The New Threat to Business

Washington’s Regulatory Agenda

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“Regulation Business, Jobs Booming Under Obama”

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• “If the federal government's regulatory operation were a business, it would be one of the 50 biggest in the country in terms of revenues, and the third largest in terms of employees, with more people working for it than McDonald's, Ford, Disney and Boeing combined.”

• Budgets at regulatory agencies have grown 16% since 2008 – now topping $54 billion.

• Employment at regulatory agencies has grown 13% -- to more than 281,000 – as jobs in the private sector shrank by 5.6%.

• The Obama administration imposed 75 new major rules in its first 26 months, costing the private sector more than $40 billion, according to a Heritage Foundation study.

• According to the Federal Register, 4200 regs are in pipeline – not including EPA, Dodd-Frank, or ObamaCare regulations.
Healthcare Reform

- The Patient Protection and Affordable Care Act (PPACA) calls for the creation of 59 new agencies, commissions, or panels and as many as 139 new regulations; many impacting employers.

- NAW is involved with several business coalitions, including the StartOver! Coalition which we manage, that worked to defeat the PPACA legislation and supports efforts to repeal all or parts of the law.

- NAW also participates at the Steering Committee level in coalitions organized to monitor and impact regulatory agencies as rules implementing the law which impact employers are promulgated.
Healthcare – “Grandfathering” regs

• Existing health care plans are “grandfathered” in the statute – remember the promise that if you like the health care you have, you’ll be able to keep it? The “grandfathered” plans would be protected from the law’s new mandates.

• But the initial regulations to implement the grandfathering provision would have denied grandfathered status to an employer who made virtually any substantive change to its plan. NAW and coalition partners filed comments in response to those interim regulations.

• According to the Obama Administration’s Department of Health and Human Services, the overly-prescriptive rules implementing the “grandfathered” health plans will result in a loss of 49 to 80 percent of small employer plans, 34 to 64 percent of large employer plans, and 40 to 67 percent of individual insurance plans.
More on Healthcare reform

• Legislation to completely repeal the PPACA passed the House of Representatives this year but was defeated in the Senate.

• PPACA as enacted would have required companies to send 1099 forms to any entity to which they paid more than $600 a year – in the aggregate. After an aggressive lobbying effort, the 1099 provision was repealed; a huge victory for the business community.

• Legislation has been introduced in both houses of Congress to repeal the law’s employer mandate, and we are working on adding co-sponsors to the bills in both the House and Senate.

• We have also supported legislation to prevent implementation of the new law until the pending lawsuits challenging its constitutionality are resolved by the Supreme Court.

• NAW is also actively supporting legislation to repeal PPACA's annual health insurance fee on health insurance providers. This $87 billion Health Insurance Tax will be passed through to premium payers (in other words a substantial "HIT" on employers), putting additional upward pressure on the cost of private insurance coverage.
Organized Labor’s Agenda – moved from Congress to regulatory agencies

• "It's not enough to have fair wages and a safe workplace - workers also need a voice on the job! Some people say that, given the state of the economy, we can't afford unions right now. They've got it backwards. Today unions are more important than ever. Workers are facing unprecedented challenges, and they need the voice on the job that unions provide."
  – Secretary of Labor Hilda Solis, speaking to the AFL-CIO, Sept. 2009

• “We are committed to ensuring that workers are paid a fair wage, have a voice in the workplace, are provided a safe workplace and have a secure retirement . . . We will not rest until the law is followed by every employer, and each worker is treated and compensated fairly.” (Secretary of Labor Hilda Solis)
Department of Labor (DoL) – Overview

- The Department identifies “Declines in Unionization” as a negative influence on their achieving their goal.

