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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Congress Goes Too Far With Bill To Curb NLRB, Attys Say

By **Ben James**

Law360, New York (September 19, 2011, 4:49 PM ET) -- Last week's passage of a bill that would bar the National Labor Relations Board from seeking to force employers to relocate work as a remedy for labor law violations is a knee-jerk reaction to the agency's controversial action against Boeing Co., lawyers say.

H.R. 2587, the Protecting Jobs from Government Interference Act, was introduced by Rep. Tim Scott, R-S.C., on July 19, prompted by the unfair labor practices complaint issued by NLRB acting General Counsel Lafe Solomon against Boeing on April 20.

That complaint alleges that Boeing's decision to place an assembly line for its 787 Dreamliner at a nonunion facility in South Carolina amounts to illegal retaliation for past strikes by unionized workers in Washington state, and seeks an order that would force the company to relocate that line to Washington.

The bill, passed by the U.S. House of Representatives on Thursday, would amend Section 10(c) of the National Labor Relations Act and prohibit the NLRB from ordering employers "to close, relocate or transfer employment under any circumstance."

The change could apply to any complaint for which the NLRB has yet to make a final adjudication, including the Boeing case, which is currently proceeding before an administrative law judge in Seattle.

But Congress' attempt to alter the NLRA and influence the ongoing Boeing case is ill-conceived, according to labor attorneys.

The NLRA, by and large, has served the country well for more than seven decades, said Seyfarth Shaw LLP partner and former NLRB member Marshall Babson, who called H.R. 2587 "unfortunate."

"I think it's a lack understanding of how the process works, combined with the economic climate, that's produced this response," Babson said.

Babson called Boeing "one of the jewels of American manufacturing," and said "we don't have a lot of jewels left."

Requiring an employer to relocate or not relocate work, or close down or reopen a particular facility, are extraordinary remedies, but “they go to the heart of the statute” and can be very important in an appropriate case, Babson said.

“We are faced with a very narrow legal question, which I do think that the [NLRB] and courts are capable of sorting through. The question is whether we are going to let them do it,” Babson said.

Don Schroeder, a partner at Mintz Levin Cohn Ferris Glovsky & Popeo PC, called the allegations in the Boeing complaint “threadbare,” and said the NLRB attorneys prosecuting the case would face an uphill battle.

“The agency seems to be going out on a very thin branch with this case,” Schroeder said. “I'm surprised at how little evidence they have right now.”

But Schroeder also said that making legislative changes to the NLRA was a “draconian remedy” and a “knee-jerk reaction” to Solomon’s decision to issue a complaint in the Boeing case.

Solomon is pushing the boundaries of his office, but those efforts will be curtailed by changes in the makeup of the NLRB under future administrations, and potentially by court decisions, according to Schroeder.

“I think trying to rewrite the NLRA is dangerous and not necessary,” Schroeder said.

Not all attorneys believe lawmakers should leave it to the courts, however.

Morgan Lewis & Bockius LLP's Philip Miscimarra said the House’s passing of H.R. 2587 was the very thing Congress ought to be doing.

“It's certainly the appropriate role of Congress to do exactly this, which is look at how the act is being applied and either make adjustments that appear warranted, or to, in some cases, ensure the board applies the act consistent with what Congress originally intended,” Miscimarra said.

According to Miscimarra, H.R. 2587 would solve a significant “process problem” posed by NLRB litigation, including the Boeing case. Such litigation can drag on for years, which can leave the subject of the challenged business decision, such as Boeing's plant in South Carolina, as a “frozen asset” for the pendency of the litigation.

That hurts employers even if they ultimately prevail in the case, which is not a rare occurrence, according to Miscimarra. And under existing law, employers can avoid a "take it back, put it back" remedy if the board concludes that such a remedy is financially burdensome or not feasible, Miscimarra said. In those situations, all H.R. 2587 would do is get rid of the years of uncertainty that come with litigation, he said.

“I regard the bill as furthering both existing employment policy and fostering economic stability by helping to address the significant process problem that exists whenever challenged business decisions involve significant investment or business changes,” Miscimarra said.

H.R. 2587's critics, some of whom have dubbed the legislation the Outsourcers' Bill of Rights, have complained that it would undermine job growth in the U.S. by opening the door for companies to retaliate against workers who engage in NLRA-protected activity by shipping their jobs out of the country.

But that argument does not account for the jobs that are created as the result of work transfers, Miscimarra said, in addition to the jobs that are eliminated as a result of lengthy NLRB litigation causing economic damage.

It also doesn't account for the fact that moving operations can be a costly, challenging undertaking that often stems from reasons that have nothing to do with unions, Miscimarra said.

“It's myopic to think these types of fundamental business decisions always turn on union-related considerations,” he said.

At least for the near future, the debate over the merits of the act may be more academic than practical. The bill is expected to face stiff opposition in the Senate, and the prospects for President Barack Obama signing it into law are scant. Schroeder compared the bill to the controversial Employee Free Choice Act, which also would have amended the NLRA and never garnered sufficient support in Congress.

“I really think it's a bit over the top for the House Republicans to go down the road of passing this legislation,” Schroeder said. “It's not going to go anywhere.”

While concerns about job growth and the economy are understandable, legislative changes to the legal framework that governs labor disputes in the U.S. is not the answer, Babson said.

“The two things that labor relations professionals should be focusing on are preserving the principles embodied in the statute which have served us well for a very long time, and preserving process under the statute,” Babson said.

--Editing by Christine Caulfield and John Williams.