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THE “OBAMA” NATIONAL LABOR RELATIONS BOARD:

THE POTENTIAL USE OF SUBSTANTIVE AND OTHER TYPES OF RULEMAKING TO ENHANCE UNION ORGANIZING

I. OVERVIEW

With the appointments by President Obama of new Members Craig Becker, Mark Pearce, and Brian Hayes, the National Labor Relations Board temporarily returned to full strength. For the first time in more than eight years, Democrats now control the NLRB. In addition, President Obama will soon be able to appoint a new General Counsel of the Board. With these appointments in mind, and despite the inability of organized labor and its supporters to enact the Employee Free Choice Act, unions are finally optimistic that they will be able to increase union membership. They believe they are poised to secure most, if not all, of their primary goals to enhance union organizing efforts. They expect the Obama NLRB to utilize not only the adjudicative process to implement changes, but to also utilize the power of the Board and General Counsel to engage in substantive rulemaking and the issuance of non-substantive interpretive rules, policy statements, and guidelines on the Board’s practices and procedures.1

Following enactment of the National Labor Relations Act in 1935, the initial members of the NLRB decided not to utilize their rulemaking authority to develop substantive law. Instead, the Board chose to formulate law and policy almost exclusively through the adjudication of unfair labor practice charges, i.e., through the decisions issued by the NLRB in individual cases. For the past seventy-five years, members of the NLRB appointed by Presidents of both parties have adhered to that position, with rare exceptions.2

Much has been written regarding prior decisions of the NLRB that may be reversed by the “Obama NLRB” in order to promote union organizing. However, the history of the NLRB clearly indicates that the Obama NLRB could have more long-term impact on labor relations in the United States by utilizing the Board’s authority to engage in substantive and non-substantive rulemaking. There are a multitude of NLRB decisions which overturn prior decisions, and they reflect the relative ease with which prior decisions of the Board can be reversed by subsequent members of the NLRB. In contrast, the substantive rule adopted by the NLRB in 1989 which established eight bargaining units for acute care hospitals remains in effect today.

1 “Substantive rules,” sometimes referred to as “legislative” rules, are generally considered to be rules which implement a statute and have the force and effect of law. As such, if properly implemented they are legally binding on the agency, the public and the courts, until such rules are either modified or revoked. They are, of course, subject to challenge in the courts.

“Interpretative rules” are not legally binding on the public, but they are published by an agency to inform the public of the agency’s opinion of the meaning of the applicable statute and substantive rules.

“Policy statements” are not legally binding on the public, but they are published by an agency to inform the public how the agency intends to exercise its authority to enforce the law. Once published, they must be followed by the agency unless the agency explains the rationale for not following the policy.

“Guidelines on practice and procedure” are rules which describe the manner in which an agency functions and makes its determinations. They are not legally binding on the public.

2 The NLRB’s own Information Quality Guidelines expressly recognizes this longstanding policy. In the section entitled “Information Disseminated through the Rulemaking Process – With Notice and Comment,” it states, “The NLRB rarely engages in rulemaking.” The exception will be discussed herein.
An agency cannot re-write or ignore express statutory language, but the Obama NLRB could effectively implement almost all of the objectives of the Employee Free Choice Act, plus many other goals of unions, through substantive rulemaking and/or other non-substantive changes in agency rules and regulations, statements of procedure, policies and guidelines.

II. THE NLRB’s AUTHORITY TO ENGAGE IN RULEMAKING

Section 6 of the National Labor Relations Act provides the NLRB with broad authority to implement rules and regulations.

Sec. 6. Rules and Regulations. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.  

The Administrative Procedures Act (APA), referenced in Section 6 of the NLRA, prescribes the manner in which administrative agencies of the Federal government, including the NLRB, may propose and establish rules and regulations to implement and enforce legislative acts. The substantive rules, once properly implemented by the agency, are enforceable because they are authorized by statute.