- **Union jobs are, by and large, good jobs. Employment in a unionized workplace has been associated with higher wages, better health and retirement benefits, and quality training. . . Thus, many of the Department's outcome goals are furthered by high rates of union membership.”** (Department of Labor Strategic Plan, Fiscal Years 2011-2016, emphasis added)

- According to the Bureau of Labor Statistics, private sector union “density” fell again in 2010, to just 6.9%.
The Coalition for a Democratic Workplace

- NAW serves on the Management and Steering Committees of the Coalition for a Democrat Workplace (CDW), a broad-based coalition of more than 600 organizations.

- CDW led the successful fight to prevent enactment of the so-called Employee Free Choice Act (EFCA), or card check, until the elections in November 2010 ensured that EFCA could not be enacted.

- With EFCA no longer a threat, CDW – and NAW – changed our focus from legislation to regulation to oppose the onslaught of pro-labor rules and regulations proposed by President Obama’s Department of Labor and National Labor Relations Board (NLRB).
New DoL Program – Plan/Prevent/Protect

• Every regulated entity “will be asked to assemble plans, create processes, and designate people charged with achieving compliance. They will be required to implement these plans and evaluate their effectiveness in achieving compliance. While the Labor Department can be flexible about which path is chosen to achieve compliance, compliance will be non-negotiable under the ‘Plan/Prevent/Protect system.’”

• Agencies participating include the Occupational Safety & Health Administration (OSHA), the Office of Federal Contract Compliance Programs (OFCCP), the Wage & Hour Division (WHD).

• DoL contends that while some employers pursue safe workplaces, many operate on a “Catch Me If You Can” basis and ignore safety regulations until and unless an OSHA inspector is at their door.
OSHA

• Injury & Illness Prevention Program – I2P2

• May require employers to provide workers opportunity to participate in developing program and monitoring compliance;

• Plan will be required of all employers, even those with a perfect safety record;

• Failure to develop, implement and maintain plan will place company in “non-compliance”;

• No proposed rules have been released as of September, although they were expected this summer.
And more from OSHA

• In January, 2010, OSHA announced a Proposed Rule on Occupational Injury and Illness record-keeping to add a column in which employers would report musculoskeletal disorders (MSDs).

• The business community, especially small business, strongly opposed the new record-keeping requirement citing the significant cost of compliance and believing this was a step toward attempting to impose new ergonomics regulations.

• In January, 2011, OSHA temporarily withdrew the proposed rule to allow them to obtain greater small business input.

• In May, 2011, they announced that they are re-opening the public record and will proceed with the new MSD-reporting proposed rule.
Wage and Hour Division (WHD) –
“Right to Know” and “We Can Help”

• WHD’s new programs to enforce the Fair Labor Standards Act (FLSA) will impose additional record-keeping rules that will require employers to demonstrate – and share with workers – the employers’ compliance with FLSA wage regulations.

• Employers will be required to notify workers of their rights under FLSA, share information on how their wages are computed, and ensure workers “are better positioned to meaningfully participate in workplace decision-making.”

• “WHD’s customer-service strategies will aim to increase the involvement of workers and community organizations in identifying and reporting alleged workplace violations.”

• “We Can Help” will help workers understand “how to file a complaint with WHD to recover wages.”

• “We Can Help” will include a program to refer workers to the American Bar Association if sufficient legal help is not available from the department.
And more from Wage and Hour . . .

• DoL announced in May (2011) the launch of a free smartphone app – a timesheet “to help employees independently track the hours they work and determine the wages they are owed.”

• “This information could prove invaluable during a Wage and Hour Division investigation when an employer has failed to maintain accurate employment records.”

• For workers without smartphones, a printable work hours calendar is available, complete with information on how to file a wage complaint against their employer with WHD.

• WHD plans expansions to additional smartphones, Spanish and English, and means to calculate “tips, commissions, bonuses, deductions, holiday pay, pay for weekends, shift differentials and pay for regular days of rest.”
“We’re looking for innovative ways to increase public awareness of the laws enforced by DOL to ensure fair and safe workplaces. The challenge is to utilize inspection and compliance information from the hotel, motel, restaurant and retail industries to help workers and consumers take educated action.”

