

# On The Hill

NELA's Washington Report



January 2012

## New Year, Same Old Politics

In a stunning political move, President Obama utilized recess appointments to fill the remaining vacancies on the National Labor Relations Board (NLRB). The appointees included union lawyer Richard Griffin, Department of Labor official Sharon Block, and NLRB counsel Terence Flynn. (See note below.)

The NLRB is an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent and remedy unfair labor practices committed by private sector employers and unions. Prior to the President's appointments, the NLRB was unable to convene the requisite three-member quorum and function at its full capacity.

By overriding the Senate approval process, the President may have advanced his political agenda as the move comes after a long and persistent pattern of partisan brinksmanship that has put Republican Congressmembers and the White House at odds. Only a few months ago the President said that the nation's economic recovery is being hampered by "the worst kind of partisanship" in Washington, and that lawmakers should "put country ahead of party."

What does this political gridlock mean for NELA's legislative agenda? In short – the development of a long-term strategic plan. Both the Arbitration Fairness Act (AFA) and the Civil Rights Tax Relief Act (CRTRA), NELA's two-pronged legislative priorities, have been filed in the House and Senate this Congressional session and referred to their respective committees. Although a hearing was held regarding the AFA in the Senate Judiciary Committee, neither bill awaits imminent mark-up. Our focus has been to "lay the foundation" for these bills as well as educate Members of Congress and their staff on the merits of the legislation – with an eye towards bipartisan support.

With respect to the CRTRA, NELA is working with the Congressional offices of Senator Jeff Bingaman (D-NM) and Representative John Lewis (D-GA) to calculate the "score" or budgetary cost to implement the CRTRA of 2011. (Scoring requests can be made to the Joint Taxation Committee by any member of Congress.) Scoring for the bill's predecessor in the 107th Congress was \$632 million over ten years. That estimate was subsequently reduced – by approximately \$200 million – when relief for the double taxation of attorneys' fees in employment and civil rights cases was enacted into law in 2004. The remaining costs of approximately \$432 million over ten years are well under an average of \$50 million a year.

As the presidential election year looms near, the President will still have an uphill battle even if the power dynamics in Congress shift. In DC, partisan politics has become the name of the game. According to a new CNN/ORC International poll released on January 16, only 11% of Americans approve of how Congress is handling its job.

### In this issue:

- New Year, Same Old Politics
- Franken Amendment Extended For 2012
- Richard Renner, Former NELA Board Member, Submits Comments To DOL On Proposed Rules Under Dodd-Frank Act
- President Obama Makes Recess Appointments To Key Administration Posts
- D.R. Horton, Inc. Case A Win For Employees' Rights
- Senator Cardin To Co-Sponsor Arbitration Fairness Act
- NELA Meets With EEOC Officials
- NELA Joins Alliance for Justice Urging Code Of Ethics For The U.S. Supreme Court
- Gross Legislative Fix Update
- Wal-Mart Legislative Fix Update
- DOL Proposes Rules On Companionship And Live-In Worker Regulations

### **Franken Amendment Extended For 2012**

On December 18, 2011, President Obama signed H.R. 2055, "The Consolidated Appropriations Act, 2012," which included language extending the "Franken Amendment" for an additional fiscal year.

The Franken Amendment prohibits awarding any Federal contracts in excess of \$1 million appropriated or made available from the Defense Appropriations Act of 2010 unless the contractor agrees not to enter into or enforce forced arbitration agreements against their employees or independent contractors for claims related to Title VII of the Civil Rights Act of 1964 and various tort claims. H.R. 2055 can be found here:

<http://www.gpo.gov/fdsys/pkg/BILLS-112hr2055enr/pdf/BILLS-112hr2055enr.pdf>.

Our special thanks to NELA USERRA Leader, Kathryn S. Piscitelli, for her contribution to this legislative update.

### **Richard Renner, Former NELA Board Member, Submits Comments To DOL On Proposed Rules Under Dodd-Frank Act**

On November 3, 2011, the Department of Labor, via the Occupational Safety and Health Administration (OSHA), published proposed revisions to the whistleblower protection regulations for Sarbanes-Oxley Act of 2002 cases to reflect changes enacted by the Dodd-Frank Act.