Section 553 of the APA sets forth the following general requirements that a federal agency must follow in order to implement a substantive rule which is binding and enforceable as law:

i. General notice of proposed rule making must be published in the Federal Register;

ii. After the notice is published, the NLRB must provide interested persons a reasonable period of time to comment on the proposed rule;

iii. Following consideration of the comments, the NLRB must finalize the rule and incorporate in the rule a concise statement of the basis and purpose of the rule.

Under the APA, the final rule is then published in the Federal Register and the Code of Federal Regulations is amended to include the rule.

As discussed below, Section 553 provides an exemption to the notice and comment provisions of the APA for “interpretive rules, general statements of policy, [and] rules of agency organization, procedure or practice.” These types of rules, generally referred to as non-substantive or non-legislative rules because they do not have the force of law for the public, may

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3 29 U.S.C. § 156
4 The procedural requirements for informal rulemaking are set forth in 5 U.S.C. § 553.
be made effective at the time they are published if the agency so decides. Despite the exemption, agencies often publish their non-substantive rules prior to the effective date and offer interested persons the opportunity to comment upon the proposed rule. The NLRB has frequently done this with changes in its non-substantive Rules and Regulations and Statements of Procedure.\(^5\)

The substantive rulemaking procedure for federal agencies has become much more involved since passage of the APA in 1946. Federal agencies now must take into consideration the Regulatory Flexibility Act,\(^6\) the Paperwork Reduction Act,\(^7\) and other applicable laws and executive orders.\(^8\) Fortunately or unfortunately, the process of adopting a substantive rule under the APA now involves multiple steps, including the opportunity for judicial and Congressional review. Therefore, the adoption of a substantive rule by the NLRB could take place within a relatively short period of time, it could take several years,\(^9\) or the Board’s efforts could be thwarted entirely. If the NLRB is successful in implementing a proposed substantive rule, however, the legal and political process makes it much more difficult to revise or eliminate the rule because the steps for implementing a substantive rule must be repeated.

III. THE NLRB’s RULEMAKING EXPERIENCE

A. The NLRB Rules and Regulations and Statements of Procedure

While the National Labor Relations Board has rarely utilized its rulemaking authority to issue substantive rules of law, the Board has on many occasions over the years issued non-substantive procedural and jurisdictional rules. The NLRB issued its Rules and Regulations and Statements of Procedure, Series 8, on November 4, 1959. They were published in the Federal Register on November 7, 1959 (24 Fed. Reg. 9095), and became effective on November 13, 1959. These rules and regulations and statements of procedure address the details of processing representation cases and unfair labor practice charges, as well as jurisdictional issues.

While the NLRB’s Rules and Regulations and Statements of Procedure are generally characterized by the Board as non-substantive “rules of agency organization, procedure or

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5 For example, on July 22, 2004, the NLRB published a notice of proposed rulemaking which would amend Section 102.62 of the Board’s Rules and Regulations and Sections 101.19 and 101.28 of the Board’s Statements of Procedure to provide for a new consent election procedure. 69 Fed. Reg. No. 143, pages 44612-44613. The Board included the following paragraph in the notice:

Although the Agency has decided to give notice of proposed rulemaking with respect to these rule changes, the changes involve rules of agency organization, procedure or practice and thus no notice of proposed rulemaking is required under section 553 of the Administrative Procedure Act (5 U.S.C. 553). Accordingly, the Regulatory Flexibility Act (5 U.S.C. 601), does not apply to these rule changes.

