GORDON & REES LLP

SUMMARY OF PENDING LABOR/EMPLOYMENT LEGISLATION THAT MAY IMPACT THE HOSPITALITY INDUSTRY

and

NATIONAL LABOR RELATIONS BOARD CASE LAW THAT MIGHT BE OVERRULED UNDER THE OBAMA ADMINISTRATION

Presented by
Robert L. Murphy, Esq.
Partner, Gordon & Rees LLP

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SUMMARY OF PENDING LABOR/EMPLOYMENT LEGISLATION THAT MAY IMPACT HOSPITALITY INDUSTRY

AS OF OCTOBER 1, 2010

1. **Employee Free Choice Act (EFCA)**

A. Current Law

- Under the National Labor Relations Act (hereinafter the "NLRA" or "the Act") a union may be recognized either by 1) the union obtaining 50% +1 of ballots cast in a secret ballot election, or by 2) card check recognition.

- In card check recognition, the employer voluntarily recognizes the union in-lieu of an election after the union presents the employer with authorization cards signed by a majority of the bargaining unit employees of the employer.

- The parties are not obligated to reach agreement on a collective bargaining agreement, but only to bargain in good faith.

- There is no mandatory mediation if the parties fail to reach an agreement on an initial contract, and an arbitrator cannot impose a collective bargaining agreement on the parties.

- Finally, employers are not subject to enhanced penalties for committing unfair labor practices during a union organizing campaign or during negotiations for an initial collective bargaining agreement.

B. Law Under the Proposed Legislation

- Under EFCA, the National Labor Relations Board (hereinafter "the Board") would certify the union as the collective bargaining representative upon the union's presentation to the employer of authorization cards signed by 50% + 1 of the bargaining unit. This would effectively end secret ballot elections because the only time a secret ballot election would be held is if the union presents the employer with cards signed by between 30% and 49% of the unit. Unions never do this.

- EFCA would also require that the union and employer engage in mandatory mediation for purposes of reaching an initial collective bargaining agreement if the parties fail to reach an agreement within 90 days of the demand for bargaining for an initial contract. If the parties fail to reach an agreement within 30 days after the demand for mediation, arbitrator(s) will impose an initial collective bargaining agreement on the parties for a period up to two years.

- EFCA will also increase penalties for employers who violate Section 8(a)(1) and (3) of the Act during organization campaign and during negotiations for initial contract. Specifically, employers will be liable to pay liquidated damages of twice backpay for violations of 8(a)(3) and civil penalties up to $20,000 for willful violations of 8(a)(1).

C. Consequences of Legislation

- If EFCA becomes law it would likely have a profound effect upon the hospitality industry (hereinafter "industry").

- First, unions would have a significantly easier time organizing non-union employers, because unions could simply request employees sign authorization cards rather than going through the expense and uncertainty of a campaign and secret ballot election.

- Second, the penalty provisions of EFCA will discourage employers from vigorously campaigning against organization.

- Third, the mandatory arbitration provisions of EFCA make the bargaining process very risky for employers. Unions are likely to have little incentive to bargain in good faith for first contracts when they know that they can rely upon a government appointed---not mutually selected--- arbitrator to set the initial terms of the collective bargaining agreement. The arbitrator may have little or no knowledge of the hospitality business, and the bill provides no guidelines or limits on the arbitrator's authority to set the initial contract's terms.

D. Prognosis

- Presently, Democrats do not have enough votes to pass EFCA.

- However, we are aware that Big Labor is pressuring the Administration and Congressional Democrats to pass EFCA.

- Fortunately, the 111th Congress is almost over, and therefore it is unlikely Congress will pass the bill this Congress. Additionally, it now appears highly likely that Republicans will pick up a sufficient number of seats in the Senate and the House to kill the bill.

- If Democrats cannot pass the bill this Congress, they might try passing part of the bill, e.g., might involve the passage of just the enhanced penalties for employers and the mandatory mediation and arbitration of first contracts.—See note below regarding The National Labor Relations Modernization Act.

2. National Labor Relations Modernization Act (the Modernization Act)

A. Current Law

- Currently, neither the NLRA nor Board law requires an arbitrator imposed collective bargaining agreement if the parties do not reach an agreement on a first contract. The parties' only obligation is to bargain in good faith. If an agreement is not reached after a period of time, the employer is free to challenge the union's majority status as the representative of its employees.

- An employer is not required to notify a union that the employer intends to oppose the organizing drive, nor inform employees of what the employer intends to do to oppose organization.

- Finally, the NLRA does not require the employer to give the union equal access to the employees.

B. Law Under the Proposed Legislation

- The Modernization Act would amend the NLRA to set forth special procedural requirements for reaching an initial collective bargaining agreement following certification or recognition of a labor organization as the exclusive collective bargaining representative of a unit of 20 or more employees.

- During an organizing drive or during the period between when the union was recognized and a first collective bargaining agreement is entered, the Modernization Act would require that priority be given to a preliminary investigation of any charge that an employer (1) discharged or otherwise discriminated against an employee to encourage or discourage membership in the labor organization; (2) threatened to discharge or to otherwise discriminate against an employee in order to interfere with, restrain, or coerce employees in the exercise of guaranteed self-organization or collective bargaining rights; or (3) engaged in any other related unfair labor practices ("ULP") that significantly interferes with, restrains, or coerces employees in the exercise of such guaranteed rights.

- The Modernization Act would increases penalties for these ULPs by requiring the employer to pay: (1) back pay plus double liquidated damages, and (2) additional civil penalties.