The plan is a contest with a $15,000 prize to the entrant who comes up with the most innovative way to increase public awareness (exposure) of citations/charges issued by WHD and OSHA.

So workers and consumers can do what? Boycott the retailers who are cited? If a worker, sue the employer?
Office of Federal Contract Compliance Programs (OFCCP) – Affirmative Action Initiatives

- OFCCP enforces non-discrimination and affirmative action obligations of federal contractors under the Rehabilitation Act and a Vietnam-era Veterans assistance program.

- Last month Director Patricia Shiu described her agency as in a “period of renaissance” with an ambitious regulatory agenda, more intense compliance reviews, and a 35% increase in staff in 2 years including 200 new compliance officers….the “most significant effort in regulatory reform in years” to “put some teeth” into the regulations.

- Of particular importance are new or increased regulations enforcing pay equity for women and requiring affirmative action for those with disabilities.

- According to management-side attorneys, the agency is now filing more complaints and requesting contractors’ pay data in almost every compliance review.
More from OFCCP

- Last year OFCCP imposed “two and two” standard as trigger for demanding more compensation data from federal contractors: if there is more than a $2,000 or 2% pay gap between the highest and lowest paid employees in a particular group, OFCCP will require the contractor to explain the disparity using 12 or more specific factors. Virtually all employers fail the “two and two” test.

- Regulators used to have to have a prima facie case of discrimination during a “desk audit” of a contractor before doing on-site compliance review; now once a contractor fails the “two and two” test, the burden is on them to prove that they are not discriminating.

- While real pay discrimination is infrequent today, contractors will have to spend money doing internal compensation analyses to defend their pay practices from OFCCP investigators.
National Labor Relations Board (NLRB) – politicized

• The President recess-appointed two Board members, and named an Acting General Counsel – unable to get them confirmed by Senate. Recess appointee Craig Becker is a former AFL-CIO and SEIU counsel.

• The Board hired a PR consultant and a government relations staff – virtually unprecedented and suggests more activism.

• The Board has rule-making authority, but has rarely used it – only one substantive rule in 75 years – but has proposed two major rules in less than a year, and has hired an outside consultant to provide advice on rulemaking.
NLRB member Becker – radical labor advocate

• SEIU/AFL-CIO lawyer Becker is implementing an unprecedented anti-employer agenda on the NLRB:

• “On these latter issues employers should have no right to be heard in either a representation case or an unfair labor practice case, even though Board rulings might indirectly affect their duty to bargain.”

• Employers "should be stripped of any legally cognizable interest in their employees' election of representatives."


**NLRB/DoL – EFCA through the back door?**

- Rulemaking to increase union membership – *Notice of Employee Rights under NLRA and “Ambush Elections”*
  - Keeping employers out of the picture – *DoL’s Persuader Agreements rule*
  - Micro-units in collective bargaining – *Specialty Healthcare*
  - Premise access – *Roundy’s*
  - Facilitating wage disputes – *“Right to Know” and “We Can Help”*
  - Overturning business decisions – *The assault on Boeing*
**NLRB -- Notice of Employee Rights**

**Under National Labor Relations Act**

- NLRB just announced its final rule requiring all regulated businesses to post a “Notice of Employee Rights Under National Labor Relations Act” virtually identical to the DoL requirement which applied only to contractors.

- Employers must post a specific notice provided by the NLRB with no changes in size, language or font; if employer regularly communicates with employees by intranet or internet, the notice must be posted that way as well; if 20% of workers are proficient in a language other than English, notice must be provided in their language.

- The notice explains employees’ rights to organize in detail, but gives short shrift to – or fails to mention at all – their right to NOT be represented by or join a union, their right to decertify a collective bargaining agent, or their right to object to the use of forced fees for politics.

- CDW will likely file a legal challenge to the new rule arguing that the Board lacked the statutory authority to impose it; other court challenges will also be filed.

