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labor and employment lawflash alert

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New Legislation and Congressional Hearing Target NLRB's Union-Friendly Changes

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On October 12, the House Committee on Education and the Workforce conducted a hearing regarding new legislation—the Workforce Democracy and Fairness Act (H.R. 3094)—which would prevent the National Labor Relations Board (NLRB or Board) from implementing changes that would help unions have greater success organizing employees.

The House hearing included testimony by Morgan Lewis senior counsel and former NLRB Member Charles I. Cohen. A copy of his testimony can be obtained at http://www.morganlewis.com/pubs/CohenStatement_WorkforceDemocracyAndFairnessAct_12oct11.pdf.

Background: Recent NLRB Developments

In the course of the last year, the NLRB has issued a series of decisions and proposed rules that are highly favorable to unions and organized labor. Two union-friendly initiatives have received particular attention, among others.

1. **NLRB's Proposed Union Election Changes—Faster Elections, More Employer Restrictions.** On June 22, the NLRB published a proposed rule that would significantly revamp union representation elections conducted by the NLRB and cause union elections to take place much more quickly. The Board's sole Republican, Member Brian Hayes, dissented from the proposed election rule. Among other things, the Board's proposed rule would change representation elections by doing the following:

    - Requiring hearings to take place within seven days after any representation petition is filed
    - Dispensing with any pre-election hearing unless disputed issues affected at least 20% of the proposed bargaining unit's employees
    - Giving employers seven days to submit a written Statement of Position regarding all unit issues, with all positions not expressed in the Statement of Position forever waived
    - Requiring disclosure to the union of employee names, home addresses, phone numbers, *and* email addresses (to the extent available)

- Accelerating the timing of elections so they occur within 10 to 21 days after the filing of a petition (compared to the Board's current target of 45 days)[1]

2. **NLRB's *Specialty Healthcare* Decision—Permitting Unions to Organize Smaller Groups.** On August 26, the Board decided *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 N.L.R.B. No. 83 (Aug. 26, 2011), holding that unions may organize a relatively small bargaining unit consisting of employees sharing a "sufficient community of interest" even if the targeted group excludes *other* employees who do similar work or have other things in common with the targeted group.

   Under the Board majority's *Specialty Healthcare* decision, the bargaining unit will not be expanded to include additional employees unless the employer demonstrates the excluded employees have an "overwhelming community of interest" with the targeted subgroup. Predictably, the *Specialty Healthcare* decision will promote smaller bargaining units that can more easily be organized by unions. Again, Republican Board Member Brian Hayes dissented.[2]

H.R. 3094 and House Hearing Held on October 12

The Workforce Democracy and Fairness Act (H.R. 3094) would amend the National Labor Relations Act (NLRA), require the Board to apply the pre–*Specialty Healthcare* standards in union representation elections, and prevent the NLRB from adopting many of the provisions of its proposed election rule. As amended by the Workforce Democracy and Fairness Act, the NLRA would explicitly provide the following:

- In each case, the Board would be required to determine, "prior to an election," what constitutes an "appropriate" bargaining unit, and these determinations must focus on employees sharing a "sufficient community of interest," including when the NLRB evaluates "[w]hether additional employees should be included in a proposed unit."
- Proposed "accretions" would be the "sole exception" for which the NLRB, when evaluating whether to add *non*-bargaining unit employees to an *existing* unit (already represented by a union), would apply an "overwhelming community of interest" standard.[3]
- NLRB hearing officers are charged with the responsibility of identifying pre-election issues, making a "full record" regarding all issues that could "make an election unnecessary or which

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1. Morgan Lewis has represented the Coalition for a Democratic Workplace (CDW) in the rulemaking regarding union elections, and has submitted detailed comments in opposition to the proposed rule. For the comments submitted by Morgan Lewis on behalf of CDW in regard to the Board's proposed election rule, see http://www.morganlewis.com/pubs/CDWComments_NLRBProposedElectionRule_22aug11.pdf. Morgan Lewis senior counsel and former NLRB Member Charles I. Cohen testified in opposition to the NLRB's proposed election rule at an NLRB open meeting held on July 18, 2011. A copy of his statement is available at http://www.morganlewis.com/pubs/NLRBTestimony_CohenStatement_18july11.pdf.

2. Morgan Lewis represented the U.S. Chamber of Commerce in the *Specialty Healthcare* litigation. For a copy of the amicus briefs submitted on behalf of the U.S. Chamber, see http://www.chamberlitigation.com/sites/default/files/cases/files/2011/Specialty%20Healthcare%20and%20Rehabilitation%20Center%20of%20Mobile,%20et%20al.%20(NCLC%20Brief).pdf (primary brief); and http://www.chamberlitigation.com/sites/default/files/cases/files/2011/Specialty%20Healthcare%20and%20Rehabilitation%20Center%20of%20Mobile,%20et%20al.%20(NCLC%20Supplemental%20Brief).pdf (supplemental brief).

3. In accretion cases, whether nonunit employees would become union-represented unit employees depends on "whether such additional employees and existing unit members share an overwhelming community of interest" and whether "the additional employees have little or no separate identity."

may reasonably be expected to impact the election's outcome," with parties retaining the right to raise any issue or assert any position any time before the hearing closes.