- The Modernization Act would require an employer, within 30 days after the Board orders an election, to: (1) notify the designated representative of activities the employer intends to engage in to oppose recognition; and (2) provide such union representative with equal access to the place of employment for organizing purposes.

- Finally, the Modernization Act would make it an ULP for an employer to fail to provide such representative with such notice and equal access.

C. Consequences of Legislation

- This is EFCA by another name, albeit absent the card check provision.

D. Prognosis

- The Modernization Act may be more likely to pass than EFCA and, therefore, poses a greater risk to the industry.

- Once again should Republicans win control over either the House or the Senate, this bill would likely die.

3. The Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers Act (RESPECT ACT).

A. Current Law

- Supervisors are excluded from the definition of employees under the Act and cannot be organized. The definition of "supervisor" is provided in Section 2(11) of the Act.

- Section 2(11) currently defines "supervisor" as: "Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

- Under current law, most individuals employers characterize as front line supervisors meet the definition of "supervisor" and cannot be organized and are not subject to union discipline.

B. Law Under the Proposed Legislation

- The RESPECT Act would amend the definition of "supervisor" contained in Section 2(11) by deleting the job functions of "assign" and "responsibily to direct" from the definition of supervisor.

- Additionally, the RESPECT Act would require an individual to spend a majority of his work time hiring, firing, transferring, suspending, laying off, recalling, promoting, discharging, rewarding, disciplining, or adjusting grievances in order to qualify as a "supervisor."

C. Consequences of Legislation

- Most individuals presently treated as supervisors will no longer qualify as statutory supervisors, because assigning work and responsibly directing others is the task most supervisors spend the bulk of their working hours performing. Thus, a majority of statutory supervisors may soon be classified as bargaining unit employees.

- This will create significant operational difficulties for employers because these former supervisors will no longer be able to give their employer their undivided loyalty and act in the best interest of the employer. These former supervisors will be subject to potential fines and disciplines from the union if they act in their employer's interest, but contrary to the dictates of the union.

- Moreover, these former supervisors may be unable to act in the best interest of the employer because of conflicting loyalties the former supervisors have for their fellow employees.

D. Prognosis

- The Obama Administration and Congressional Democrats may elect to try and pass the RESPECT Act to assuage Big Labor if they cannot pass EFCA or similar legislation.

- The bill will likely not pass this Congress but may very well be reintroduced in the next session of Congress. If Republicans succeed in getting control of either house of Congress, the likelihood of the RESPECT Act's passage is probably remote.

4. Independent Contractor Proper Reclassification Act (ICPRA)

A. Current Law

- Currently an employer can establish a defense for misclassifying an employee as an independent contractor if there is a longstanding industry practice of treating these workers as independent contractors.
- There is no mechanism for a worker to petition for a determination of their status as employee or independent contractor, nor is the Department of Labor and Treasury tasked with investigating misclassifications.

- Employers are not required to notify independent contractors of their tax obligations or the employment protections not applicable to independent contractors.

B. Law Under Proposed Legislation

- ICPRA would eliminate the defense of industry practice as justification for misclassifying workers as independent contractors.

- ICPRA would require the Treasury Department to establish a procedure for workers to petition for a determination of their status or to challenge their classification as an independent contractor, and oblige employers to notify independent contractors of their federal tax obligations, their right to a status determination, and of the labor and employment protections unavailable to them as independent contractors.

- ICPRA would require the Departments of Treasury and Labor to investigate industries identified by the IRS as misclassifying workers and state unemployment offices to track and report misclassifications.

- ICPRA would require the IRS to audit employers identified as misclassifying employees and to report this to DOL.

- Finally, ICPRA would require employers to maintain a list of their independent contractors for three years.

C. Consequences of Legislation

- The elimination of the industry practice defense for misclassifying independent contractors could be very significant. With a down economy, employers in the hospitality industry may attempt to substitute independent contractors for employees in an effort to save money on benefits and payroll taxes.

- ICPRA would make such use of independent contractors riskier because an employer could not use the fact that other employers in the industry similarly use independent contractors as a defense for misclassifying employees.

- Additionally, employers will be less likely to utilize independent contractors out of fear that the employer's obligation to disclose independent contractors' increased tax obligations and limited employment protections will encourage independent contractors and unions to file requests for determinations or lawsuits.

- Finally, ICPRA would increase the cost and administrative responsibilities of hospitality employers utilizing independent contractors and further diminish the likelihood that employers would utilize independent contractors.

D. Prognosis

- ICPRA has yet to be re-introduced this Congress; therefore, it is unlikely to be introduced before the elections.

- Given the possibility that Democrats may lose control of at least one House of Congress, this bill probably does not have a significant chance of passage if re-introduced in the next Congress.

5. Employee Misclassification Prevention Act (EMPA)

A. Current Law

- Currently the law does not make it expressly unlawful for an employer to fail to properly classify workers, although misclassification may result in liability under wage and hour laws, e.g., the Fair Labor Standards Act ("FSLA").

- Employers are not required to notify independent contractors of the limited rights independent contractors possess under wage and hour and other employment laws.

- There is no mechanism for the Department of Labor to report misclassifications to the Internal Revenue Service .

B. Law Under Proposed Legislation

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- EMPA would amend the Fair Labor Standards Act to strengthen enforcement and penalties for misclassification of employees as independent contractors.

