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NLRB Votes in Favor of Major Changes to NLRA Election Procedures and House Passes "Workforce Democracy" Bill

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By a 2–1 vote today, the National Labor Relations Board (NLRB or Board) decided to move forward with major changes to the Board's representation election procedures. The vote adopted a subset of procedural reforms first proposed by the Board on June 22, 2011. The new rules are designed to substantially change—and speed up—the existing union election process, as well as limit employer participation in that process.

The adopted rules, as outlined below, will take effect after the Board drafts the revised regulatory language and then votes on the final language. Because the Board will likely be reduced to only two members at the end of this year when Member Craig Becker's recess appointment concludes, thus losing its three-member quorum, the current Board majority plans to act on the final language within the next 30 days. Ironically, almost immediately after the changes are adopted, they will be supported by only a single NLRB member—Chairman Mark G. Pearce—with the opposition of Member Brian Hayes, and with Member Becker gone.

Also today, the House of Representatives passed the Workforce Democracy and Fairness Act (H.R. 3094). If enacted, H.R. 3094 would overturn many election procedure changes that have been proposed by the NLRB, and require the Board to make bargaining unit determinations based on standards in effect prior to the Board's controversial *Specialty Healthcare* ruling on August 26, 2011.

Background

The National Labor Relations Act (the NLRA or the Act) gives employees the right to "form, join, or assist" unions; to bargain collectively with their employer; or to refrain from engaging in such activities. The Board has long played a central role in union elections, overseeing most aspects of the pre- and post-election process. Since the NLRA was enacted, built into the pre-election process has been an employer's ability to challenge either the appropriateness of the petitioned-for unit of employees or voter eligibility through an evidentiary hearing process, briefing, and Board review.

The Board also administers representation elections. For many years, it has had a fairly stringent and successful internal policy designed to schedule elections within approximately six weeks after a petition is filed. In 2010, initial elections were held within a median of 38 days after the petition was filed, with more than 95% of initial elections being held within eight weeks of the filing of a petition. For all petitions filed in 2010, the average time to an election was 31 days.

The Board's Adopted Rules

Although the Board has used its rulemaking power only sparingly, Section 6 of the NLRA authorizes it to make rules and regulations "necessary to carry out the provisions" of the Act. The current Board believes that the Act itself, endorsed by the U.S. Supreme Court, requires the Board to adopt rules so that representation issues can be resolved "quickly and fairly." The June 22, 2011 Notice of Proposed Rulemaking (NPRM) was designed to achieve this stated objective of faster elections.

The June 22 NPRM resulted in a massive public response. At public hearings on July 18 and 19, 2011, the Board heard testimony from 66 witnesses, including Morgan Lewis's Chuck Cohen, a former Board member, who testified against the proposed changes. Morgan Lewis also submitted detailed comments in opposition to the proposed rule on behalf of the Coalition for a Democratic Workplace (CDW), a coalition that included the U.S. Chamber of Commerce, the National Association of Manufacturers, the Retail Leaders Industry Association, and 275 other associations. The Board received more than 65,000 other sets of written comments regarding the proposed changes. Since the close of the comment period in September, the Board has devoted significant staff and resources to analyzing those comments at a hurried pace.

The resolution adopted today by Chairman Pearce and Member Becker (both Democratic appointees), over the opposition of Member Hayes (a Republican appointee), represents an acknowledgment by the current Board majority that it cannot, by the end of this year, adopt all the changes proposed in the June 22 notice. Today's resolution would still, however, result in elections being held at a faster pace in many cases, and it also would substantially reduce an employer's opportunity to challenge voter eligibility prior to an election. The changes would also reduce the information available to employees, prior to any election, regarding who would be represented by the union if the union prevailed in the election.

The resolution contains six specific amendments to the Board's existing rules for processing representation petitions, with these six changes originating from portions of the larger overhaul of election procedures proposed on June 22. Generally, the adopted amendments reflect a commitment to speeding up the process and removing pre-election appeals, but without specific timetables embodied in regulatory language.

> **Adopted Amendment #1** – Would revise the law to state that the purpose of any pre-election hearing described in Section 9(c) of the Act only is to determine if a question concerning representation exists. Whether or not this would include the issue of whether the proposed bargaining unit is appropriate or inappropriate is not clear, but issues related to voter eligibility would not be litigable prior to the election. At the public meeting, both Chairman Pearce and Member Becker made statements indicating that any supervisory status or other eligibility issue would be litigated after the election, regardless of the number of employees involved. If voter eligibility issues are completely excluded from a pre-election hearing, amendment #1 would be more restrictive than the Board's June 22, 2011 proposal, which allowed voter eligibility issues to be litigated before the election if 20% or more of the unit would be impacted by the dispute.
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> **Adopted Amendment #2** – Would allow post-hearing briefs in only certain cases. The Chairman explained that "the briefing adds nothing to the regions' decision-making process in such routine cases and substantially increases the parties' litigation costs." Briefing would be limited to more complex disputes, at the discretion of the hearing officer.

Adopted Amendment #3 – Would eliminate the right to seek pre-election review by the Board. Almost all appeals, including appeals related to election conduct, would be consolidated in one appeal after the election is conducted. This allegedly would eliminate the need for appeals over issues that were "mooted by the results of the election."

