

## Craig Becker: Unions' Man on the NLRB

By Deepa Subramanian (Atlanta)

On July 9, 2009, President Obama nominated Craig Becker to be a member of the National Labor Relations Board (NLRB). This is bad news for employers. Becker goes beyond espousing pro-labor positions; he occupies the very fringe of the left wing of the labor movement. As a member of the NLRB, he would be in a position to radically change the rules for retailers and all other businesses.

### The Importance Of The Board

The NLRB is a federal agency that sits as a tribunal for cases involving union issues. For a relatively obscure agency, its power is far-reaching. If its members choose to exercise their full authority, the NLRB can make policy for all employers – not just employers with unions. The political leanings of its members can have a tremendous effect on how business is done in America.

To take only one example, the NLRB under President Clinton enacted a policy that required an employer to allow an “employee representative” to sit in on disciplinary meetings. That rule was swiftly revoked by Bush appointees to the NLRB.

Expect a return of that rule, and many other bad policies and rules, if Becker and others of his stripe form a majority on the NLRB.

### The View From The Far Left

Becker is currently Associate General Counsel to both the Service Employees International Union and the AFL-CIO. He is strongly pro-union. That's expected of a Democrat nominee and, standing alone, is not a problem. But even by the standards of labor activists, Becker stands out for his extreme positions.

For example, in a 1993 Minnesota Law Review article he explained that “traditional” democracy should not apply in union elections. He believes that employers should be barred from attending NLRB hearings regarding elections, and from challenging election results even when there are allegations of union misconduct. He wrote: “The law leaves the Board discretion to determine the appropriate parties to hearings in representation cases. It should exercise this discretion by specifying that the only

parties to both pre- and post-election hearings are employees and the unions seeking to represent them.”

Becker also believes that union elections should be removed from the work site and held on “neutral grounds,” or via mail ballots. Employers should also be barred from “placing observers at the polls to challenge ballots.”

Furthermore, Becker favors a new “body of campaign rules” that would severely limit the ability of employers to argue against unionization. Becker wrote that any “captive audience” meeting a company holds in which it states its anti-union positions ought to be grounds for overturning an election. He also contends that a company that distributes anti-union material should be forced to allow union access to its private property to distribute pro-union material.

And Becker goes even further – he's even suggested that unions should be *mandatory*, whether employees want them or not. As reported by the National Right to Work newsletter, Becker stated, “Just as U.S. citizens cannot opt against having a congressman, workers should not be able to choose against having a union as their monopoly-bargaining agent.”

### Looking Ahead

A major piece of legislation that has been frequently discussed in labor law circles and among employers is the Employee Free Choice Act (EFCA). When questioned about EFCA by a Senate committee in July 2009, Becker unsurprisingly stated that he supports EFCA, supports the elimination of secret-ballot elections, and supports card-check certification. When asked whether secret ballots were also the best and most honest way for employees to *decertify* a union, Becker avoided the question and stated that he could not answer this question as it may come before the Board while he is a member.

Becker's appointment does not bode well for retailers and other employers.

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## Sanity Prevails in California

By Andy Scott (Atlanta)

It's true: the California appeals court struck down a particularly nutty employment law, one which required anyone who bought a Los Angeles supermarket to retain the prior owner's employees. The California Supreme Court is due to review the decision.

### Hire Them Or Else

We have written about this law before (see, “*Judge Strikes Down Controversial Ordinance*,” Retail Update, Fall, 2007). The law was passed in the wake of a successful union campaign against a number of Los Angeles grocery-store chains, including Albertson's. When Albertson's subsequently decided to leave the L.A. market, the union apparently feared

that whoever bought the stores might not want to retain all of the Albertson's workforce. And the fear was not without reason: when a new owner buys an underperforming facility, replacing management and some workers is often the first step towards turning the place around. The union apparently feared that these new employees would erode its support at the former Albertson's stores.