- EMPA would make it unlawful for any person to fail to properly classify an employee and unlawful to discharge or discriminate against any individual who has opposed any practice, filed a complaint, or instituted an action based on this statute.

- EMPA would require employers to keep records of independent contractors, and an employer's failure to maintain records would create a rebuttable presumption of employee rather than independent contractor status.

- EMPA would require employers to notify employees and independent contractors in writing of their classification and that their rights to "wage, hour, and other labor protections" depend upon proper classification.

- EMPA would double the liquidated damages amount for violations of the maximum hours/minimum wage laws and notification requirements and permit civil penalties of up to $5,000 per each misclassification (including recordkeeping) where willful or repeated.

- EMPA would also amend the Social Security Act to require states, as a condition to receiving grant money for administration of state unemployment compensation programs, to include a provision for an audit program for purposes of identifying employers who have not registered under state law or who are paying unreported compensation where the effect is to exclude employees from unemployment compensation coverage.

- Finally, EMPA would authorize the Department of Labor to report any misclassification to the Internal Revenue Service.

C. Consequences of Legislation

- Given the poor economy, employers in the hospitality industry have an incentive to reduce costs, including labor costs. Unfortunately, misclassification of independent contractors could be extremely expensive for employers under the EMPA.

D. Prognosis

- EMPA does not appear to have sufficient support to pass this Congress, but the bill could be reintroduced in the next Congress.

6. Patriot Employer Act

A. Current Law

- Currently this proposed tax break does not exist.

B. Law Under Proposed Legislation

- The Patriot Employer Act would provide a 1% tax credit on taxable income to employers who qualify as patriot employers.

- But to qualify, an employer would need to maintain its HQ in the U.S.; pay at least 60% of its employees' healthcare premiums; maintain/increase the number of its workers employed in the U.S. relative to its total workforce; provide employees called to active duty the difference between their salary and their military pay; and provide employees with a certain level of compensation and retirement benefits.

- Moreover, the Patriot Employer Act would require employers to remain neutral with respect to union organizing.

C. Consequences of Legislation

- To remain competitive with other employers availing themselves of this legislation, an employer would have to forego its free speech rights in union organizing campaigns.

- This bill would make union organizing in the hospitality industry easier and likely result in more hospitality employers being organized. This would almost certainly increase employers' operational costs and reduce an employer's operational flexibility.

- The bill also harms employees by failing to give them a complete picture of unions, which potentially could foster dissatisfaction on the part of the employees if they find out they do not like the union representing them. These same employees interact on a daily basis with customers, and their dissatisfaction could jeopardize hospitality employers' relationships with customers.

D. Prognosis

- This bill simply does not appear to have sufficient support at the moment to be brought to a vote this year. Depending on the outcome of the election, however, the bill could be reintroduced in the next Congress.

7. Working Families Flexibility Act of 2009 (WFFA)

A. Current Law

- Currently, there is no requirement that an employer meet with an employee to discuss working a flexible schedule.

- Nor is an employer obligated to provide employees a flexible schedule or provide employees a reason for the denial of a flexible schedule.

- Consequently, there is no basis for administrative action, civil penalties or injunctive relief for failing to provide a flexible schedule.

B. Law Under Proposed Legislation

- The Working Families Flexibility Act (WFFA) would require employers to meet with employees regarding employee requests for flexible work schedules.

- If an employer fails to provide an employee a flexible schedule under the WFFA, the employer would be obligated to provide the employee a legitimate reason in writing for the denial of the flexible schedule.

- The WFFA would also provide employees a mechanism to file a complaint with Department of Labor, and the Administrator of the Wage and Hour Division would be authorized to impose civil penalties or provide other relief for the violation.

- The parties could appeal the Administrator's decision in an appropriate federal court of appeals.

- Finally, the WFFA would permit the Department of Labor to file a civil action for injunctive relief in district court.

C. Consequences of Legislation

- This legislation could have a pronounced affect on hospitality employers. To accommodate employees' requests for flexible schedules, employers might need to hire additional workers to provide for adequate staffing. Presumably hospitality employers would feel the effects of this more than businesses that are less labor dependent and that do not need 24 hour staffing.

- Employers would also lose a good deal of discretion in setting work schedules because employers would be obligated to discuss a requested flexible schedule and to provide a legitimate reason for denying such a request.

- Finally, it is unclear what would constitute a legitimate reason for not granting a flexible schedule.

D. Prognosis

- This bill is unlikely to pass this Congress, but may be introduced in the next session.

- Should the economy improve, this bill will likely enjoy considerable support among Democrats as it would address a complaint frequently raised by working mothers and other caretakers.

8. Labor Relations First Contract Negotiations Act of 2009

A. Current Law

- Currently there is no mandatory binding arbitration when the parties fail to reach agreement for a first collective bargaining agreement.

B. Law Under Proposed Legislation

- The Labor Relations First Contract Negotiations Act ("First Contract Act") is essentially a single prong of the Employee Free Choice Act.

- This First Contract Act would amend the National Labor Relations Act to require mediation and, if necessary, binding arbitration of initial contract negotiation disputes.

C. Consequences of Legislation

- The First Contract Act would result in arbitrator imposed first collective bargaining agreement in virtually all instances.

- As discussed above with the EFCA, unions will have no incentive to bargain in good faith, and the very short bargaining period would all but ensure that the parties would not reach an initial collective bargaining agreement in the statutory time period.

D. Prognosis

- It is unlikely that the First Contract Act will pass this Congress, but expect to see this bill re-introduced next Congress.

