

Obama Administration Forcing EFCA by Regulatory Edict Economic Study Suggests Job Loss in Millions

Recently proposed regulations by the NLRB and DOL and other initiatives will bypass Congress to achieve the goals of the misnamed “Employee Free Choice Act” by promoting job-killing “micro unions” and denying employees an informed choice about union representation.

The National Labor Relations Board (NLRB or Board) grabbed headlines in the summer of 2011 for the outrageous actions of its Acting General Counsel, who attempted to mandate where and how one company—Boeing—could operate and expand its business and what the company could tell the public and its employees about costs related to collective bargaining. The Board followed up with two August 26, 2011 decisions—one that allows the creation of job killing micro-unions and another that strips workers of the right to contest card check via secret ballot elections—and two disturbing regulations—one that would require employers post a new and very biased posting requirement and another that would effectively limit the information employees receive about unions prior to an election, known as the “ambush” election regulation. Perhaps the most egregious action, however, was President Obama’s “recess” appointments of three members to the Board while the Senate was still in session. All of these actions are simply payback to the administration’s big labor allies and are therefore specifically designed to bring us closer to administrative imposition of the legislatively dormant and grossly misnamed Employee Free Choice Act (EFCA).

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Introduction

Those who headed up the Board during the Clinton and Bush administrations have called the NLRB’s actions over last few years unprecedented.¹ The attack on Boeing not only threatened to eliminate thousands of jobs in South Carolina, but also injected an additional uncertainty into the economy that is sure to cost American jobs. As the [Washington Post noted](#), the NLRB suit in Boeing “substitutes the government’s judgment for that of the company [and t]his is neither good law nor good business.” Although the complaint against Boeing was withdrawn after the

¹ See remarks of former Clinton NLRB Chair William Gould at <http://www.slate.com/id/2294834/> and of former

company yielded to other union demands, there remains a lingering threat of misguided prosecution by this Acting General Counsel and the possibility that the NLRB could at any time thrust itself into ongoing negotiations between a business and a union in an effort to strengthen the union's hand at the bargaining table.

Moreover, the Boeing case is only the tip of the iceberg. The U.S. Department of Labor (DOL) released a proposed rule and the NLRB a final rule that are designed to work in concert to deny employees crucial information needed to make an informed choice about whether or not to pay for union representation. In conjunction with the ruling in *Specialty Healthcare*, which allows organizers to gerrymander bargaining units and form "micro-unions," and the recent decision in *Mastec Direct TV and Communications Workers Local 3871*, where the Board turned a blind eye to union supporters' threats and intimidation of co-workers during an election,² the NLRB's and DOL's rules are achieving through administrative fiat the goals of the legislatively dormant and grossly misnamed Employee Free Choice Act (EFCA).

Unfortunately, the Board's radical agenda is likely to continue. In January 2012, President Obama took the unprecedented step of making recess appointments to the Board while the Senate was still in session, instead of working with the Senate to find acceptable Board nominees.³ This lack of accountability is sure to foster continued extremism.

With an estimated six million workplaces falling within the NLRB's jurisdiction, the Board's irresponsible actions have sent ripples through the economy. Congress needs to stop the Board now, before it can do more damage to our job growth and economic recovery.

Economic Data on EFCA

Study Shows EFCA Leads to Chronic Double Digit Unemployment and Millions of American Jobs It's quite simple: EFCA, a legislative effort to increase union density at the expense of an employees' right to vote by secret ballot, would cost millions of jobs and leave the U.S. facing chronic double digit unemployment. That's one reason why 74% of voters and union households oppose EFCA (see polling data at www.myprivateballot.com). One prominent study estimates EFCA's predicted increase in union density would spike unemployment by as much as 3.5% in one year and by over 9% over 10 years.⁴ This would drive the unemployment

² The intimidation included a threat to "whip" a specific employee's "ass" and to sabotage his work; an anonymous call to another employee's home threatening to "get even" with him if he "back-stabbed" the pro-union employees; a threat made in front of three or four employees to "bitch slap" two other employees, or to "whip their f---n' ass" if they "cost us the election;" and to "whip [a supervisor named] Eddy's ass" if the union lost. The Board held that the two employees making threats were not agents of the union (which would have triggered a lower standard of misconduct required to set aside the election) despite their being on an "organizing committee" and being the main points of contact between the union organizers and their fellow employees.