7 44 U.S.C. § 3501, et seq.
8 See, for example, Executive Order 12866 of September 30, 1993, as amended by Executive Order 13258 of February 26, 2002 and Executive Order 13422 of January 18, 2007.
9 As discussed herein, the NLRB’s rule establishing eight bargaining units in acute care hospitals was not adopted as a final rule for almost two years. Then, following adoption of the final rule, an interested party was able to obtain an injunction prohibiting implementation of the rule for two additional years while the validity of the rule was under appeal.
practice” which do not require the agency to publish the rules and allow for comments from interested parties, they undoubtedly have a tremendous impact on union organizing and enforcement of the NLRA. However, over the years, proposed changes to the NLRB Rules and Regulations have been published on a number of occasions with an opportunity provided for public comment. Generally, there has been little or no conflict, opposition, or even comment by individuals when such an opportunity is given.

The significance of the NLRB’s ability to revise its Rules and Regulations and Statements of Procedure cannot be overstated. The NLRB cannot re-write or overturn statutory language, but changes in the non-substantive Rules and Regulations by the Obama NLRB could have a significant impact on union organizing efforts, the prosecution of unfair labor practice charges, and the remedies utilized by the NLRB when they find a violation of the Act. For instance, Sections 101.17 through 101.21 relate to representation petitions filed with the NLRB.

Under the current Rules and Regulations, the Regional Office is assigned the responsibility of conducting an investigation to determine “the appropriateness of the unit of employees for the purposes of collective bargaining . . . .” Section 101.20 specifies the procedure to be followed if the union and the employer are unable to reach an agreement with regard to the Board’s conduct of an election. The NLRB might attempt to revise these sections without following the notice and comment provisions of the APA, which could result in legal challenges through the courts.

Section 101.4, Investigation of Charges, sets forth the priority for processing unfair labor practice charges. Charges filed during union organizing campaigns do not currently have priority for investigation, but they could be given greater priority. Sections 101.7 and 101.9 provide rules for the settlement of unfair labor practice charges before and after a complaint is issued. The Obama Board might attempt to modify the rules to impose more restrictions or obligations on settlements in an effort to deter aggressive conduct by employers which might result in an unfair labor practice charge.

The NLRB’s non-substantive Rules and Regulations and Statements of Procedure are not enforceable as law, but the Board and the public generally treat them as binding. From a practical standpoint, interested parties recognize that they ignore an agency’s non-substantive rules, guidelines and statements of procedure at their peril. Conflict with the rule or policy can significantly increase the party’s risk of litigation with the Agency, and litigation is expensive whether it is successful or not.

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For example, on March 11, 1987, the NLRB published a notice of proposed rulemaking in the Federal Register to amend Section 103.20, Posting of election notices, to include a provision requiring employers to post a notice of election 3 days before an election is conducted. Under the rule, the failure to timely post the notice constitutes grounds for setting aside the election. In response to the published proposal, the Board received only nine written comments from individuals and organizations, all but one of which spoke positively of the Board’s proposal. The final rule was then published on July 6, 1987. 52 FR 25215.
B. The Casehandling Manual and Other Manuals of Procedure and Practice

Pursuant to the authority granted the General Counsel of the NLRB in Section 3(d) of the NLRA, the General Counsel issued the National Labor Relations Board Casehandling Manual.\(^1\) The Manual consists of three volumes: Part One, Unfair Labor Practice Proceedings; Part Two, Representation Proceedings; and Part Three, Compliance Proceedings. Revisions to the Manual have been made in 1993, 1999, and 2002.

In issuing and revising the Manual, the General Counsel has been careful to ensure that the Manual is not written to create substantive law which would require application of the notice and comment provisions of the APA. The Purpose of the Manual expressly provides that the Manual “is not a form of binding authority, and the procedures and policies set forth in the Manual do not constitute rulings or directives of the General Counsel or Board.”\(^2\) However, the General Counsel then indicates that the Agency itself should generally follow the Manual, stating:

Although it is expected that the Agency’s Regional Directors and their staffs will follow the Manual’s guidelines in the handling of cases . . . .