- Assuming Republicans do not take over either House of Congress, this bill has a fair chance of passing. The bill is popular with Big Labor and has not been as widely publicized as a "jobs killer" as EFCA.

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9. Alert Laid Off Employees in Reasonable Time Act ("the ALERT Act")

A. Current Law

- Under the WARN Act, employers are obligated to give employees, the State dislocated worker unit and the chief elected official of the unit of local government in which the employment site is located, 60 day notice of a plant closing or mass layoff.

- Currently the Act applies to employers with more than 100 employees (not including employees that have worked less than 6 of the last 12 months or who work on average less than 20 hours per week).

- A covered employer must give notice if an employment site will be shut down, and the shutdown will result in an employment loss for 50 or more employees during any 30-day period.

- A covered employer must also give notice if there is to be a "mass layoff" which does not result from a plant closing, but which will result in an employment loss at the employment site during any 30-day period for 500 or more employees, or for 50-499 employees if they make up at least 33% of the employer's active workforce.

- Further, an employer must give notice if the number of employment losses which occur during a 30-day period fails to meet the threshold requirements of a plant closing or mass layoff, but the number of employment losses for 2 or more groups of workers, each of which is less than the minimum number needed to trigger notice, reaches the threshold level, during any 90-day period.

- Job losses within any 90-day period will count together toward the WARN threshold levels, unless the employer demonstrates that the employment losses during the 90-day period are the result of separate and distinct actions and causes.

- An employer who violates the provisions by ordering a plant closing or mass layoff without providing appropriate notice is liable to each aggrieved employee for an amount including back pay and benefits for the period of violation, up to 60 days.

- An employer who fails to provide notice as required to a unit of local government is subject to a civil penalty not to exceed $500 for each day of violation.

B. Law Under Proposed Legislation

- The ALERT Act would amend the WARN Act to provide that the definition of "mass layoffs" include layoffs across more than one facility.

- The ALERT Act would double the backpay employers owe under the WARN Act.

C. Consequences of Legislation

- The ALERT Act would prevent employers from avoiding WARN Act notification requirements by spreading layoffs among a number of facilities.

- Consequently, employers with multiple hotels would need to devote resources to tracking layoffs at its various hotels to see if the amended WARN Act is triggered.

- Employers' backpay obligation for violation of the bill would double.

D. Prognosis

- This bill will not likely pass this Congress, but is likely to be reintroduced next Congress.

- Given the stagnant economy, this bill might garner significant public support and be hard to vote against.

10. FOREWARN Act

A. Current Law

- See WARN Act immediately above.

B. Law Under Proposed Legislation

- The FOREWARN Act would amend the WARN Act to redefine the terms "plant closing," and "mass layoff" for purposes of the Act and apply to an employment loss of 25 rather than the current 50 employees.

- The FOREWARN Act would cover employers with more than 75 employees (currently, 100 employees), including any parent company of which the business enterprise is a subsidiary. Requires an employer to give 90-day written notice (currently, 60-day) to employees and appropriate state and local governments before ordering a plant closing or mass layoff.

- The FOREWARN Act would require employers to provide affected employees with information regarding benefits and services available to them, including unemployment compensation, trade adjustment assistance, COBRA benefits, onsite access to rapid response teams, and certain other services.

- The FOREWARN Act would also hold an employer who violates such notice requirements liable to the employee for two days pay (currently, back pay for each day of violation) multiplied by the number of calendar days for which the employer was required but failed to provide notice, including interest on such pay.

- Additionally, the FOREWARN Act would permit the Secretary to bring an action in court on behalf of an affected employee to recover any backpay (including interest), benefits, and liquidated damages due.

- Further, the FOREWARN Act would prohibit employees from waiving their rights and remedies provided under this Act (including the right to maintain a civil action) by any agreement or settlement negotiated on behalf of affected employees.

C. Consequences of Legislation

- The FOREWARN Act would have a dramatic affect on the industry. The bill would cover a larger number of employees, the threshold for triggering liability would be reduced, and employers would have to plan layoffs further in advance or face backpay and other penalties for failing to comply with the notice requirements. Finally, the FOREWARN Act would appear to preclude employers from including release language in any severance agreement to cut off such liability.

D. Prognosis

- The FOREWARN Act actually had more support than the proposed ALERT Act listed above; however, this bill will be unlikely to pass this Congress.

- Given the stagnant economy, this bill might garner significant public support and be hard to vote against.

12. Healthy Families Act (the HFA)

A. Current Law

- Currently there is no federal requirement that employers provide employees paid sick leave.

B. Law Under Proposed Legislation

- The Healthy Families Act would apply to employers that employ 15 or more employees for each working day for 20 or more workweeks a year.

- Under HFA, employers would be required to permit each employee to earn at least one hour of paid sick time for every 30 hours worked up to 56 hours per calendar year, unless the employer chooses to set a higher limit.

- The HFA would permit employees to use such time to: (1) meet their own medical needs; (2) care for the medical needs of certain family members; or (3) seek medical attention, assist a related person, take legal action, or engage in other specified activities relating to domestic violence, sexual assault, or stalking.

- The HFA would also authorize civil actions by employees or their representatives for damages or equitable relief against employers who violate this Act.

C. Consequences of Legislation

- Legislation could prove costly for employers in this industry, particularly with respect to unorganized employers that may not currently provide paid sick leave. Additionally, employers in the hospitality industry might incur additional costs associated with the obligation to provide leave under circumstances the employer otherwise might not have been required to give.