³ For a more in-depth discussion on the constitutional ramifications of the appointments, see the testimony of Charles J. Cooper, former Assistant Attorney General of the Office of Legal Counsel of the Department of Justice, presented at a February 7, 2012 hearing in the Education & Workforce Committee available here: http://edworkforce.house.gov/UploadedFiles/02.07.12_cooper.pdf.

⁴ See AN EMPIRICAL ASSESSMENT OF THE EMPLOYEE FREE CHOICE ACT: THE ECONOMIC IMPLICATIONS, Anne Layne-Farrar, March 3, 2009 available at www.myprivateballot.com. The study states that "The precise effect on unemployment will depend on the degree to which EFCA increases union density, but for every 3 percentage points gained in union membership through card checks and mandatory arbitration, the following year's unemployment rate is predicted to increase by 1 percentage point and job creation is predicted to fall by around 1.5 million jobs.... [if] EFCA were to increase the percentage of private sector union membership by between 5 and 10 percentage points, as some have suggested, my analysis indicates that unemployment would increase by 2.3 to 5.4

rate from 7% to above 10%, cost millions of jobs in a single year, and lead to persistent double digit unemployment for the next decade and beyond. Congress recognized that EFCA would kill jobs and refused to pass the bill. Now, unions and their allies in the Administration are forcing the real-world equivalent policies of EFCA through the NLRB and DOL and the intended impact is the same—to force increases in union density at the expense of informed employee choice, jobs, and economic prosperity. Lawmakers must stop this attack on the economy. Jobs should not be sacrificed for political payback or to ensure future political support from unions.⁵

Specialty Healthcare **Gerrymandering & Micro-Unions = Economic Disaster**

The most significant of the Board's recent actions is its August 26, 2011 decision in *Specialty Healthcare and Rehabilitation Center of Mobile and United Steelworkers, District 9*, 357 NLRB No. 83 (2011). This ruling sets the stage for the gerrymandering of elections and the organization of "micro-unions." The Board's decision radically changes the standard for determining an appropriate bargaining unit for all of the estimated six million workplaces covered by the National Labor Relations Act. The key issue is the extent to which a union may organize a group of employees into a bargaining unit without due consideration of interests those employees share with other employees outside the proposed unit. The NLRB has historically applied a clear set of standards in determining a unit appropriate for bargaining – the *Specialty Healthcare* decision turns those standards upside down. The impact on employers, who could face a proliferation of micro-unions with competing needs and demands, and employees, who could lose out on opportunities to build skills and advance their careers, will be significant.

Gerrymandering The decision makes it easier for unions to organize by cherry picking a unit composed of the subset of employees most likely to organize, with little regard for whether those employees constitute a practical unit. As a result, unions will often organize by forming smaller bargaining units that exclude those similarly situated employees who oppose unionization, effectively disenfranchising them. For example, a union may choose to organize poker dealers at a casino, rather than all dealers, because it knows the poker dealers support the union, while the blackjack, craps, roulette and other dealers may not. Similarly, a union may organize a small group of employees working on one machine rather than all machinists in a manufacturing facility, because the majority of machinists do not want union representation. In a retail store, a union may organize just the "greeters," rather than all employees interacting with customers, even though they have similar pay scales and work duties, because those employees do not want a union. This is in contrast to the law before *Specialty Healthcare*, under which bargaining units generally must include employees that share a community of interest. Before *Specialty Healthcare*, smaller units were only permissible where the employees in the proposed unit had interests that were "sufficiently distinct from those of other employees to warrant the establishment of a separate unit." This was intended to prevent proliferation of small "fractured units" or micro-unions.

million in the following year and the unemployment rate would increase by 1.5 to 3.5 percentage points in the following year." "[T]he effect of this increase in union membership would be to raise the unemployment rate by between 8.6% and 9.2% by 2018."