Former NELA Board Member Richard Renner, in his role as Legal Director for the National Whistleblower Center, submitted comments to this proposed regulation.

Click here to view the comments:

<http://www.whistleblowers.org/storage/whistleblowers/documents/blogdocs/nwcdolcomments20120103doddfrankfinal.pdf>.

Of significant note is the proposed amendment to the advance notice requirement for complaints in U.S. District Court from 7 days after filing in federal court to 15 days before filing. The proposed regulation retains Section 1980.110(a) requiring a petition for review to enumerate all legal issues claimed and be filed within 10 days of issuance (not receipt) of the Administrative Law Judge's order.

### **President Obama Makes Recess Appointments To Key Administration Posts**

As referenced above, on January 4, 2012, President Obama made recess appointments of four individuals to fill these key administration posts:

- **Richard Cordray**, Director, Consumer Financial Protection Bureau
- **Sharon Block**, Member, National Labor Relations Board
- **Terence F. Flynn**, Member, National Labor Relations Board
- **Richard Griffin**, Member, National Labor Relations Board

President Obama said, "The American people deserve to have qualified public servants fighting for them every day - whether it is to enforce new consumer protections or uphold the rights of working Americans. We can't wait to act to strengthen the economy and restore security for our middle class and those trying to get in it, and that's why I am proud to appoint these fine individuals to get to work for the American people."

### ***D.R. Horton, Inc. Case A Win For Employees' Rights***

In *D.R. Horton, Inc. and Michael Cuda*, the National Labor Relations Board (NLRB) held that a company may not take away employees' rights to collective action through private arbitration agreements. In its decision, the NLRB stated, "employers may not compel employees to waive their [National Labor Relations Act (NLRA)] right to collectively pursue litigation of employment claims in all forums, arbitral and judicial."

Under the NLRA, employees have the right to engage in concerted activity to address workplace concerns. Employer D.R. Horton attempted to enforce its arbitration agreement by dividing a group of workers facing overtime violations into single units in spite of the fact they shared the same complaint against their employer.

NELA Member Cliff Palefsky and plaintiffs' counsel in *D.R. Horton* said about the case, "If workers had lost the right to bring class actions that would have undermined so many acts of Congress."

NELA and its public interest organization, The Employee Rights Advocacy Institute For Law & Policy, has published "Ten Frequently Asked Questions About *D.R. Horton, Inc.* And Answers For Employee Rights Advocates."

Click here to read the Institute's FAQ on the decision: [www.nela.org/DRHorton](http://www.nela.org/DRHorton).

Click here to read the decision: <N:\Legislative & Public Policy\On The Hill, The Employee Advocate and E-newsletter Contributions\On The Hill\2012\1-2012\DR Horton.pdf>.

### **Senator Cardin To Co-Sponsor Arbitration Fairness Act**

After his Chief Counsel met with a NELA contingent on Lobby Day 2011, Senator Ben Cardin (D-MD) has decided to co-sponsor the Arbitration Fairness Act (AFA/S. 987). The AFA would amend the Federal Arbitration Act (FAA) to make unenforceable contracts forcing binding arbitration of employment and consumer claims.

Special thanks to NELA Members Alan Banov, Jerry R. Goldstein, Kenneth Lemberg, Geoffrey H. Simpson, and Deyka Spencer for their advocacy efforts. Additional thanks to NELA Executive Board Members David R. Cashdan, Bruce A. Fredrickson, and Daniel B. Kohrman, who also serves as NELA's Vice President of Public Policy.

### **NELA Meets With EEOC Officials**

On January 17, 2012, NELA met with EEOC officials to follow-up on issues raised by NELA members at NELA's 2011 Annual Convention held in New Orleans, Louisiana.

Joining me for the meeting were Daniel B. Kohrman, David R. Cashdan, NELA Liaison to the EEOC, and Joseph V. Kaplan, NELA's advisor on federal sector employment issues. The Commission was represented by Claudia A. Withers, EEOC Chief Operating Officer, Patrick O. Patterson, EEOC Senior Counsel, and Cathy Ventrell-Monsees, EEOC Senior Attorney Advisor for Commissioner Stuart J. Ishimaru.