The fact that the Casehandling Manual is not a substantive rule of law does not negate its impact on the public. By publication of changes in the Casehandling Manual, the General Counsel and Obama NLRB can inform the public in advance of anticipated changes in the substantive law and, equally important, the positions which the General Counsel will take with regard to particular issues. Most parties attempt to comply with the Casehandling Manual because they wish to avoid a complaint being issued and litigation with the General Counsel. For those parties who do not comply, revisions to the Casehandling Manual assist and direct Regional Offices of the Board in identifying cases with issues that the Obama NLRB can use to make new substantive law through the adjudicative process.

There are other similar documents that are not substantive rules but which have been issued by the National Labor Relations Board or the General Counsel and can be used to effectuate changes which further union goals. For example, Assistant General Counsel Elihu Platt issued “An Outline of Law and Procedure in Representation Cases” in the early 1960s. It has been revised on a number of occasions, the last time being in 2007. The manual is regularly reviewed and utilized by both NLRB attorneys and outside counsel and labor relations experts. It provides another excellent opportunity to provide Board attorneys with alternate legal arguments to past decisions of the Board and interpretations to current law relating to representation cases.

The General Counsel also provides Board attorneys with a Section 10(j) Manual which is designed to provide operational and procedural guidance for the Agency’s attorneys who must consider whether to seek a temporary restraining order against a party alleged to have violated the Act.\(^3\) The full manual is not released to the public, and NLRB employees are cautioned in

\(^{1}\) 29 U.S.C. § 153
\(^{2}\) NLRB Casehandling Manual, Part One, Unfair Labor Practice Proceedings.
\(^{3}\) 29 U.S.C. § 160(j)
the Preface that “[t]his Manual, or any of its contents, in its current form, should not be released
to the public.” The General Counsel of the NLRB conveys its position regarding 10(j) injunctive
relief in the Manual.

With revisions to the Manual, the General Counsel appointed by President Obama may
utilize his authority under Section 10(j) to seek injunctions more frequently during union
organizing campaigns in order to enhance union organizing efforts. Once the General Counsel’s
policy is known, the threat that the General Counsel might seek an injunction under Section 10(j)
during an organizing campaign will create a strong disincentive for employers to wage an
aggressive campaign in response to union organizing. For those employers who do aggressively
campaign, the Obama General Counsel may use Section 10(j) to attempt to quickly resolve
alleged violations of the Act in a manner favorable to the unions, rather than allowing employers
to defend their position through the normal adjudicative procedures established in the Act.

There are many opportunities available to the new Board and General Counsel in the
NLRB’s detailed Rules and Regulations, Statements of Procedure, and various manuals to
enhance the union’s position during an organizing drive. As non-substantive rules, the changes
can be made more quickly, without the burden of complying with the APA’s notice and
comment provisions and the related laws and Executive Orders. And from a practical standpoint,
most employers might simply accept and comply with the new rules to avoid litigation. The
drawback for the unions and the Board, of course, is that such changes would be subject to
reversal more quickly than formal substantive rulemaking. However, revising or eliminating
non-substantive rules changed by the Obama NLRB and General Counsel could still require
more time than simply reversing a prior decision of the NLRB.

C. The NLRB’s Only Significant Substantive Rule

It was over 50 years after passage of the National Labor Relations Act in 1935 before the
Board finally proposed its first major substantive rule. On July 2, 1987, the NLRB proposed a
rule to define the scope of bargaining units in health care facilities.14 Prior to that time, the
Board had only utilized rulemaking to promulgate procedural rules and minor substantive rules
regarding the Board’s jurisdiction over symphony orchestras, private colleges and universities,
and the horse racing industry.