⁵ Several articles highlight past expense by unions and threats to withhold future political support without sufficient payback. <http://www.foxnews.com/politics/2011/05/20/afl-cio-chief-warning-dems-unions-lose-support/>

Multiple Micro-Unions Pulling Businesses Apart Under *Specialty Healthcare*, with the potential for micro-unions and fractured units, businesses may have to manage multiple small units of similarly situated employees with increased chances of work stoppages and potentially different pay scales, benefits, work rules, bargaining schedules, and grievance processes for similarly situated employees (e.g., different collective bargaining agreements for poker and blackjack dealers, cashiers and stockers, manufacturing production employees with similar skills but working on different machines, etc.). This could overwhelm businesses, particularly small businesses, with administrative requirements forcing them into a constant state of bargaining. Imagine a small business franchise owner with four fast food restaurants managing eight or more separate bargaining relationships with different unions or a manufacturer with a different unit for each different piece of machinery in the facility. In addition, any one of these micro-unions could cripple the business with work stoppages, creating a situation where a union representing a handful of employees could threaten the economic well-being of the rest of the company's employees, nonunion and union alike, and their families.

U.S. Competition and Employee Opportunities Crippled as Micro-Unions Prevent Flexible Staffing Fractured units also would greatly limit an employer's ability to cross train and meet customer and client demands via lean, flexible staffing as employees could not perform work assigned to another unit. The impact on business productivity and competitiveness would be significant. Employees also would suffer from reduced job opportunities as promotions and transfers would be hindered by organization-unit barriers. Global competition is challenging enough without government-fostered barriers that cripple productivity and hamper opportunities for skill and career development.

In allowing for the formation of micro-unions, the NLRB has overturned precedent that was well established, worked well for employers and workers, and had been virtually unchallenged. Indeed, the ruling goes far beyond what was actually necessary to decide the case. Further, there was almost no urging from any interested party for the sort of sweeping overhaul the Board carried out. The Board, on its own initiative, intending to use the case as a platform for its activist agenda, solicited input from the public as to whether it should overhaul the unit determination process—and received almost no input encouraging such changes. While this clear lack of need and support for changes should have ended the initiative, the Board was determined to turn unit determination upside down and blatantly hand unions an organizing tool that almost certainly violates the NLRA. (The law states that a union's choice of which employees to organize cannot be the determinative factor in considering unit appropriateness, which in effect is exactly what *Specialty Healthcare* does. In fact, in 1995 a Federal Court of Appeals rejected the very standard put forth by the NLRB in *Specialty Healthcare* for this very reason).

Massive Changes to Established Law The NLRB's new procedure involves first determining that a proposed group is readily identifiable and has a sufficient community of interest among its own members. If so, then in order to challenge the unit determination and have other employees added to the group, an employer has to prove that employees in the larger unit "share an overwhelming community of interest." The majority of the Board characterized that standard as what has always applied outside of the health care industry (which is subject to separate, specific unit determination rules). As dissenting member Brian Hayes points out, however, the "overwhelming" component of the standard had previously been applied only in an extremely narrow and rare situation, called an accretion, where the issue is whether a newly established group of employees (a newly-created department in an existing union facility, for example) should be added to an existing represented unit without benefit of a vote. The

heightened standard of an “overwhelming” community of interest has been applied to safeguard the inclusion of employees in a unit with no election. In *Specialty Healthcare*, however, the majority glosses over this crucial point to apply the higher standard in situations where employees will be able to vote.

The Supreme Court has not considered the issue presented in *Specialty Healthcare*, but one court in 1995 (the 4th Circuit in *NLRB v. Lundy Packing Company*) struck down application of the “overwhelming community of interest” standard on the grounds that it violated the law and was justifiable only in the context of an accretion. While another court in 2008 (the DC Circuit in *Blue Man Vegas v. NLRB*) indicated application of the “overwhelming” standard was permissible in the case before it; the court did so only because the “Board's finding that the proposed unit was appropriate ...was certainly reasonable and supported by substantial evidence” and in applying the standard the Board “did not give controlling weight to the extent of the Union's organization.” Furthermore, as member Hayes points out in his dissent in *Specialty Healthcare*, there are flaws in the reasoning of *Blue Man*.

Specialty Healthcare's Immediate Impact Because *Specialty Healthcare* is a representation case, there is no opportunity for direct judicial review so the Board and its regional offices have already been implementing this disastrous decision. For example, in *DTG Operations*, the union petitioned for a unit of 31 rental service agents at a car rental facility. The Regional Director dismissed the petition, determining that the appropriate unit for bargaining was a wall-to-wall containing all 109 hourly employees because of the employees' functional integration. The Board applied *Specialty Healthcare* and reversed the dismissal, ruling that the other hourly workers did not share an *overwhelming* community of interest with the rental service agents.

