

## US SUPREME COURT TO DECIDE LEGITIMACY OF UNDERSTAFFED NLRB

By: *Mark T. Broth, Esq.*  
Email: [mbroth@devinemillimet.com](mailto:mbroth@devinemillimet.com)  
Phone: 603.695.8558

MARCH 12, 2010

The National Labor Relations Board (NLRB), an independent federal agency created in 1935, is responsible for overseeing enforcement of the National Labor Relations Act (NLRA), which governs relationships between labor unions and private sector employers. The NLRB's primary responsibilities are to oversee the process by which employees decided whether or not they want to be represented by labor unions and to assure that both labor and management fulfill their statutory obligations to bargain in good faith. The majority of NLRB cases are either representation cases or unfair labor practice (ULP) claims. Under the NLRA, representation cases and ULP claims are initially decided by officials in the NLRB's several regional offices or by administrative law judges. Appeals from those decision can then be taken to the NLRB.

The NLRA authorizes the appointment of five (5) individuals to serve as the NLRB board members. Appointments are made by the President, subject to confirmation by the US Senate. Traditionally, the majority of seats on the NLRB are held by the sitting President's political party. As a result, the NLRB's decisions, which establish the rules which all unionized private sector employers must follow, tend to reflect an Administration's pro-business or pro-labor attitudes.

The polarization of the US Senate, as exemplified by the ongoing struggles over health care, climate change and other pending legislation, has also effected the ability of a sitting President to fill NLRB vacancies. On December 20, 2007, the NLRB, which then consisted of only 4 members (one unfilled vacancy), recognized that the expiring terms of 2 board members would leave the Board with only 2 members as of January 1, 2010. As President Bush was unable

### Labor, Employment & Employee Benefits

**Mark Broth, Chair**  
603.695.8558  
[mbroth@devinemillimet.com](mailto:mbroth@devinemillimet.com)

**Newton Kershaw**  
603.695.8571  
[nkershaw@devinemillimet.com](mailto:nkershaw@devinemillimet.com)

**Patricia McGrath**  
603.695.8537  
[pmcgrath@devinemillimet.com](mailto:pmcgrath@devinemillimet.com)

**Anthony Augeri**  
978.475.9108  
[aaugeri@devinemillimet.com](mailto:aaugeri@devinemillimet.com)

**Margaret O'Brien**  
603.695.8631  
[mobrien@devinemillimet.com](mailto:mobrien@devinemillimet.com)

**Anne Scheer**  
603.410.1708  
[ascheer@devinemillimet.com](mailto:ascheer@devinemillimet.com)

**Laurel Van Buskirk**  
603.695.8565  
[lvanbuskirk@devinemillimet.com](mailto:lvanbuskirk@devinemillimet.com)

**Anne Trevethick**  
603.695.8725  
[atrevethick@devinemillimet.com](mailto:atrevethick@devinemillimet.com)

DEVINEMILLIMET.COM

EMPLOYMENT@DEVINEMILLIMET.COM

to obtain Senate approval of his candidates to fill the vacant and soon to be vacant positions, the NLRB voted to delegate authority to the remaining 2 members to perform all of the agency's duties and responsibilities. President Obama has also been unsuccessful in getting his nominees approved. Accordingly, since January 1, 2008, 2 NLRB members (Wilma Liebman (Democrat) and Peter Schaumber (Republican)) have performed all of the duties of what was intended to be a five member board. The 2 member NLRB has issued over 400 decisions since January 1, 2008.

Since 2008, the federal Circuit Courts of Appeal have issued conflicting decisions over whether the 2 remaining NLRB members constitute a quorum with the legal authority to issue decisions. In the case of New Process Steel v. NLRB, which is scheduled for oral argument on March 23, 2010, the Supreme Court should resolve this question. If the Court finds that the Board as currently constituted lacks the authority to issue decisions, then many of the 400+ decisions issued in the last several years may need to be relitigated.

**The Devine, Millimet & Branch Labor, Employment and Employee Benefits Group offers this free Friday E-Mail Alert service to provide information on recent developments in labor, employment and employee benefits law. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at [employment@devinemillimet.com](mailto:employment@devinemillimet.com).**

"This is not a legal document nor is it intended to serve as legal advice or a legal opinion. Devine, Millimet & Branch, P.A. makes no representations that this is a complete or final description or procedure that would ensure legal compliance and does not intend that any reader should rely on it as such."

#### Office Locations:

111 Amherst Street  
Manchester, NH 03101  
T 603.669.1000  
F 603.669.8547

300 Brickstone Square  
Andover, MA 01810  
T 978.475.9100  
F 978.470.0618

43 North Main Street  
Concord, NH 03301  
T 603.226.1000  
F 603.226.1001