Even in 1987, the administrative process utilized by the NLRB was slow. The final rule
establishing eight bargaining units in acute care hospitals was not adopted until April 21, 1989.15
Then, following the Board’s adoption of the final rule, the American Hospital Association filed a
lawsuit in federal district court challenging the rule’s validity and asking for an injunction to
delay implementation of the rule. The district court issued an injunction, and that injunction
remained in effect for some two years during the course of the litigation.16

14 52 Fed. Reg. 25, 142
15 54 Fed. Reg. 16,336
16 American Hospital Ass’n v. NLRB, 718 F. Supp. 704 (N.D. Ill. 1989)
The U.S. Supreme Court ultimately issued its decision upholding the NLRB’s authority to issue the rule on April 23, 1991, almost four years after the rulemaking process began. In its decision upholding the Board’s authority, the Supreme Court specifically referenced the NLRB’s broad rulemaking authority granted in Section 6. Courts generally defer to agencies’ substantive rules unless the rule is inconsistent with statute and is not irrational, arbitrary or capricious. With little effort, the Obama Board could write a logical, reasoned argument which supports their promulgating a pro-union substantive rule of law.

The Board’s rule establishing eight bargaining units for acute care hospitals remains in effect today. However, indicative of the problems which may arise with any attempt to adopt a new substantive rule of law, the NLRB was not successful in its next efforts to adopt substantive rules of law. On March 5, 1992, the NLRB proposed a second substantive rule, this time to implement the Supreme Court’s decision in Communication Workers of America v. Beck, 487 U.S. 735 (1988). The Beck decision limited the union’s ability to obtain union dues for use on activities unrelated to collective bargaining, contract administration or grievance adjustment. Then, on September 25, 1995, the NLRB issued a proposed rule which would create a presumption in favor of single-location collective bargaining units.

The Board was unsuccessful in implementing either of these rules due to the political pressure applied. Of particular significance, Congress effectively quashed the proposed rule regarding the presumption of single-location bargaining units by attaching a rider to the NLRB’s appropriation bills in 1996, 1997 and 1998 prohibiting the NLRB from expending any funds to create the proposed rule. The proposed Beck rule was withdrawn on March 19, 1996, four years after it was proposed by the Board. The proposed rule regarding single location bargaining units was withdrawn February 23, 1998.

In sum, while the NLRB has broad authority under the NLRA to utilize its rulemaking authority, the process for adoption of a substantive rule of law requires a substantial period of time, and it does not always result in success for the agency. The courts, Congress, and even interested parties can delay and ultimately defeat the final implementation of formal rules and regulations. In large part for those reasons, the Obama NLRB may turn, at least in some instances, to issuing revised manuals with interpretive rules and policy statements with the effect of enhancing union organizing efforts. Such statements and rules are routinely utilized by other federal agencies today, and the effectiveness of such policy statements can be seen by considering the effectiveness of the EEOC’s “Enforcement Guidances.”

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17 American Hospital Ass’n v. NLRB, 499 U.S. 606 (1991)
18 Union Dues Regulations, 57 Fed. Reg. 43,635
19 Appropriateness of Requested Single Location Bargaining Units in Representation Cases, 60 Fed. Reg. 50,146
20 HR REP. No. 104-368 (1996); 63 Fed. Reg. 8890 (Feb. 23, 1998)(withdrawal of the rule by the NLRB referencing the prohibition enacted by Congress)
21 61 Fed. Reg. 11,167
23 § 553(b)(3)(A). This section of the APA also exempts “rules of agency organization, procedure, or practice,” which allows the NLRB to adopt such rules without complying with the APA’s notice and comment provisions.
IV. POTENTIAL CHANGES FREQUENTLY DISCUSSED

There is no doubt the Obama NLRB is studying its options with regard to changing the law to improve unions’ chances of success in union organizing drives. Whether the Board attempts to utilize the notice and comment rulemaking procedure to change the law, or the more informal, non-binding manuals, interpretations and policy statements to informally initiate new rules and procedures and identify possible cases for adjudication is still subject to speculation. However, employers should not be surprised to learn that the Obama Board or the General Counsel appointed by President Obama are issuing new rules or proposed rules. The following are among the most frequently mentioned potential rule changes.