In his dissent, Member Hayes notes that *DTG Operations* provides confirmation that *Specialty Healthcare* will lead to “balkanization” of the workforce: “As long as a union does not make the mistake of petitioning for a unit that consists of only a part of a group of employees in a particular classification, department, or function... it will be impossible for a party to prove that an overwhelming community of interests exists with excluded employees. Board review of the scope of the unit has now been rendered largely irrelevant. It is the union's choice, and the likelihood is that most unions will choose to organize incrementally, petitioning for units of the smallest scale possible.”

Fortunately, the arduous process for seeking judicial review of *Specialty Healthcare* has started. After the case was originally decided in August 2011, the employer refused to bargain with the union, claiming that the bargaining unit as determined by the Board was inappropriate. The union filed an unfair labor practice charge against the employer and on December 30, 2011, the Board ordered the employer to bargain with the union. The employer has since filed an appeal of the Board's order in federal court. The court will ultimately determine whether or not *Specialty Healthcare* was appropriately decided.

Yet while the appeal is pending, *Specialty Healthcare* continues to wreak havoc in ongoing representation cases. Retailer Bergdorf Goodman is before the Board fighting a Regional Director's Decision and Direction of Election ruling, under *Specialty Healthcare*, that sales employees in the women's shoe department—as opposed to all sales employees—constituted an appropriate bargaining unit for purposes of a representation election. In a similar case, Macy's is fighting an Acting Regional Director's ruling that full and part-time employees in the fragrance department of a single store constitute an appropriate bargaining unit. This ruling came approximately a year and a half after the petitioning union had lost an election involving a proposed unit that included all store sales employees. Macy's thus makes clear the insidious

effect of *Specialty Healthcare*, allowing unions to divide and conquer, picking apart groups of employees who for decades would have been considered a single bargaining unit and focusing on isolated sub-groups. CDW continues to fight for a return to a more balanced election process by filing *Amicus* briefs with the Board and the courts as these disturbing cases follow a course most likely leading to the Supreme Court.

On November 30, 2011, the U.S. House of Representatives passed the Workforce Democracy and Fairness Act (H.R. 3094), which would effectively overturns *Specialty Healthcare*, but the bill stalled in the Senate. The House has not brought up the bill this year.

Lamons Gasket Company - NLRB Strips Away Election Rights

The NLRB issued its decision in *Lamons Gasket Company* on August 26, 2011, over-ruling its 2007 decision in *Dana Corp.* Over the strong dissent of Member Brian Hayes, the majority threw out *Dana*, eliminating employees' opportunity to immediately challenge card check with a secret ballot election. Under *Dana*, when an employer voluntarily recognized a union to represent a group of employees via card check and without a secret ballot election, employers were to post a notice (referred to as a *Dana* Notice), telling employees about the recognition and informing them that they (or a rival union) had 45 days to file a petition for a secret ballot election. Employees not wanting a union could seek decertification, and rival unions could seek an election to replace the original. After the 45 days, employees would be barred from challenging the election for up to a year,⁶ and if a contract was signed, for up to four years.⁷

Over the last four years, the Board received over 1,300 requests for *Dana* notices, had 102 election petitions filed, and held 62 elections. In 17 of those elections, employees voted to oust the voluntarily recognized union, including two cases where a different union was chosen. The Board's majority contended that 17 elections out of over 1,300 notice requests showed that there was very little need for the *Dana* ruling. Dissenting member Hayes, however, focused on the fact that in about 25% of all elections held the employees voted against the voluntarily recognized union. This provides a strong indication that many employees who sign recognition cards would vote against unionization if given the chance.

The notices themselves were a point of contention for the majority, which characterized them as contrary to the Board's long-standing practices and improperly implying that the Board was biased against voluntary recognition. In its discussion, the Board overlooked the fact that an official Board notice is required when a union has filed a petition for election, as well as its own recent rule (discussed below) requiring employers to post notices describing organizing rights and explaining how to contact the NLRB. As member Hayes pointed out in his dissent, the Board has no problem requiring postings and upholding traditions only when they are likely to assist in union organizing.