D. Prognosis

- The bill likely will not pass this Congress, but the bill is likely to be reintroduced next Congress.

- Its success, like many of the other bills, turns on the economy and the outcome of the election results.

NATIONAL LABOR RELATIONS BOARD CASE LAW THAT MIGHT BE OVERRULED UNDER THE OBAMA ADMINISTRATION

1. Dana Corporation

A. Current Law

- In *Dana Corp.*, 351 NLRB 434 (2007), the Bush Board held that an election bar would not be imposed after a card-based recognition unless:
    - Employees in the unit received notice of the recognition and of their right within 45 days of the notice to file a decertification petition (or to support a petition filed by a rival union), and
    - No valid petition is filed within 45 days of notice being given.
        - However, if a valid petition is filed within 45 days of the notice and the petition is supported by 30% of the unit, the election petition will be processed.

B. Possible Change

- Obama Board may overrule *Dana Corp.* and hold that a voluntarily recognized union will be irrefutably presumed to enjoy majority support for a reasonable period of time after recognition to enable the parties to negotiate an initial CBA.

C. Possible Consequence

- Reinstatement of the voluntary recognition bar would give unions even more incentive to utilize card check recognition rather than the traditional secret ballot elections for organizing purposes. This is so, because unions will not have to worry about dissident employees demanding a secret ballot election immediately after the employer has voluntarily recognized the union.

- This would have a serious consequence for the hospitality industry employers and their employees, because unions frequently use cards that both authorize an election and/or authorize the union to represent the employees.

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- Employees sign the cards in order to get union business agents and any employee interested in organizing those soliciting the authorization cards to stop harassing them with the understanding that the employees only consented to an election.

- Instead, the cards are used to demand recognition based on assertion of majority support. Typically this occurs before the employer has had an opportunity to educate the union about the negative consequences of unions.

D. Prognosis

- The National Labor Relations Board (hereinafter "the Board") recently announced that it would reconsider its decisions in *Dana Corp.*

- Board will likely overrule *Dana Corp*.

2. MV Transportation

A. Current Law

- The Bush Board held in *MV Transportation*, 337 NLRB 770 (2002), an incumbent union in a successorship situation is only entitled to a rebuttable presumption of continuing majority support, which will not serve to bar an otherwise valid decertification, rival union, or employer petition, or other valid challenge to the union's majority status.

- Therefore, when one business entity purchases another entity, there is no bar to a decertification petition or other valid challenge to the union's majority support.

B. Possible Change

- The Obama Board may overrule *MV Transportation*, affirm its previous holding in *St. Elizabeth Manor,* and reinstate the successor bar doctrine, which required employers to bargain with an incumbent union for a reasonable period of time before efforts to decertify the union were permissible.

- Alternatively, the Board could uphold *MV Transportation,* but carve out a narrow exception for the successor bar doctrine to apply in circumstances where there is a "clear successor," i.e. it is clear that the successor will continue the same business with the same employees.

C. Possible Consequence

- Established unions who do not enjoy majority support will nevertheless be able to delay their decertification for a period of time after the successor takes over a property sufficient to secure a successor contract and prevent a decertification petition from being filed or an election being held.

- There is no justifiable reason to impose a successor bar, because most unions will have had sufficient time to establish themselves with the employees under their predecessor, and failed to do so.

- This could negatively impact the value of a hotel if a successor employer is obligated to bargain with and possibly conclude a successor contract with the union even in those instances where the union lacks majority support.

D. Prognosis

- The Board has indicated it will reconsider its holding in *MV Transportation*.

- Given the Obama Board's composition, the Board will likely overrule *MV Transportation* and reinstate the successor bar doctrine.

3. Wurtland Nursing and Rehabilitation

A. Current Law

- In *Wurtland Nursing,* 351 NLRB No.50 (2007), the Bush Board held that a petition signed by a majority of the bargaining unit that stated simply that the employees wanted "a vote to remove the union" constituted objective evidence that the union no longer enjoyed majority support.

- Therefore, the Board found that language sufficient for an employer to lawfully withdraw recognition from the union, i.e., the employer did not need to present additional evidence to demonstrate loss of majority support.

B. Possible Change

- It is likely that the Board will overrule *Wurtland Nursing* and find that a union's loss of majority support cannot be demonstrated simply by a request from the majority of the bargaining unit for an election to remove the union.

- Given this Board's pro-labor sentiment, it could conceivably demand decertification elections in all circumstances where there is objective evidence of loss of majority support and deny employers the right to withdraw recognition absent a decertification election.

C. Possible Consequence

- If the Obama Board requires a decertification election in all instances where there is objective evidence that the union has lost majority support, the cost of decertifying the union will result in employers incurring significant expense in preparing for the election.

- Unions will have an opportunity to engage in coercive tactics to thwart the majority's will.

- The employer will be obligated to continue bargaining/dealing with a union that does not represent the employees during the pending election.

D. Prognosis

- Given the Obama Board's composition, the Board will likely overrule *Wurtland Nursing* and require decertification elections.

4. Shaw Supermarkets

A. Current Law

- The Bush Board held in *Shaw's Supermarkets, Inc.,* 350 NLRB No. 55 (2007), that an employer may lawfully withdraw recognition from a union after the third year of a CBA that lasts for a longer period if the employer can show through objective and untainted evidence that the union lost majority support.

B. Possible Change

- The Obama Board may overrule this decision and prohibit an employer from challenging a union's majority support during the life of a CBA, irrespective of the length of the agreement.

