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Labor Law
Labor Board Nominee's Legal Work Raises Recusal Questions


By Hassan A. Kanu

A brief exchange between Sen. Elizabeth Warren (D-Mass.) and federal labor board nominee William Emanuel during a recent hearing raises some provocative questions about how Emanuel might handle conflicts of interest stemming from decades of representing businesses in workplace disputes.

Emanuel last worked as a management-side lawyer and shareholder in Littler Mendelson PC in Los Angeles. The firm houses the country's largest labor and employment law practice and generally represents employers. Emanuel has submitted a financial disclosure form listing some 49 former clients, including FedEx, JPMorgan Chase, and Safeway Inc. He has also signed an ethics agreement pledging to recuse himself for a two-year period from board cases involving any of his former clients as well as parties represented by Littler Mendelson.

But Emanuel isn't likely to take Warren's suggestion that he also sit out any case involving the hotly contested question of whether employers can force their workers to sign class action waivers.

Emanuel has represented parties on the class action waiver issue in a case before the board, and his firm is counsel in a number of others. He has also co-written briefs in U.S. Supreme Court cases arguing that the agreements aren't unlawful restraints on employees' right to engage in collective activity. That position contradicts a National Labor Relations Board decision made during President Barack Obama's administration.

The issue is still very much alive. The board has put cases presenting that question on hold, and the Supreme Court is expected to rule on it in October. Warren said Emanuel has "prejudged" the class action waiver question and shouldn't rule on it if he is confirmed, a position other left-leaning observers in labor and employment have taken.

"I don't believe, however, that recusal will apply to issues, and the fact I may have advised or written a brief in the past doesn't mean I'd have to recuse," Emanuel said. He answered questions at a Senate committee hearing July 13, as did Marvin Kaplan, President Donald Trump's other NLRB nominee.

A Warren spokeswoman didn't immediately respond to Bloomberg BNA's request for comment.

Issue Recusal?
Snapshot

- NLRB nominee wrote legal briefs on class action waiver issue that could come before board
- Sen. Warren wants Emanuel to recuse himself from any case involving the issue
- Former Republican board members call suggestion purely political

Ethics officials at the NLRB told Bloomberg BNA that Emanuel's obligations are to refrain from participating in cases in which a former client of his is involved and those in which Littler Mendelson is either a party or represents a party. They declined to provide any further comment when asked if there are any legal provisions that would prevent a board member from ruling on an issue if they previously took a position on the same issue in a court brief.

One Democrat-appointed former member, speaking on the condition of anonymity, told Bloomberg BNA he agrees with Warren. A number of practitioners and former board members, including Republican appointees John Raudabaugh and Marshall Babson, said the argument is pure political posturing.

"I find it amusing" that Democrats are making this argument "now that we're going to have a Republican majority," Raudabaugh said. He added that he's not aware of any rule that would require recusal based on issues.

"This issue comes up often whenever we have a nominee for any judicial position, although these are administrative," Peter Finch, a former NLRB staff attorney, told Bloomberg BNA. Finch is now a partner at Davis Wright Tremaine LLP.

"The judge's personal views or previous writings are called into question suggesting he's prejudged an issue, but the board is traditionally made up of practitioners who have represented either labor or management and have taken positions as an advocate or scholar before their appointment," he said.

The Democrat former board member who declined to be identified said it's inappropriate for Emanuel to rule on the class action waiver issue, given his involvement in the board and court cases.

That's particularly true, he said, because Emanuel could be ruling in a case that would set a precedent on the issue. Although Emanuel might not be deciding the issue in a case involving a client or his former firm, the decision could determine the outcome in a case in which he has participated.

"What's the difference?" the former member asked.

Partisan Politics 'Inherent'

Babson told Bloomberg BNA that hundreds of practitioners and judges have written about the class action waiver issue in particular because it's something about which reasonable people may disagree.

Warren's argument "invites the question of whether you want people who've had no experience, no knowledge, or points of view on any issue" to serve on the board, he said. Finch agreed that it would be problematic to enforce an "issue recusal" rule because it would exclude so many well-qualified practitioners.

"Take Richard Griffin," he said, referring to the board's general counsel, who represented unions before his appointment.

"He clearly comes to his position with a particular viewpoint and has pursued his mission with that in mind," Finch said. "But I don't know that anyone would say he can't look at an issue impartially."

Nonetheless, asking the sort of question Warren did is part of the process of "fully vetting" nominees, he said.

"Politics are inherent at the board—you come in having represented employers or unions," Raudabaugh told Bloomberg BNA. "The fact of the matter is a lawyer is

ethically capable of putting aside their prior practice and approaching things in a neutral, ethical fashion.”

“The bottom line is Senator Warren should know better—she's a former Harvard Law professor—there's no issue preclusion here,” Babson said.

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