The ruling is all the more significant because the election bar imposed would last from approximately six months to as much as four years after voluntary recognition. The Board ruled

⁶ The National Labor Relations Act imposes an "election bar" where new elections are barred for one year after a conclusive NLRB election. The NLRB has extended this bar in situations where an employer voluntarily recognizes a union based on cards. The *Dana* case ensured employees facing card check were afforded the limited opportunity within the 45 days for a secret ballot election before the bar took effect.

⁷ A collective bargaining agreement may serve as a bar to an election for three years.

that after voluntary recognition an election is barred, in the absence of agreement on a contract, for no less than six, and no more than twelve, months after the parties' first bargaining session. If an agreement is reached, the bar applies until the agreement expires. For contracts of short duration (under three years), the bar would end at expiration. For contracts longer than three years, the Board applies an "administratively burdensome" rule, under which a petition may be filed even though the contract has not yet expired. For contracts of three years' duration or longer, this would result in a bar of about four years given that, absent unfair labor practice charges (which would themselves have an effect on the ability to petition for an election), a first agreement would normally be reached within the first year after recognition.

The decision represents another step toward an agency-created EFCA.

Propaganda – The NLRB's Biased Notice Requirement

NLRB's regulation would require, for the first time in the seventy-five year history of the NLRA, that employers post detailed notices outlining organizational rights and providing contact information for the NLRB. The notice itself and the posting requirements are beyond the Board's authority to require, unclear, confusing, incredibly burdensome and, predictably, biased in favor of unions.

First, the NLRB has no legal authority to require all six million covered employers to post a notice. Unlike many other workplace laws, the NLRA does not contain a posting requirement. Congress certainly knows how to require the posting of notices, but has never directed or authorized the NLRB to do so. Moreover, the NLRA gives the Board the power to act with respect to any given employer *only* if (a) a petition for election has been filed; or (b) an unfair labor practice charge has been filed. A strong argument exists that the Board cannot do *anything* that requires action of all employers absent a petition or charge. Also, the Board lacks authority to require employer to say anything, as doing so would interfere with specific free speech rights provided to employers under the NLRA.

Second, the notice itself is long, confusing and one-sided. It informs employees of their right to organize and bargain collectively, about restrictions on employers, and about petitions for election and unfair labor practice charges, but it does not adequately inform them about the following equally clear and important rights and information:

- The right to refuse to pay union dues to the extent they are used for political purposes.
- The right to refuse to join a union or pay dues in Right-to-Work states.
- The right to decertify an unwanted union.
- The downsides to unionization, such as loss of the ability to negotiate directly with their employer, the fact that economic strikers can be permanently replaced or that unions can fine their own members.

In March of 2012, the U.S. District Court for the District of Columbia, in the case brought by CDW and the National Association of Manufacturers, issued an injunction preventing implementation of the NLRB's notice rule. The Court found that the Board exceeded its authority by declaring an employer's failure to post the notice to be an unfair labor practice, and

by purporting to toll the NLRA's statute of limitations for filing a ULP. The decision was appealed and in May 2013, U.S. Court of Appeals for the D.C. Circuit struck down the NLRB's rule in *National Association of Manufacturers v. NLRB*.

In a thoughtfully-explained decision, the Circuit Court's reasoning differed slightly from that of the District Court, concluding that all three of the posting rule's enforcement mechanisms are invalid, and therefore that the entire rule must fall. The Circuit Court, rather than starting with the question of the Board's basic statutory authority to promulgate such a rule, struck down all three enforcement mechanisms after concluding that they violated section 8(c) of the National Labor Relations Act. Section 8(c) confirms employers' First Amendment free speech rights by providing that no expression of views or opinions may constitute a ULP as long as there is no threat of reprisal or force or promise of benefit.

The Appeals Court reasoned that the posting requirement amounted to forcing employers to disseminate the Board's own characterization of the law, and cited a long line of Supreme Court cases holding that the First Amendment protects one's right NOT to speak just as it protects the right to speak freely. Having decided the case based on section 8(c), one member of the panel declined to rule on whether the Board would have had the authority to require employers to post a notice absent 8(c) violations.

The two other judges, however, ruled in their concurrence that the Board lacked such authority. The Board's authority over employers, the concurring judges said, is purely reactive, depending on the existence of either a pending unfair labor practice charge, or an election petition. Further, the concurrence acknowledged that in attempting to declare a failure to post to be a ULP, the Board had "create[d] a new species of unfair labor practice unforeshadowed in the NLRA's text." In other words, rather than merely issuing regulations to carry out the provisions of the Act, the Board had attempted to re-write the law.