- NLRB pre-election hearings would take place *no sooner than 14 calendar days* after the filing of a representation petition, and elections would take place *no sooner than 35 calendar days* after the petition is filed.
- Employers must provide a voter eligibility list (Excelsior list) *no sooner than seven days* after the Board makes a "final determination" of the appropriate bargaining unit, and the required disclosures are limited to employee names and "one additional form of personal employee contact information (such as telephone number, email address, or mailing address) chosen by the employee in writing."

The House Committee on Education and the Workforce held a hearing on October 12 regarding the Workforce Democracy and Fairness Act. As noted above, witnesses at the hearing included Morgan Lewis senior counsel and former NLRB Member Charles I. Cohen, who stated that H.R. 3094 "would restore the critical role that Congress should play formulating our national labor and employment policy."

According to Mr. Cohen, "the Workforce Democracy and Fairness Act seeks a return to the status quo of the long-standing and effective election procedures that have been in place at the NLRB, and the legislation would . . . restrict this NLRB—or any future NLRB—from attempting to violate the mandates of the NLRA and circumvent Congress with regard to election procedures." A copy of Mr. Cohen's hearing testimony is available at http://www.morganlewis.com/pubs/CohenStatement_WorkforceDemocracyAndFairnessAct_12oct11.pdf.

Other NLRB and DOL Labor Relations Developments

These are not the only significant recent NLRB and U.S. Department of Labor (DOL) developments that have strongly favored unions. As we have previously reported, other developments include the following:

- The Board has promulgated a *final rule requiring notice posting* by employers regarding unions and collective bargaining rights (which the NLRB recently postponed to January 31, 2012).[4]
- The NLRB's General Counsel is pursuing antiunion discrimination claims *challenging Boeing Co.'s $750 million new investment decision in South Carolina*, even though union members at Boeing's unionized facilities in Washington State have not lost jobs or otherwise been adversely affected.[5]

4. Morgan Lewis represented the Coalition for a Democratic Workplace in the NLRB rulemaking regarding a potential NLRA notice-posting requirement. For a discussion of the NLRB's final notice-posting rule, see http://www.morganlewis.com/pubs/LEPG-LF_NLRB-FinalRuleRequiringAllEmployersPostNotice_25aug11.pdf (Morgan Lewis LawFlash regarding final notice-posting rule); and http://www.morganlewis.com/pubs/LEPG-LF_NLRBDelaysImplementationOfFinalRule_5oct11.pdf (Morgan Lewis LawFlash regarding postponement). A copy of the Morgan Lewis comments submitted on behalf of CDW in opposition to any NLRA notice-posting requirement is available at http://myprivateballot.com/wp-content/ uploads/2011/02/110222_cdw_comments_nlrb_poster.pdf.

5. Morgan Lewis partner Philip A. Miscimarra testified on June 17, 2011 before the House Committee on Oversight and Government Reform regarding the Boeing litigation. His testimony is available at http://www.morganlewis.com/pubs/MiscimarraStatement-CapInvstNLRA_17june11.pdf.

- The Board has issued *other decisions favorable to unions* that will make union corporate campaigns more damaging to neutral parties or present other challenges for employers.[6] Morgan Lewis partners Jonathan Fritts and Philip A. Miscimarra testified at hearings regarding the NLRB held in May and February 2011, respectively, by the House Committee on Education and the Workforce (Subcommittee on Health, Employment, Labor, and Pensions).[7]
- *DOL* has also released a proposed rule that would *significantly expand required "persuader" activity reporting* by employers, law firms, and outside consultants.[8]

Conclusion

These are uncertain times for employers confronting possible union organizing and labor relations issues. The Workforce Democracy and Fairness Act would address some but not all of the NLRB's controversial recent actions. The Board itself—currently with three members—is widely expected to have only two members by year-end (after Member Craig Becker's recess appointment expires), which would prevent the Board from issuing new decisions. These issues are further complicated by the potential for unexpected developments during the 2012 congressional and presidential elections. Employers are well advised to closely monitor future events, to take these developments into account, and to contact legislators in the House and Senate regarding these issues and other pending legislation.

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6. *See* http://www.morganlewis.com/pubs/LEPG-LF_NLRBIssuesThreeDecisionsPromotingUnionRepresentation_31aug11.pdf (Morgan Lewis LawFlash regarding three pro-union decisions rendered on August 26, 2011); http://www.morganlewis.com/pubs/LEPG-LF_NLRBSanctionsUseOfInflatableRats_31may11.pdf (Morgan Lewis LawFlash regarding NLRB decision permitting large inflatable rats designed to pressure neutral employers); and http://www.morganlewis.com/ pubs/LEPG_UnionsTargetNeutralEmployers_LF_07sept10.pdf (Morgan Lewis LawFlash regarding NLRB decision permitting "bannering" designed to pressure neutral employers).

7. See http://www.morganlewis.com/pubs/WrittenTestimony_HELPSubcommittee.pdf (testimony of Jonathan C. Fritts, May 26, 2011); http://www.morganlewis.com/pubs/MiscimarraStatement-re-NLRB_11feb10.pdf (testimony of Philip A. Miscimarra, Feb. 11, 2011).

8. Morgan Lewis represented the Council on Labor Law Equality (COLLE) in the DOL rulemaking regarding the expansion of persuader activity reporting requirements. A copy of the comments submitted on behalf of COLLE in opposition to the proposed persuader reporting requirements is available at http://www.morganlewis.com/pubs/Comments-ProposedInterpretationoftheLMRDAAdviceExemption.pdf.

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