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NLRB Taking A Look At Recusal Process Amid Ethics Dispute

By **Braden Campbell**

Law360 (June 8, 2018, 11:01 AM EDT) -- The National Labor Relations Board is examining how it decides whether its members should sit out labor disputes because of conflicts of interest amid an ethics controversy over former Littler Mendelson PC attorney and current board member Bill Emanuel's participation in a pivotal December decision on the NLRB's joint employer test, the agency announced Friday.

The agency said it will "examine every aspect of [its] current recusal practices," including how it decides when members should recuse themselves and who should have a say in these decisions, and issue a report after it finishes the review.

"Recent events have raised questions about when board members are to be recused from particular cases and the appropriate process for securing such recusals," NLRB Chairman John Ring said in a statement. "We are going to look at how recusal determinations are made to ensure not only that we uphold the board's strong ethical culture, but also to ensure each board member's right to participate in cases is protected in the future."

Longstanding ethics rules bar board members from taking part in any "particular matter" in which they or their firm represented a party, or from adjudicating a case involving a party "for which the member performed work," for two years after taking their seat.

The ethics controversy stems from the board's December ruling in a case involving an Iowa builder known as Hy-Brand Industrial Contractors Ltd. The decision overturned the Obama NLRB's 2015 decision in a case involving waste management company Browning-Ferris Industries that broadened the board's test for holding two affiliated businesses liable for each other's labor law violations, known as its joint employer test.

The decision pulled heavily from the Republican-penned dissent in Browning-Ferris. Labor advocates and lawmakers seized on this as evidence of bias, claiming Emanuel, a Republican, should have sat out the 3-2 vote because Littler represented a party in BFI.

The NLRB voted in February to vacate the Hy-Brand decision after Inspector General David Berry said Emanuel should have recused himself from the case due to the Littler connection, and the board on Wednesday denied Hy-Brand's motion to reconsider vacating the ruling. Emanuel did not take part in either vote.

Former NLRB member Marshall Babson told Law360 on Friday that he thinks the board is reviewing its ethics rules out of caution.

“I don’t agree with IG Berry’s conclusion that Hy-Brand was a continuation of deliberations in BFI,” said Babson, a Reagan board appointee who now represents businesses in labor disputes at Seyfarth Shaw LLP. “Having drawn that conclusion, I understand the board wants to be very careful and make sure that everybody is acting above reproach.”

Morgan Lewis & Bockius LLP attorney and former Republican board member Harry Johnson III echoed Babson’s sentiment in a call with Law360. He said it’s a “good idea” for the board to look at its recusal process now to stave off recurring ethical crises.

“At some point in time the board is going to look different, then there will be [more] recusal motions … asking for Democratic [member] recusal,” Johnson said. “[Unless they do something formal and comprehensive,] that’s what the ‘new NLRB’ is going to look like from here on out every year, with all kinds of recusal motions being filed.”

Both members said they believe recusals were rare when they were on the board. But even if the board ultimately expands its rules so members have to sit out more cases, “there are enough cases to work on” that it shouldn’t have trouble reaching a three-member quorum on most cases or, when issuing new precedent, finding a case all five members can opine on, Babson said.

--Additional reporting by Vin Gurrieri. Editing by Emily Kokoll.

Update: This story was updated with more information on the ruling and comments from interested parties.