In the majority opinion, the Court noted that the Fourth Circuit Court of Appeals is currently considering an appeal from a ruling by the U.S. District Court for the District of South Carolina, which held that the Board lacked authority to issue the posting requirement. Whatever the outcome of the Fourth Circuit case, it appears likely that the notice rule is headed to the Supreme Court.

NLRB Proposed Rule on Ambush Elections

In December 2011, the Board's two Democratic members, then Board Member and former SEIU lawyer Craig Becker and Chair Mark Pearce issued the "ambush" election rule. The two claimed the rule is intended to streamline procedures for elections to determine whether or not employees wish to be represented by a union. The total effect of the proposed changes, however, would be to drastically alter the entire election process in favor of unions by greatly limiting communication between employers and employees about the general disadvantages of unions or about a specific union attempting to organize the workplace. The proposal would trample businesses' free speech and due process rights, while also greatly limiting worker access to information needed to make an informed choice about union representation. The changes are unnecessary and fly in the face of what the Supreme Court has called "congressional intent to encourage free debate on issues dividing labor and management." The

proposal is nothing more than a naked attempt to promote unionization by silencing the opposition—a concept Becker has supported in an article he published in the past. The effective date of the rule is April 30, 2012, but CDW and others have challenged the rule in federal court.

The Ambush These new procedures could result in union representation elections held in as few as 14-20 days after the filing of a union petition. The NLRB's own statistics reveal that in 2010, the average time to election was 31 days, with over 90% of elections occurring within 56 days. The current election time frames are not only reasonable, but permit employees time to make an informed decision, which would not be possible under the proposed timetables. In fact, in other situations involving "group" employee issues, Congress requires that employees be given at least 45 days to review relevant information in order to make a "knowing and voluntary" decision (this is required under the Older Workers Benefit Protection Act when employees evaluate whether to sign an age discrimination release in the context of a program offered to a group or class of employees).

Given that union organizers typically lobby employees for months outside the workplace without an employer's knowledge, these "ambush" elections would often result in employees' receiving only half the story. They would hear promises of raises and benefits that unions have no way of guaranteeing, without an opportunity for the employer to explain its position and the possible inaccuracies put forward by the union. Ambush elections would be particularly damaging to small businesses as the proposed changes would effectively eliminate any measure of due process by forcing elections before most employers could even understand what was happening, let alone obtain legal advice and representation.

Based on the legislative history of the 1959 amendments to the National Labor Relations Act, it is clear Congress believed that an election period of at least 30 days was necessary to adequately assure employees the "fullest freedom" in exercising their right to choose whether they wish to be represented by a union. As then Senator John F. Kennedy explained, a 30-day period before any election was a necessary "safeguard against rushing employees into an election where they are unfamiliar with the issues." Senator Kennedy stated "there should be at least a 30-day interval between the request for an election and the holding of the election" and he opposed an amendment that failed to provide "at least 30 days in which both parties can present their viewpoints."

Trampling Due Process Member Hayes notes that the Board's proposed changes will also "substantially limit the opportunity for full evidentiary hearing or Board review on contested issues involving, among other things, appropriate unit, voter eligibility and election misconduct." For example, the rule would in many cases result in elections where no one - not the employer, the union, nor the employees - knows which employees will be in any final bargaining unit that could result from the election. In a situation where an employer contends that some employees at issue are supervisors, the effect of the new rule would be to virtually guarantee improper influence on properly eligible employees, who would be forced into the polling place along-side their bosses.

Ignoring the Obama Administration's Regulatory Executive Order As Member Hayes points out in his dissent to the proposed rule, the Board rushed these regulatory changes just as it plans to rush elections, allowing only 60 days for initial public comments and two days of public hearing in Washington, DC. The last time the Board made significant changes to any of its election procedures, over 20 years ago and relating only to the health care industry, the Board allowed for two years from the first proposed rulemaking to the implementation of a final rule and held multiple hearings in various locations. President Obama has said in his executive

order that 60 days should be the minimum amount for a rulemaking. While the Board is not bound by the order, there is no reason it should disregard the guidelines the administration established for good governance.

