in 1994, he worked for the Department of Justice in Washington, DC.

Bullard Law will continue to monitor events at the NLRB, EEOC and other enforcement agencies. Please also feel free to contact us with any questions or concerns about any other employment, labor relations, and employee benefits issues.