The Los Angeles city council rode to the rescue, passing an ordinance that covered all supermarket-sized stores, and that required a “transitional retention period upon change of ownership, control, or operation of grocery stores” to preserve the “vital workforce” of “[e]xperienced grocery workers . . .” Translation: the new owner of a supermarket has to retain the former owner's rank-and-file employees, whether they were any good or not.

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# Holiday Hiring: 'Tis The Season To Be Careful!

By Alan Lesnewich (New Jersey)

Many companies need to take on extra help around the holidays, retail stores more so than most. Poor hiring decisions this holiday season could have repercussions on employers and turn a profitable season into a costly discrimination lawsuit. Well-planned hiring practices that comply with federal, state and local employment laws can help ensure that seasonal employees are well-suited for the job, and that the company is in a position to defend any possible claims. Here are six tips to ensure success and keep the peace in your workplace.

## 1. Carefully Review Application Materials

Avoid becoming an employer who in the midst of litigation concludes "if I had only reviewed the application more carefully." Meticulously examining applications will alert you to significant gaps in employment history. "Victim-like" responses to questions about why the employee left prior jobs and questions left might tell a story. A prudent employer should spend time reviewing these materials.

## 2. Listen To The Applicant

Applicants for seasonal employment need to be interviewed thoroughly. Ask prospects to clarify any unclear information on their applications, which allows you to test applicants' truthfulness and gain more insight into their personalities, character and motivation. The goal of the interview should not be to sell the applicant on the job, but to gather details about the person's employment history by listening. And, of course, remember not to ask unlawful questions about age, ancestry, religion or other protected categories.

## 3. Check References

Be sure to check references. One short telephone call might provide information that can save your company time, money and a lawsuit.

## 4. Use An Offer Letter

Even with seasonal employees, the first line of defense against claims can be a signed offer letter. The use of a short, customized letter can help

prevent wrongful termination claims. The applicant's signature verifies the candidate's understanding of the terms of employment and the limited maximum duration of the job. This small step can provide important evidence in the event of a lawsuit.

Also, if seasonal employees will have access to confidential information, require them to sign a non-disclosure/confidentiality agreement.

## 5. All The Usual Rules Apply

Inform seasonal employees that the company does not tolerate discrimination or retaliation and have them sign an acknowledgement documenting they have been advised. That goes for state laws, too. For example, in New Jersey, all full-time employees must be provided with a notice regarding the state's "whistleblower" law. Many other states have similar requirements.

Remember, even though temporary, each person hired must complete the necessary I-9 forms, and minors must have all required permits.

Be sure that seasonal employees are properly classified and that all federal and state wage-and-hour laws are followed during the holiday season. Make certain that you provide all required breaks, especially to minors, and that overtime is accurately recorded and paid.

## 6. Check Your Benefits Policies

Review your benefits policies to determine if seasonal employees are included. Failure to provide required benefits can lead to expensive consequences.

These suggestions are just a few actions employers should consider in preparing for what already promises to be a busy and stressful season. Implementing this prep-work in advance can help minimize unnecessary "to-dos" this holiday season, and avoid a potential holiday "hangover" for employers hiring seasonal staff.

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The ordinance required the new owner to hire from the pool of employees who worked at the store prior to the change in control, based on seniority. The new employer was required to: 1) retain the employees for 90 days after the store is operational and open; 2) provide each employee with a written performance evaluation at the end of the 90-day period; and 3) "consider" offering continued employment to each employee whose performance was satisfactory. Workers could sue for violation of the ordinance and seek reinstatement, back and front pay, lost benefits, and attorneys' fees.

## The Real Agenda

Conveniently, the ordinance provided that a collective-bargaining agreement with a union would supersede the ordinance's requirements. A Los Angeles County Superior Court judge struck down the ordinance on equal-protection grounds. Now the California appellate court has upheld the lower court's decision, ruling, among other things, that the law impermissibly infringed on federal labor law.

As we noted in our earlier stories about this ordinance, the fear was that other local governments with a pro-union bent would pass similar laws. That hasn't happened, thankfully, and if the California appeals court decision is upheld, we're hopeful that it won't in the future.

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