Board Threatens to Make it Worse The Board has threatened to make the situation worse by promulgating sections of the proposed rule it had omitted from the final rule. In a January 11, 2012, interview with Bloomberg BNA, NLRB Chairman Mark Pearce stated that the Board “would continue to evaluate the notice of proposed rulemaking to see what else in the proposed rule could be pursued.” This means that the Board will look to enact some of the provisions in the proposed rule that were left out of the hastily promulgated final rule. Examples of these provisions include: (1) requiring pre-election hearings be held within seven days of the filing of the petition; (2) requiring employers to draft a “statement of position” to be presented at that hearing which sets forth their position on all relevant legal issues; and (3) requiring employers to provide union organizers with employees’ private information. With respect to the later, the Board’s proposed rules would have require that employers give the union—in addition to names and addresses—employee phone numbers, email addresses, work locations, and shift and classification details. The proposed rules offered no protection for employees barraged with emails and phone calls from union organizers paid to do so, nor do they address the fact that many people have unlisted phone numbers, often due to concerns over harassment or domestic violence. And although the Board justifies the added information by citing the rise of electronic communications, it is worth noting that while telephones clearly existed in 1966, the Board ruled at that time that names and addresses were sufficient.

Responses to the Finalized Ambush Rule On February 16, 2012, Senators Enzi and Isakson introduced S. J. Res 36 and Representatives Kline, Roe and Gingrey introduced H. J. Res. 103. Both resolutions provide for congressional disapproval and nullification of the rule. Congress should immediately pass these much-needed resolutions.

In addition, on November 30, 2011, the House passed the Workforce Democracy and Fairness Act (H.R. 3094), which addresses some of the major issues resulting from the Board’s regulation. More specifically, the bill:

- Provides for a fair hearing process by allowing employers at least 14 days to prepare their case for the Board and allows employers to raise issues during the hearing.
- Prohibits ambush elections by requiring a campaign period of at least 35 days prior to an election. This will guarantee that workers have an opportunity to hear both sides of the unionization debate.
- Reinstates the long-standing criteria that the Board has traditionally used for determining the appropriateness of a proposed bargaining unit.
- Allows employees to choose how they may be contacted by union organizers.

Unfortunately, after being approved by the House, the bill stalled in the Senate. The House has not taken up the bill again this year.

Like the poster regulation, the ambush regulation is also the subject of a legal challenge in federal court by CDW. On May 14, 2012, the Federal District Court for the District of Columbia struck down the Board's ambush election rule. The Court accepted the argument advanced by CDW and the U.S. Chamber of Commerce that the Board's purported approval of the final rule was invalid due to the lack of a quorum. With three sitting members at the time, the minimum required for the Board to act, Chairman Pearce and then-member Becker voted to approve the final rule and immediately submitted it for publication in the Federal Register without Member Hayes having cast a vote. Attempting to justify their actions without a vote by Member Hayes, the Board brazenly argued that previous statements by Hayes were the equivalent of a vote, and alternatively that a quorum existed for voting purposes simply because Member Hayes occupied a seat on the Board. Despite quoting Woody Allen for the proposition that 80% of life is just showing up, the Court was not amused. The following day the Board suspended its invalid rules. The NLRB eventually appealed the case to the U.S. Court of Appeals for the DC Circuit. That court is holding the case in abeyance based on challenges to the validity of Becker's appointment to the NLRB.

DOL's "Gag" Rule

On June 21, 2011, DOL issued a Notice of Proposed Rulemaking that would drastically change certain reporting requirements relating to the use of paid "persuaders" by employers. Since 1959 the Labor Management Reporting and Disclosure Act (LMRDA) has contained a requirement that employers file certain reports with the DOL if they use outside labor consultants to "persuade" their employees with respect to collective bargaining issues. The law was adopted in large part to "control the activities of management middlemen who flitted about the country on behalf of employers interfering with retraining and coercing employees in the exercise of the right to organize and bargain collectively..." The law contains an exception under which no reporting is required when consultants or outside attorneys provide "advice" to the employer rather than directly interacting with employees for purposes of persuasion. Since the early 1960s, DOL has taken the position that advice includes situations where consultants or attorneys provide employers with materials and draft speeches to be used to educate employees. In these situations, DOL found no reporting requirement, as long as the consultant did not directly interact with the employees. DOL's position has been that the prepared materials constitute "advice" because the employer is free to accept or reject the written material prepared by the consultant. DOL is seeking to reverse this long-held position and would narrow the advice exception (thus broadening the reporting requirement) and expand the information that must be reported to the government when the reporting requirement is triggered. According to its most recent regulatory agenda, DOL has said it plans to release the final rule in August of 2012.