- Unless the court challenges are successful and the a temporary restraining order is issued enjoining the Board from enforcing the rule, it takes effect and the notice must be posted effective November 14th.
NLRB “Representation Case” Ambush Elections rules

- These new rules governing union certification elections are designed to impose back-door EFCA by mandating “quickie” or “ambush” elections.

- The new rules could result in elections being conducted in as little as 10-21 days.

- Unions spend months collecting signatures in card check campaigns with the employer unaware of the effort; quickie elections would deny the employer the opportunity to make its case to employees and employees the opportunity to hear from both sides.

- The new rules would set shorter times for hearings and filings, require employers to quickly provide voter lists with phone numbers and email addresses in electronic form, but . .

- Deny the employer the right to raise some legal issues, attempt to verify the eligibility of voters, or challenge pre-election rulings – until after the election.

- The Board is fast-tracking this proposal, providing the very minimum required time for public comment and only one public hearing, despite receiving 30,000 public comments.
Office of Labor-Management Standards (OLMS) – “Advice Exemption” and Persuader Agreements

• Employer arrangements with consultants who do NOT interact with workers are currently & Disclosure Act (LMRDA), but OLMS just announced new rules calling for disclosure of a wide range of advice now available to employers without disclosure.

• The new rules would make it virtually impossible for employers to retain counsel to get advice on how to handle an organizing campaign, especially small companies which do not have in-house counsel (according to prominent management attorneys).

• “An employer and consultant each must file a report concerning an agreement or arrangement pursuant to which the consultant engages in activities that have as a direct or indirect object to, explicitly or implicitly, influence the decisions of employees with respect to forming, joining or assisting a union . . .”

• Covered counsel includes “drafting, revising, or providing a persuader speech, written material, website content, audiovisual or multimedia presentation, or other material or communication of any sort, to an employer for presentation, dissemination, or distribution to employees, directly or indirectly . . .”

• Some labor lawyers believe this infringement on employer free speech would even extend to a trade association providing a generic document about labor organizing to its member companies.
NLRB Cases – Specialty Healthcare

• NLRB just announced its anticipated decision reversing decades-old standards governing how collective bargaining units are determined.

• Under the previous standard, after a union petitioned for a group of employees to represent an “appropriate” bargaining unit, the employer could challenge that unit asking that additional employees with “community of interest” be included in the proposed unit.

• Under Specialty, the union’s requested collective bargaining unit will be deemed to be appropriate “despite [an employer’s] contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit” (emphasis added).
Specialty Healthcare – the ramifications

- Labor unions will be able to target “micro units” within a company, singling out small groups of workers sympathetic to the union.

- Employers could be faced with multiple bargaining units with separate wages, benefits, work rules, grievance procedures, etc., within a single workplace even if the workers are cross-trained, do effectively the same job, and work within a few feet of one another (think about pickers in a warehouse being in separate bargaining units based on the product they take from the shelves).

- GOP Board member Brian Hayes, in his dissenting opinion, accused his NLRB colleagues of acting “for the purely ideological purpose of reversing the decades-old decline in union density in the private American workforce.”
Back door EFCA: Quickie elections, Persuader Agreement Disclosure, & Specialty Healthcare

- With these three measures, the Administration and organized labor would do through regulations what EFCA would have done:

  - Quickie elections – “ambush” elections – allowing unions to organize for many months and denying the employer any reasonable time to communicate with its workers or to ensure a fair and proper election;

  - Persuader agreement disclosure to make it difficult for an employer to even pick up the phone to talk to a labor lawyer without the risk of committing unfair labor practices they were not even aware of; and

  - Specialty Healthcare to enable unions to carve out “micro bargaining units” within a single workplace so the employer could be dealing with multiple organizing efforts and/or bargaining units and terms of employment – all at the same time.
NLRB Cases – Roundy’s

- Roundy’s Inc. and Milwaukee Building and Construction Trade Council

- The issue is access to business premises by non-employee union organizers if an employer grants access to other non-employee individuals or groups (i.e., Salvation Army or Girl Scouts).