A Reduction in Time Prior to an Election. The NLRB’s current target for setting elections is 42 days following the filing of a petition. Unions, of course, were seeking to require a card-check procedure in the Employee Free Choice Act, but they expect a significant reduction in this 42 day period. While the Board could easily modify its own manuals, and even its Rules and Regulations and Statements of Procedure to a large extent, the statutory language creates a significant problem for the Obama Board.

The NLRA does not prescribe the time period for holding an election after a petition is filed. During President Clinton’s administration, however, the pro-union Board considered changing the time period and concluded that Section 9(c)(1) of the Act and Section 102.63(a) of the Board’s Rules and Regulations required the Board to provide “an appropriate hearing” prior to finding that a question concerning representation exists and directing an election. This interpretation, however, is subject to change, and it might be possible for the Board to decide to hold hearings only after the election has been conducted. It is doubtful that the NLRB could reduce the 42 days to 7 or even 14 days from the filing of a petition, but it certainly could reduce the time period below 42 days. The proposed Labor Law Reform Act of 1977, introduced with variations in the Senate and House bills, would have required an election be held within either 21 or 30 days following the filing of a petition.

Expanded Remedies for Violation of the Act. EFCA included a provision which provided for punitive fines of up to $20,000 for violation of the NLRA. Section 10(c) of the Act provides that the Board, upon finding a violation of the Act, “shall . . . take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.” The Board’s authority is “remedial” and must not be “punitive.” Nevertheless, the Board has wide discretion in determining the remedy that will best effectuate the purposes of the Act.

In 1999, shortly before President Bush assumed the presidency, the Assistant General Counsel issued a Memorandum on Remedial Initiatives. In that memorandum addressed to all Regional Directors, Officers-in-Charge, and Resident Officers, he cited the Supreme Court’s repeated recognition of the broad remedial powers of the NLRB and instructed the Regions to be

26 29 U.S.C. § 160(j)
27 Memorandum OM 99-79.
alert for appropriate test cases in which the General Counsel could seek compensatory damages and front pay in addition to the traditional remedies utilized by the NLRB. While the remedies would not be structured as “fines” or “penalties,” the potential amount of the remedy could easily equal or exceed the proposed fine in EFCA.

In addition to his instruction to the Regions to be alert for possible test cases, the Assistant General Counsel also “encouraged” the Regions to incorporate new remedial measures into settlement agreements. It is reasonable to assume the Obama NLRB and new General Counsel appointed by President Obama will again assume this position. Such a change will reduce the likelihood of employers being able to settle unfair labor practice charges and will result in increase litigation and litigation expense.

Mandatory Interest Arbitration Upon a Finding of Bad Faith Bargaining in Egregious Cases. EFCA also included a provision to mandate interest arbitration after 120 days of bargaining for a first contract. While the Obama NLRB could not impose a specific deadline on employers who are engaged in bargaining a first contract, the Board might attempt to exercise its broad remedial powers to order mandatory interest arbitration in egregious cases of bad faith bargaining as an “extraordinary remedy,” regardless of whether it involves negotiation of a first contract or subsequent contracts. Any attempt by the NLRB to utilize mandatory interest arbitration as a standard remedy for all findings of bad faith bargaining, however, should fail under the current law.

The U.S. Supreme Court has addressed the limitations imposed on the NLRB’s remedial powers when it finds bad faith bargaining in several important decisions. Section 8(d) of the NLRA specifically provides that the parties’ bargaining obligation “does not compel either party to agree to a proposal or require the making of a concession.”28 The Supreme Court, in addressing the limitations of this section, has clearly recognized the Act’s limitation on the Board’s power to order a party to agree to any substantive proposal.