Interfering with the Right to Legal Counsel The net effect of the proposed rule changes would be to discourage employers, particularly smaller employers, from seeking legal representation in the course of a union campaign. Under the requirements, employers and consultants would need to report details of the agreement, information about the employees affected, and all related financial data. It would also severely penalize employers, consultants, and attorneys who inadvertently fail to report activities and agreements that for nearly five decades had fallen squarely within the advice exception. In fact, certain violations could result in criminal sanctions.

The American Bar Association (ABA) filed comments opposing DOL's proposal for this very reason. The ABA specifically said the following about the rule:

The proposed rule threatens to undermine Congress' intent by nullifying the advice exemption included in the original act and, if adopted, the rule would require lawyers to disclose a substantial amount of confidential client information, including the identity of the client, the general nature of the legal representation and a description of the legal tasks performed. The proposed rule also would require lawyers to disclose a great deal of confidential financial information about clients that is unrelated to persuader activities the act intends to monitor.

The ABA also urges the department to withdraw or modify the proposed rule-and reaffirm its longstanding interpretation of the advice exemption-because the new rule threatens to violate the ethical duties of lawyers outlined in the ABA Model Rule of Professional Conduct 1.6 dealing with "Confidentiality of Information." ABA Model Rule 1.6 and the many binding state rules of professional conduct that closely track the ABA Model Rule protect the types of confidential client information that the department would have lawyers disclose.

The department's proposed rule could also seriously undermine both the confidential client-lawyer relationship and the employers' fundamental right to counsel. To encourage trust and candor between the client and its lawyer, their exchanges must be confidential. "Only in this way can the lawyer engage in a full and frank discussion of the relevant legal issues with the client and provide appropriate legal advice," Robinson wrote. By requiring clients and their lawyers to report confidential client information to the government, Robinson warned, "the Proposed Rule could very well discourage many employers from seeking the expert legal representation they need."⁸

Education is Not Intimidation There is a fundamental difference between intimidation and education. While the LMRDA and NLRA are both designed to address misconduct and intimidation by unions and employers, education about and debate over the advantages and disadvantages of union representation are central to our nation's labor policy. As the Supreme Court has noted, the "NLRA as a whole, 'favor[s] uninhibited, robust, and wide-open debate in labor disputes,' stressing that 'freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB.'" Yet throughout the DOL's proposal it equates any communication by employers about the potential disadvantages of unions with intimidation. In fact, the proposal goes so far that even something as innocuous as training or providing materials in a group seminar or conference for employers, could trigger reporting obligations.

DOL Relies on Defunct EFCA Studies to Support Change In justifying its proposed changes, DOL largely relies on the same union-financed, defunct studies used to support EFCA.⁹ Many of the "studies," which claim widespread coercion by employers, rely heavily on anecdotal data obtained from union organizers—hardly an unbiased source. Others seem to suggest any employer communications with employees about unions is coercive, going so far as to condemn

⁸ See <http://www.abanow.org/2011/09/aba-opposes-dol-proposed-rule-on-persuader-activities/>

⁹ See www.uschamber.com/sites/default/files/reports/0908_unionstudies_coercion.pdf.

employers for informing employees of simple facts such as union dues requirements and other basic consequences of unionization.

Letting Union Lies Go Unanswered What DOL's proposed rules would do is hamstring the legitimate and important rights of employers to communicate with employees about the facts of union representation. The law has traditionally allowed unions to exaggerate, promise benefits it may not be able to deliver, and essentially lie to employees in organizing campaigns. In part this has been justified by the fact that election time-frames and employer free speech rights, together with stricter restrictions on what employers are allowed to say, will ensure that an organizer's inaccurate statements can be countered by employers truthfully conveying the facts. The DOL's proposed rule would effectively allow months of exaggerations, undeliverable promises, and outright lies to precede the NLRB's proposed quickie elections, while putting a gag on law-abiding employers.