- An employer could be required to provide access to its property even to non-employer union activists actively urging boycott of that company’s product.

- Board *may* be looking at electronic as well as physical access.

- This could have impact not just on retail and shopping centers, but on any business using a non-union company for a construction project.
NLRB – redefining “concerted activity”

- Under the NLRA, it is illegal for an employer “to interfere with, restrain, or coerce” employees for participating in “concerted activities for the purpose of collective bargaining or other mutual aid or protection” – **whether or not they are unionized**.

- “Concerted activity” has historically been defined as one or more employee[s] talking with or acting on behalf of or in concert with other employees.

- Under a 2007 Board decision (*Five Star Transportation*), individual activities may be protected if they are shown to be the “logical outgrowth” of concerted activity.

- Under the new Board, the definition of “concerted activity” has been broadened to potentially include a single employee acting alone.
In a number of recent cases, the Board has issued complaints against employers who discharged or disciplined employees for posting derogatory material on Facebook, Twitter or YouTube, arguing that such postings were “concerted activity”.

NLRB Acting General Counsel Lafe Solomon said in a June, 2011 speech that every regional NLRB office has “at least one pending case presenting issues about employee use of social media or an employer's policies concerning the use of such media”.

On August 18, 2011, Mr. Solomon issued a memorandum in which he reviewed 14 recent cases involving “the use of social media and employers’ social and general media policies.” Some cases were decided in favor of the employees, others supported the employer.

In several cases, company policies that restricted employees’ use of social media were declared unlawful because employees would reasonably construe the overly board policies to prohibit protected concerted activity.

Every company would be well advised today to consult their own counsel and establish a social media policy that will meet the Board’s test regarding protected activity.
**NLRB Complaint Against Boeing**

- Boeing decided to establish second production line for its 787 Dreamliner aircraft in its new (non-union), almost complete Charleston, South Carolina facility.

- NLRB issued a complaint in April alleging that Boeing violated Federal labor laws by moving the production to South Carolina from its Washington state facility in retaliation for previous union strikes.

- Boeing denies the unfair labor practice charge, arguing that they have increased, not decreased, employment in Washington state and that the decision to build in SC was a business, not a labor, decision.

- NLRB is seeking an order against Boeing requiring the company to move the second production line to Washington.

- The case is now proceeding but will likely be in court for years; in the interim, legislation will be voted on in the House of Representatives in mid-September to effectively reverse the Board’s Boeing decision.
**Response to Labor assault**

NAW, the Coalition for a Democratic Workplace (CDW) and other employer groups have responded to each labor assault:

- Comments were filed with the Dept of Labor and the NLRB in the “Notice of Employee Rights” poster rulings.
- CDW and NAW have joined in one of the lawsuits challenging the NLRB’s Notice Posting rule. Amicus briefs were filed in the NLRB’s Roundy’s and Specialty Healthcare cases.
- A request to file a brief was filed in *Mental Health Assoc* dealing with off-site electronic voting; while the Board denied the motion, they announced they would NOT use this case to promote a broad off-site electronic voting policy.
- Comments were filed with the Department of Labor in opposition to its proposed “Persuader Agreement” rulemaking.
- Comments were submitted in response to the NLRB’s “quickie election” Representation Case rule-making.
- NAW and CDW worked for the enactment of legislation (which has now passed the House) to reverse the Board’s Boeing decision and to block implementation of a number of other DoL and NLRB rulings/decisions.

This fight is a long way from over!

- Protecting our members from this labor assault is one of NAW’s top priorities
- We expect the Board and DoL to continue implementing their aggressive pro-union agenda
- Several decisions are expected soon, especially from the NLRB
- It is likely that more of these labor cases will end up being litigated so there is a lot yet to be done
- Thank you for all that you are doing – and please stay involved and engaged!