- The justification for this proposed change is that an employer should not be able to repudiate a contract it signed.

C. Possible Consequence

- Encourage unions to seek longer contracts which would bar employer's withdrawal of election or decertification efforts for periods in excess of 3 years.

D. Prognosis

- The Obama Board will likely overrule this case in a future decision.

- However, the Board will likely not reconsider this case, but rather review this issue in a future case involving a four or five year CBA.

5. Toering Electric

A. Current Law

- The Bush Board in *Toering Electric*, 351 NLRB No.18 (2007), held that the General Counsel can only require instatement and backpay if it can show both that the applicant had a genuine interest in employment with the employer and that the applicant applied for himself or had someone apply on his behalf.

- Union organizing often involves the practice of "salting," *i.e.*, the act of a union sending professional organizers or union members to an unorganized jobsite or company, with the goal of obtaining employment and then working to organize the company's employees from within.

- Sometimes, however, a large number of "salts" will apply with the specific goal of having their applications rejected, so that they can then claim that the targeted employer refused to hire them because of its opposition to the union and its supporters.

- The *Toering* Board concluded that "submitting applications with no intention of seeking work but rather to generate meritless unfair labor practice charges is not protected activity."

- In circumstances where the Union encouraged the salts to apply simply to generate unfair labor practices, the salt is not entitled to instatement or backpay.

B. Possible Change

- The Obama Board could overrule *Toering Electric*, and reestablish the presumption that salts, like all other applicants, are "bona fide" employees under the NLRA

- Thus, the Board will return to its prior holding in *FES, (A Division of Thermo Power)*, 331 NLRB 9 (2000).

C. Possible Consequence

- This change would greatly assist unions in organizing unorganized hospitality employers.

- This effectively permits an end run against "no access" policies presently in place, because the salt becomes an employee and has free access to your facility. This typically gives the union more time to organize an employer before you learn of it and guarantee the union at least one vote.

- Perhaps most significantly, the change would provide the union another means by which to provoke an employer to commit unfair labor practices and possibly secure a bargaining order without actually winning a secret ballot election.

D. Prognosis

- The prevailing view is that the Obama Board will overrule *Toering Electric*.

6. Oil Capital Sheet Metals

A. Current Law

- The Bush Board in *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007) reduced the damages that could be claimed by salts in discriminatory refusal to hire cases due to the short period of time salts typically remain employed.

- It did so by requiring General Counsel to demonstrate the period of time the salt would have worked absent the discrimination.

- If the salt would not have worked until the instatement offer was made, the backpay period would terminate whenever the salt would have quit.

- The Board also indicated this analysis would apply to instances where the salt was hired and was later discriminatorily discharged or laid off.

B. Possible Change

- The Obama Board may reverse this and return to the prior case law which holds there is a rebuttable presumption that backpay will continue from the date of the discrimination to the date a valid offer of instatement is made.

C. Possible Consequence

- Overruling this case would mean that the hospitality employer will once again need to produce evidence that the applicant/discriminatee would not have remained employed by the employer for the entire backpay period.

- This would add needless uncertainty for employers because salts typically intend to work only as long as it is takes to achieve the union's goal. Thus, the union is in the best position to demonstrate how long the salt would have worked, but for the employer's unlawful refusal to hire.

- This is contrary to the purpose behind the NLRA which is to make employees whole for their loss. The NLRA does not permit penalties. However, reinstatement of the presumption would likely be punitive because the presumption does not limit the backpay period to that period of time the salt would have worked had the employer not unlawfully refused to hire, discharged, or laid the salt off. Consequently, the salt would likely receive a backpay award that exceeds what the salt would likely have earned.

D. Prognosis

- It would seem likely that the Obama Board will overrule this as it will deter employers from refusing to hire and discharging salts, and it will aid union organizing efforts.

7. Jones Plastics & Engineering

A. Current Law

- The Bush Board in *Jones Plastic & Engineering*, 351 NLRB 61 (2007), concluded that a strike replacement hired on an "at-will" basis may be found to be a permanent replacement where there exists an understanding between the employer and the replacement that the striker is a permanent replacement.

B. Possible Change

- The Board may ban the permanent replacement of economic strikers.

C. Possible Consequence

- Removing an employer's ability to permanently replace strikers would greatly enhance unions' ability to engage in economic strikes in an effort to pressure employers into better terms.

- Given that the hospitality industry is heavily organized and is a labor intense industry, removing employers' right to hire permanent replacements would greatly enhance union bargaining power.

D. Prognosis

- President Obama has indicated that he favors banning the permanent replacement of strikers.

- Thus, it is likely an Obama Board would overrule *Jones Plastic* to hold an "at will" employee cannot be a permanent strike replacement.

8. IBM Corporation

A. Current Law

- The Bush Board in *IBM Corp*, 341 NLRB 1288 (2004), held that an employer does not violate 8(a)(1) of the NLRA by denying unorganized employees the right to have a co-worker present at an investigatory interview that may result in discipline (*Weingarten* rights).

B. Possible Change

- The Obama Board could reverse this decision and return to the Clinton-era decision in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB No. 92 (2000), which held that unorganized employees were entitled to have a co-worker present in such circumstances.

C. Possible Consequence

- This could potentially disrupt operations because employees would be able to involve themselves in the investigation of co-workers. This could facilitate the spread of rumors, harm operations, and encourage union organizational efforts.