NELA representatives raised several operational concerns including making available to charging parties copies of the respondent's statements, charge verifications, and other documents contained in the investigation file, as well as prompt notification to federal sector complainants of the right to bring suit. The EEOC responded that it continues to discuss the issues raised by NELA members, and is vetting them internally and externally with its stakeholders.

Many operational issues are also addressed in the Commission's Draft Strategic Plan, which can be found at <http://www.eeoc.gov/eeoc/newsroom/1-18-11a.cfm>. Comments may be submitted via the EEOC's web site and are due by February 1, 2012.

### **NELA Joins Alliance for Justice Urging Code Of Ethics For The U.S. Supreme Court**

On January 9, 2012, the Alliance for Justice (AFJ) and ten other reform-minded organizations, including NELA, sent a letter to the justices of the U.S. Supreme Court calling upon them to bind themselves formally and voluntarily to the Code of Conduct for United States Judges. Currently, the Code, which spells out both general and specific rules of conduct for federal judges, does not apply to the U.S. Supreme Court.

"It is time for the same rules that guide district and circuit court of appeals judges to apply to Supreme Court justices," the letter asserts. With "the integrity of our judicial system at stake," the groups call on the Court to "take it upon itself to agree to be bound by the Code," and "do so unequivocally and publicly."

To read the letter to Chief Justice, click here: <http://www.afj.org/connect-with-the-issues/supreme-court-ethics-reform/coalition-letter-to-chief-justice-roberts.pdf>.

### **Gross Legislative Fix Update**

NELA and other advocates met with staffers from the offices of Senators Tom Harkin (IA-D) and Charles Grassley (IA-R), as well as other stakeholders, to discuss the next steps for a legislative fix for the U.S. Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, which held that a "mixed-motive" jury instruction is "never proper" in a suit brought under the Age Discrimination in Employment Act.

Long-term negotiations came to a stand still when business community advocates ceased discussion on what potentially would have been a bipartisan bill. Still, NELA and our coalition partners are currently working with Congressional offices to file a bill in the upcoming months with bipartisan sponsorship from several members of Congress.

### **Wal-Mart Legislative Fix Update**

As a member of the Leadership Conference on Civil and Human Rights' Employment Task Force, NELA has been closely involved in discussions with other advocacy organizations regarding the aftermath of the U.S. Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, which ruled the lawsuit did not satisfy a requirement of the class-action rules that there be questions of law or fact common to the class in order to achieve class certification.

A subcommittee of this group was recently involved in drafting a legislative fix to the decision with hopes of introducing the bill by early February. Interested sponsors of the bill are Representative Rosa DeLauro (D-CT) and Senator Barbara Mikulski (D-MD), who worked together on the the Lilly Ledbetter Fair Pay Act.

NELA and The Employee Rights Advocacy Institute For Law & Policy formed a *Wal-Mart* Task Force to assist workers' rights lawyers and their clients in responding to the *Wal-Mart* decision. To learn more about the Task Force and its available resources, e-mail Matt Koski, The Institute's Paul H. Tobias Attorney Fellow, at [pht\\_fellow@employeeadvocacy.org](mailto:pht_fellow@employeeadvocacy.org).

### **DOL Proposes Rules On Companionship And Live-In Worker Regulations**

On December 15, 2011 President Obama announced a proposal from the U.S. Department of Labor (DOL) to revise the Fair Labor Standards Act (FLSA) rules that would ensure fair pay for approximately 1.8 million workers who provide in-home care services for the elderly and infirm. According to Labor Secretary Hilda Solis, "this new rule would ensure that these hardworking professionals who provide valuable services to American families would receive the protections of minimum wage and overtime pay that nearly every employee in the United States already receives under the FLSA."

NELA, in conjunction with other national employee rights organizations, plans to submit comments to the proposed rules which are due to the DOL on February 27, 2012.. To provide comments on this important proposal, visit the federal rulemaking web site at [www.regulations.gov](http://www.regulations.gov). More information, including the proposed rule and fact sheet, is available at [www.dol.gov/whd/flsa/companionNPRM.htm](http://www.dol.gov/whd/flsa/companionNPRM.htm).

Sincerely,  
Eric M. Gutierrez,



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