

BT Labor Relations' Top Ten Traditional Labor Stories Of 2011 (Part 2)

December 30, 2011 | [Labor And Employment](#)

Here's the conclusion to our countdown of the top ten traditional labor issues that made the news this year. Our top five are below; see numbers 6-10 in [yesterday's post](#).

5. The Board mandates employee-rights posters, but lawsuits delay implementation

In a move that will affect virtually all private employers, whether unionized or not, [the Board approved a final rule](#) in August which requires employers to notify employees of their rights under the NLRA via an 11 x 17 inch poster. A copy of the required poster, along with more information about the posting requirement is available on the [Board's website](#). This posting requirement elicited strong opposition from many business groups, including the [National Association of Manufacturers](#), the National Federation of Independent Businesses, and the [U.S. Chamber of Commerce](#), who have all filed lawsuits against the Board challenging the posting requirement. In response to these suits, the Board [has delayed](#) implementation of the rule, most recently postponing the effective date of the posting requirement until April 30, 2012.

So for now, employers can leave the NLRB poster off their walls, but all employers should stay informed on this issue as the implementation date approaches.

See our previous coverage of this issue [here](#).

4. Social media becomes a new battleground

Facebook came to traditional labor this year, as the Board put a new emphasis on social media as a form of protected activity. [Several complaints](#) were filed against employers during the early part of the year alleging unfair labor practices, after the employers disciplined or terminated employees for posts related to their jobs on their personal Facebook and other social media accounts. In August, General Counsel Solomon [issued a report](#) summarizing the cases and detailing the Board's position on appropriate social media policies. These actions by the Board caution employers to be wary of protected speech rights under the NLRA before taking action against employees for off-duty Facebook chatter and to also make certain that company policies on social media do not chill or limit discussion regarding working conditions. Recent General Counsel decisions have also brought up the issue of potential surveillance violations if employers monitor employees' off-duty social media use. This continues to be a hot issue, and as we move into the new year, employers should stay cautious when it comes to social media.

See our previous coverage of this issue:

- [New Facebook Cases - No Protected Concerted Activity, But Is It](#)

RELATED PRACTICE AREAS

Labor and Employment
Labor Relations

3. NLRB complaint against Boeing for alleged unlawful transfer of work creates national controversy

By far the traditional labor story that created the most national headlines this year was the Board's [complaint filed against Boeing](#) in April alleging unlawful transfer of work over Boeing's decision to open a new 787 Dreamliner assembly plant in South Carolina instead of building the new planes at Boeing's facilities in Washington. The key controversy wasn't really the Board's allegation of unlawful transfer of work, but its proposed remedy – shut down the brand new billion-dollar South Carolina plant and move the work to Washington. Unsurprisingly, this suggestion turned some heads in the business world. [Accusations](#) of job-killing by the NLRB soon followed, as well as [legislation](#) introduced in Congress to prevent the NLRB from mandating such a remedy. Boeing litigated the issue for much of the year, but ultimately [agreed in December to settle](#) the case as part of a new contract with the Machinists union for its Washington facility. The union agreed to keep production of the Dreamliner in South Carolina in exchange for a promise by Boeing to build its new 737 MAX aircraft in Washington. This agreement officially ended the saga for Boeing, as the Machinists union withdrew its charge. As for the Board, it remains to be seen whether negative fallout, if any, from its decision to issue the complaint will affect its public perception in the future.

See our previous coverage of this issue:

[- An Active Day at the NLRB](#)

[- Boeing and the Union Reach a Tentative Agreement to End Contentious Battle Over Cross-Country Relocation](#)

2. Board implements “quickie election” rules despite strong criticism from dissenting Member Brian Hayes

While it took all year, the Board succeeded last week in finalizing what critics have dubbed its “quickie election” rules. The new rules eliminate avenues for employers to challenge union activity prior to an election and also shorten time periods during which employers can campaign against unionization. The rules had been [proposed](#) by the Board in June and generated significant criticism from business groups who found the rules blatantly pro-union and accused the Board of denying employers their rights to free speech. Also highly critical of the proposed rules was the sole Republican member of the Board, Brian Hayes, who said he [considered resigning](#) prior to the Board's meeting to vote on the rules just to prevent them from being implemented. Member Hayes did not resign, but instead argued for more time to consider the rules, a request that was denied by his fellow Board members. The Board voted 2-1 in November to finalize the rules and the final version was published in the [federal register](#) last week. As we move into 2012, this may not be the end of the issue, however. The rules should take effect in April, but [a lawsuit](#) filed by the U.S. Chamber of Commerce challenging the new rules may change this. Stay tuned.

See our previous coverage of this issue:

- [NLRB Releases Update on “Quickie Election” Vote Scheduled Tomorrow](#)
- [Strategic Resignation by Member Hayes May Derail Scheduled Board Vote on “Quickie Election” Rules](#)

1. Behind-the-scenes politics leave an uncertain future for the NLRB

As our list so far has illustrated, 2011 was an active year for the National Labor Relations Board, with several controversial decisions, new administrative rules, and Congressional scrutiny. But all of these issues that we’ve included in our list are really just a byproduct of a more aggressive, and some would say politically motivated, Board. And the composition of the Board, which has driven most of the change we’ve seen this year, not only heads our list for 2011, but provides a starting point for looking into the 2012 crystal ball. 2011 saw an increased politicization of the Board, with a contentious division between the Board’s Democratic and Republican members. Sole Republican member Brian Hayes even went so far as to threaten resignation in November over what he saw as the Board’s unwillingness to take the time to consider the full effects of its controversial “quickie election” rules prior to drafting a final version of the rules. The Board also made the controversial decision to publish those rules without allowing the customary time for dissenting members (in this case, Hayes) to prepare and publish a dissent.

All of this behind-the-scenes politics has played out in the shadow of the looming expiration of Member Craig Becker’s appointment to the Board. President Obama appointed Becker as a recess appointment in 2010, which means that his term expires on December 31. Once his term expires, the Board (which is intended to have five members) will be left with only two remaining members. This loss of quorum will prevent the Board from issuing any new decisions or rules until a third member is appointed, under the U.S. Supreme Court’s [New Process Steel](#) decision. President Obama has attempted to prevent this from happening by [recently naming](#) two additional nominees for Board member positions, both Democrats. (The President also nominated Republican Terence Flynn to the Board last January, but his nomination has not yet been considered by the Senate.) However, the Senate so far has refused to hold a vote on any of the nominees and additionally [appears to be avoiding](#) declaring a formal recess so that the President cannot name a recess appointment as he did with Becker. This collection of events is set to leave the National Labor Relations Board effectively useless come midnight Saturday. As we ring in the new year, the Board may be closing up shop.

Stay tuned to BT Labor Relations as we see what 2012 brings.