D. Prognosis

- The Obama Board will likely overrule IBM Corp and return to its holding in *Epilepsy Foundation.*

9. Oakwood Care Center

A. Current Law

- In *Oakwood Care Center*, 343 NLRB No. 76 (2004), the Bush Board held that it would not find a bargaining unit appropriate that includes both employees employed solely by the user employer (e.g., the employer that utilizes the temporary agencies' employees) and employees jointly employed by the user employer and the supplier employer (e.g. the temporary agency), absent the consent of both employers.

B. Possible Change

- The Obama Board may overrule *Oakwood Care* and find such a bargaining unit appropriate.

- Consequently, jointly employed temporary employees could be accreted into the user employer's permanent workforce if they are found to share a sufficiently significant community of interest.

C. Possible Consequence

- Effect of this will be to entangle temporary agency employers in the labor relations of the hospitality employers, potentially requiring the two entities to jointly bargain over those employees that are treated as "co-employees."

- Organized hospitality employers could lose the benefit of using unorganized temporary employers as the temps could be accreted into the hospitality employer's bargaining unit, thus negating savings and flexibility**.**

D. Prognosis

- The Board will likely overrule this decision when it gets an appropriate case to revisit the matter.

10. Register Guard

A. Current Law

- In *Register-Guard*, 351 NLRB No. 70 (2007), the Bush Board held that employers could legally prohibit employees from using company e-mail systems for personal and other non-job-related reasons, including union solicitations, as long as the restriction or the employer's enforcement of the restriction did not discriminate on the basis of the employees' exercise of Section 7 rights.

- Presently, employees have no statutory right to use the employer's computer equipment, e-mail system or other company property to engage in union activities.

B. Possible Change

- It is widely believed that the Obama Board will follow the position of Chairman Liebman's dissent in *Register-Guard*, which would greatly expand a union's ability to use employer e-mail systems for union-related solicitations.

- In her dissent, now Chairman Liebman wrote that "where employers have given employees access to e-mail for regular, routine use in their work, we would find that banning all non-work related solicitations is presumptively unlawful absent special circumstances."

C. Possible Consequence

- Should Chairman Liebman's dissent become law, employers will effectively be subsidizing and assisting unions in organizing and representing their employees.

- Non-work related emails would take up space in the e-mail system and require the employer to either increase its e-system's storage capacity or engage in a potentially time consuming and costly review of e-mails to determine which e-mails need to be stored and which e-mails can be deleted.

- Finally, permitting employees to utilize e-mail for personal reasons would likely result in reduced productivity and lost hours because employees would utilize the employer's e-mail systems for non-work related purposes during working hours.

D. Prognosis

- At some point employee use of company e-mail and computer systems will be revisited, and the Obama Board will likely overrule *Register Guard*.

11. BE & K Construction

A. Current Law

- *In BE & K Construction Co.*, 351 NLRB 451 (2007), the Bush Board, on remand from the Supreme Court, held that an employer that files a reasonably based but ultimately unsuccessful lawsuit has not engaged in prohibited retaliation, regardless of the motive for bringing the suit and regardless whether the lawsuit is ongoing or completed.

- The Board extended *Bill Johnson's Restaurant's Inc v. NLRB, 461* U.S. 731 (1983), which held that the Board could not enjoin a reasonably based ongoing lawsuit as an unfair labor practice, to apply to completed lawsuits on the rationale that the Supreme Court's reason for precluding injunctive relief for ongoing suits is equally applicable to completed suits, i.e. to protect and preserve individuals' First Amendment right to petition.

- The Board noted that even a reasonably based lawsuit is not guaranteed success and given the significant adverse consequences attendant with Board adjudication, a prospective plaintiff may be deterred from vindicating his or her legal rights.

- The Board concluded that there was no logical basis for finding that an ongoing, reasonably-based lawsuit is protected by the First Amendment right to petition, but that the same lawsuit, once completed, loses that protection solely because the plaintiff failed to ultimately prevail.

B. Possible Change

- In her dissent, Chairman Liebman asserted that the Supreme Court did not hold that all reasonably based suits are constitutionally immune from liability under the Act, and that the Board majority went too far in protecting First Amendment interest over rights protected by the Act.

- Specifically, Chairman Liebman suggested that the Board could find unlawful the following reasonably based but unsuccessful lawsuits:

- The Board could find unlawful a reasonably based but unsuccessful lawsuit, where the employer is indifferent to the outcome but brought the suit simply to impose litigation costs on the union.

- She also suggested that the Board could find unlawful a reasonably based but unsuccessful lawsuit brought as part of a broader course of conduct aimed at harming unions and interfering with employees' rights would be unlawful.

C. Possible Consequence

- A reversal of this decision could have a pronounced effect on the hospitality industry, particularly in this era of renewed union activity and corporate campaigning by unions.

- Hospitality employers need to remain in the good graces of the various government agencies, and unions use corporate campaigns to harm employers' business to pressure employers into recognize the unions or to get the employers to agree to the unions' collective bargaining proposals.

- Should the Board overrule this case, employers will be much more reluctant to file suits against the union for attempting to harm the employer as part of union corporate campaigns for fear that the union will file an unfair labor practice charge.

D. Prognosis

- This case will likely be overruled, and the Board will assert the right to find unlawful reasonably based but ultimately unsuccessful employer lawsuits against unions.