It is “clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.”29

“It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties.”30

Union Access to Employees on or via Company Property. It will be surprising if the Obama NLRB does not seek some means of allowing unions more access to employers’ e-mail systems and private property for the purpose of communicating with employees. For example, revisions may be made to require that employers provide employees’ available e-mail addresses

\footnotesize{28 29 U.S.C. § 158(d)
as part of the *Excelsior* List.\(^{31}\) As with interest arbitration, however, due to the Supreme Court’s recognition of the importance of private property rights the Obama Board faces a major hurdle in providing unions with access to employers’ private property.

The Supreme Court has held that the Board cannot grant a union access to an employer’s private property unless “the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them.”\(^{32}\) Logging camps and mining camps are the typical examples of such workplaces where the employees live “beyond the reach of reasonable union efforts to communicate with them.”

**Expanded Use of Section 10(j) Injunctions.** The number of petitions filed with federal district courts requesting Section 10(j) injunctive relief has already increased, and employers should anticipate this trend. Unions have long argued that the NLRA’s adjudicative procedure, with its appellate process, imposes such significant delays that employers utilize the process to defeat organizing efforts. The General Counsel appointed by President Obama can be expected to utilize his authority granted in Section 10(j) of the Act to seek more injunctions when there is on-going union organizing and during early stages of the processing of unfair labor practice charges. By doing so, the General Counsel can minimize the value of any appeal by an employer and, in effect, obviate the appellate provisions of the Act.

**Expansion and Contraction of Possible Bargaining Units, Possibly Including Recognition of Minority Unions.** Section 7 of the NLRA provides that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .” Section 9(a) of the Act states that “[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of employees *in a unit appropriate for such purposes*, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . .” (Emphasis supplied.)

Employers should not be surprised to find the Obama NLRB receptive to new types of units appropriate for collective bargaining. The Board and General Counsel could encourage such new bargaining units through revisions in their rules, manuals and other publications. The Obama Board is expected to recognize and encourage contract employees to be included in the primary employer’s bargaining unit, and employers should not be surprised if they find that the Obama Board will approve an individual department as an appropriate bargaining unit in the future if the union seeks such a bargaining unit.

On August 14, 2007, a coalition of labor unions, as “interested persons,” filed a 68-page petition proposing that the Board promulgate the following substantive rule:

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31 The *Excelsior* list is the list of employee names and addressed that the employer must provide to the union after a showing of interest has been made to the Board.

Pursuant to Sections 7, 8(a)(1), and 8(a)(5) of the Act, in workplaces where employees are not currently represented by a certified or recognized Section 9(a) majority/exclusive collective-bargaining representative in an appropriate bargaining unit, the employer, upon request, has a duty to bargain collectively with a labor organization that represents less than an employee-majority with regard to the employees who are its members, but not for any other employees.

The petitioners, supported by 25 law professors, argued that prior to the passage of the Act, and in its early years, “members-only minority-union collective-bargaining agreements were as prevalent as majority-exclusivity agreements” and that such agreements were used as a stepping stone to exclusive majority relationships. The petitioners contended that the plain language of Section 7 grants employees the right to bargain collectively through representatives of their own choosing, without regard to majority status, so long as the relationship does not grant exclusivity to the representative and does not require union membership as a condition of employment. Because this right would be meaningless without employer participation, the petitioners argued that a refusal to engage in such bargaining constitutes unlawful “interference” under Section 8(a)(1).

Because it had only 2 members in 2008 and 2009, the Board did not act on this petition. Now that the Board is at full strength, this petition is ripe for consideration. Would the Board actually adopt such a drastic re-interpretation of the Act? Only time will tell.

V. CONCLUSION

The Board has been relatively quiet since the recess appointments of Members Becker and Pearce, but it is most likely “the lull before the storm.” The pro-labor swing of the Obama Board is already evident. On June 9, 2010, the NLRB solicited bids for “procuring and implementing secure electronic voting services both for remote and on-site elections.” The elimination of voting in the workplace has been a goal of unions for many years. Other changes and proposed changes will undoubtedly be forthcoming.

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33 Solicitation No. RFI-NLRB-01.