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## Continuing Vacancies at Enforcement Agencies Slow Administration's Agenda in Labor and Employment Law

The Obama Administration's attempts to fill vacancies at the National Labor Relations Board (NLRB) and the Equal Employment Opportunity Commission (EEOC) have encountered serious opposition and setbacks, and this has led to corresponding delays in expected stepped-up enforcement efforts by these agencies. In particular, on February 9, 2010, U.S. Senate Democrats were unable to break a filibuster against the nomination of Craig Becker to the NLRB. Two Democrats, Senator Ben Nelson of Nebraska and Senator Blanche Lincoln of Arkansas, in addition to thirty-one Republicans voted "nay" on the cloture motion. Mr. Becker was President Obama's nominee to occupy one of three vacancies that the President currently has the opportunity to fill at the NLRB. The President has also offered up a second Democratic nominee, Mark Pearce, as well as a Republican, Brian Hayes, to fill the other two open posts. Mr. Becker's nomination to fill one of the open NLRB spots was an especially controversial one, primarily due to Becker's strong ties to organized labor and his work as a lawyer for both the Service Employees International Union (SEIU) and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO). There remains the possibility, however, that President Obama will use a recess appointment to place Mr. Becker and his fellow nominees on the NLRB on a short term basis.

Meanwhile, the NLRB continues to operate with only two of its five allotted members in place, which has led to a series of court challenges asserting that the Board lacks the necessary quorum to decide cases. A split in the circuits has developed on this question, and the U.S. Supreme Court granted a petition to decide the issue in the case of *New Process Steel v. NLRB*. A decision from the Court is expected this Spring.

Similar opposition and delay have left the EEOC in the same situation as the NLRB – only two of the Commission's five allotted seats are currently filled. The President nominated Jacqueline Berrien as EEOC Chair, along with Chai Feldblum and Victoria Lipnic as Commissioners, but the Senate failed to confirm this package in 2009, and the nominations remain pending.

The net result of the delayed appointments at the NLRB and the EEOC is that anticipated significant changes in the enforcement of labor and employment regulations, once expected to take place in 2009, remain on hold for the time being. But the President will ultimately be able to name a majority of the members of both the NLRB and the EEOC, either through recess appointments or Senate confirmations, which will eventually bring about significant change in the enforcement efforts of both agencies. Employers should therefore remain alert to the agency appointment process and its implications for their workplaces.

Employers should particularly take note that the appointment process has proceeded ahead to a greater extent at the U.S. Department of Labor (DOL), which is likely to lead to expansion of the DOL's enforcement efforts aimed at employers. For instance, President Obama's nominee for Secretary of Labor, Hilda Solis, was confirmed by the Senate on February 24, 2009 by a vote of 80-17. The new Secretary has made clear her intention to increase enforcement of the labor laws within her jurisdiction, including wage and hour, prevailing wage, affirmative action, ERISA, and OSHA. The Senate also confirmed Seth Harris as Deputy Secretary of the DOL on May 21, 2009. On October 14, 2009, the President's nominee to be Administrator of the Wage and Hour Division, Lorelei Boylan, withdrew her name from consideration, and that post remains vacant. But on December 3, 2009, David Michaels was confirmed as Assistant Secretary of Labor for Occupational Safety and Health, and former New York Labor Commissioner M. Patricia Smith was confirmed by the Senate as Solicitor of the DOL on February 4, 2010. Additionally, as recently as February 11, 2010, the Senate confirmed Sara Manzano-Diaz as Director of the Women's Bureau, DOL and confirmed Cynthia Attwood as a Member of the Occupational Safety and Health Review Commission.

The new pro-labor slate of agency personnel at DOL will be armed with an increase in federal funding. The Consolidated Appropriations Act of 2010 will send increased resources to the Labor Department, which Secretary Solis is using to hire several hundred new inspectors and enforcement personnel. Additional funds have also been budgeted for the EEOC and the NLRB, in 2010.

Thus, while some federal agencies continue to have vacancies caused by delays in confirmation of Presidential appointees, employers should not rest easy. The Administration's toughened enforcement agenda has been delayed but not derailed. Venable attorneys are monitoring the situation with respect to administrative agency nominations as well as legal developments at the administrative agency level and will be prepared to assist employers with respect to any questions they may have on these developments.

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