12. Alladin Gaming

A. Current Law

- In *Alladin Gaming LLC*, 345 NLRB 585 (2005), the Bush Board held that an employer did not engage in unlawful surveillance under Section 8(a)(1) of the Act where an employer's manager briefly interrupted off-duty employees soliciting authorization cards on company property (employer dining room shared by managers and employees) by expressing the employer's views on unionization.

- For two minutes the manager quietly stood next to the table where the union solicitation was being conducted. The manager then interjected himself into the conversation and explained the employer's views on unions for eight minutes.

- The Board majority noted that observation of employees engaged in open Section 7 activity on company property does not constitute unlawful surveillance, unless it is done in a way that is out of the ordinary (not routine) and therefore coercive. Additionally, the majority noted that the manager had an 8(c) right to express the employer's views on unionization.

B. Possible Change

- Member Liebman in her dissent made clear that she viewed an employer's or manager's interjection of their views into a private conversation between employee as violative of Section 8(a)(1).

- Liebman would appear to make it a per se unfair labor practice for a supervisor to interrupt a protected conversation between two employees to express their own views on unionization as such conduct would be highly coercive. She noted employers are already free to set meetings to express their views.

C. Possible Consequence

- The Obama Board may overrule *Alladin Gaming* and make unlawful an employer's interruption of employees engaging in Section 7 activity to interject their view on unions.

- The Obama Board may more frequently find employer observation of union activity unusual and violative of the Act.

- Under such circumstances hospitality employers would need to remain vigilant so as to avoid giving unions an excuse to file unfair labor practice charges and the resulting waste of time and money defending or settling the charges.

D. Prognosis

- Given the Board's composition, it is likely *Alladin Gaming* will be overruled, and the Obama Board will find that an employer violates Section 8(a)(1) by briefly interrupting open Section 7 activity to express an employer's view on unionization.

13. Anheuser-Busch Inc.

A. Current Law

- In *Anheuser-Bush, Inc*., 351 NLRB 644 (2007), the Bush Board held that it would not grant a make-whole remedy to employees disciplined for loitering in an unauthorized area where they used illegal drugs and urinated off the employer's roof, despite the fact that detection of the employees was the product of surveillance cameras that had been installed without giving the union notice and an opportunity to bargain over the installation in violation of Sections 8(a)(5) and (1) of the Act.

- The Board in reaching this conclusion noted the discipline was for misconduct and that it would be inconsistent with the policies of the Act, and public policy generally, to reward parties who engage in unprotected conduct and cited Section 10(c) of the Act for the proposition that the Act prohibits make-whole relief for employees disciplined for cause.

B. Possible Change

- The Obama Board will likely overrule *Anheuser-Busch* and effectively apply a fruit of the poisonous tree approach to make-whole relief, i.e., that the employer must prove cause for the discipline without reliance on information acquired by means that violated the Act.

C. Consequence

- Overruling *Anheuser-Bush* will mean that employers will need to be more vigilant in avoiding violating the Act by means of surveillance --- otherwise evidence acquired may not be used for disciplinary purposes without violating the Act.

- Lack of vigilance could create the following difficulty: Employer installs a surveillance camera in a hotel's parking lot without notifying or bargaining with the union. Now assume that the unit employees park there and that it is also used to park hotel shuttle busses. One day the newly installed camera captures a shuttle driver who is a member of the bargaining unit drinking before or during his shift. The employer needs to discipline this individual for violating company policy, driving laws, and depending on the size of the vehicle, possibly DOT. Failure to take action could expose the employer to significant liability, but under the Obama Board the employer would be obligated to provide make-whole relief, removal of the discipline and reinstatement.

D. Prognosis

- The Chairman dissented in Anheuser-Bush so it is likely she would try to overrule this case.

14. United Brotherhood of Carpenters

A. Current Law

- *In United Brotherhood of Carpenters*, 355 NLRB No. 159 (2010) the Obama Board expanded a union's ability to wage a publicity campaign directed at the secondary employer rather than the primary employer with whom the union has a labor dispute.

- Generally the Board protects secondary employers from being enmeshed in primary employers' labor dispute with a union. Section 8(b)(4)(ii)(B) of the Act prohibits a union from engaging in conduct that threatens, coerces, or restrains any person [e.g. a secondary employer] where an object thereof is forcing or requiring any person to cease doing business with any other person [the primary employer].

- In *Carpenters*, the Obama Board upheld the union's right to display large stationary banners just off the secondary employers' property with messages stating "shame on [the secondary employers] for having utilized the primary for construction services." The Carpenter's Board held that stationary bannering directed at the secondary was protected concerted activity.

- The Board analogized the stationary bannering to peaceful handbilling rather than the unlawful picketing of the secondary because the stationary banners did not create the proscribed confrontation at the heart of 8(b)(4)(ii)(B).

B. Prior Law

- The Obama Board's ruling creates a significant change in the law.

- Previously, Board law prohibited unions from engaging in picket activity (marching and carrying signs) at secondary employers, although unions were free to peacefully handbill at the secondary in an effort to persuade the public not to do business with the secondary because of its relationship with the primary.

C. Consequence of the Change in Law

- Unions will now routinely enmesh innocent secondary employers in unions' labor disputes with primary employers in order to cause the secondary to either pressure the primary to capitulate to union demands such as card check recognition or risk losing the business of the secondary employer.

- The unions will simply have its picketers/individuals bannering remain stationary, and the union's handbillers will remain mobile.

- Unions will therefore engage in the same conduct previously found to be confrontational by simply keeping its picketers stationary. Handbillers presumably will continue to be able to move without violating Section 8(b)(4)(ii)(B).