Adopted Amendment #4 – Would eliminate the 25-day waiting period to conduct elections in cases where a party has filed a pre-election request for review. Such requests for review will not be allowed under proposed amendment #3.

Adopted Amendment #5 – Would require "special permission" for pre-election review based only on "extraordinary circumstances" (i.e., where post-election review could not adequately resolve the issue).

Adopted Amendment #6 – Would make Board review of any remaining *post*-election disputes discretionary and enable the Board to reject any appeal that does not "present a serious issue for review." This aligns the post-election standard for appeals with the current standard for pre-election requests for review, which are discretionary.

The proposals from June 22, 2011 that were not included and adopted in the Chairman's resolution—but that remain pending further consideration by the Board—include the following items, among others:

- Requirement that any pre-election hearing be held seven days after service of the notice of hearing
- Requirement that an employer file a written statement of position prior to the hearing or else waive any substantive arguments not advanced by that date
- Requirement that voter lists supplied to the union include employee email addresses and employee telephone numbers (to the extent available)
- Requirement that the voter list be supplied within two days after the direction of election, rather than the seven days currently called for
- Permission for unions to file representation petitions and related documents electronically

Again, these proposals are subject to further consideration by this Board or a future Board.

Likely Effects of the Adopted Rules

As Member Hayes mentioned at the public meeting, "the devil is in the details" regarding how the Board chooses to write the final language on the six adopted amendments. Chairman Pearce stated at the close of the public hearing that his team would now "crack the whip" to prepare final language. The most significant effect of the adopted rules will be to speed up the election process, despite the fact that more than 95% of all elections already take place within eight weeks of a petition being filed. Stipulated elections, whereby the employer does not seek to challenge unit appropriateness or voter eligibility issues, may ultimately not be impacted by the adopted changes. However, it is likely that regional offices will push for faster elections even in stipulated cases, following the final implementation of the adopted rules.

Although the time periods for elections will likely be shortened, the *overall* time frames for processing election cases to conclusion may not be significantly affected, because the elimination of many of the pre-election procedures—particularly the opportunity to present evidence with respect to unit scope and voter eligibility—could ultimately result in more post-election litigation and adjudication. Member

Hayes has explained that—based on pre-election uncertainty about which employees are statutory supervisors—alleged supervisors and their employers could inadvertently engage in conduct that gives rise to additional unfair labor practice litigation. The cumulative effect of the adopted rules will be to reduce the information available to employees prior to an election, reduce the time available for employees to make an informed choice, and reduce an employer's ability to express legitimate views regarding collective bargaining and its positions regarding the collective bargaining process. It will also deprive employees of enough time to get fully educated on the issues before having to cast their vote on such an important matter.

House Passes the Workforce Democracy and Fairness Act

The same day the divided NLRB voted to approve the election procedure changes described above, the House of Representatives passed the Workforce Democracy and Fairness Act (H.R. 3094) by a 235-188 vote. As reported in a prior LawFlash,[1] H.R. 3094 would overturn many election procedure changes that have been proposed by the NLRB, and require the Board to make bargaining unit determinations based on standards in effect prior to the Board's controversial *Specialty Healthcare* ruling on August 26, 2011. It remains to be seen what reception H.R. 3094 will receive in the Senate, although some Democrats voted in favor of the legislation when it was adopted by the House.

Conclusion

The rules adopted by the Board majority to overhaul the representation election procedures continue the political battle over the NLRB's role in regulating federal labor law. This is also reflected in the adoption today of the Workforce Democracy and Fairness Act by the House of Representatives. In addition, multiple litigation challenges to the Board's recently adopted rule on NLRA workplace notices remain pending, with at least one court decision expected prior to the notice rule taking effect on January 31, 2012. And last but not least, the NLRB is likely to lose its quorum of at least three members by the end of this year, unless recess appointments are made by President Obama (which will not take place if the Senate fails to recess) or unless the U.S. Senate approves the nominations of new Board members. The latter events are not considered likely, given the political gridlock in Washington, D.C., and this may lead to an incapacitated Board as of January 2012.

If you have any questions about the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

Washington, D.C.
Charles I. Cohen 202.739.5710 ccohen@morganlewis.com
Joseph E. Santucci 202.739.5398 jsantucci@morganlewis.com
Jonathan C. Fritts 202.739.5867 jfritts@morganlewis.com
John F. Ring 202.739.5096 jring@morganlewis.com

Chicago
Philip A. Miscimarra 312.324.1165 pmiscimarra@morganlewis.com
Ross H. Friedman 312.324.1172 rfriedman@morganlewis.com

1. *See* our October, 12, 2011 LawFlash, "New Legislation and Congressional Hearing Target NLRB's Union-Friendly Changes," available online at http://www.morganlewis.com/pubs/LEPG-LF_NewLegislation-HearingTargetNLRBUnion-FriendlyChanges_12oct11.pdf.

Houston
A. John Harper II 713.890.5199 aharper@morganlewis.com

Los Angeles
Clifford D. Sethness 213.612.1080 csethness@morganlewis.com

New York
Doreen S. Davis 215.963.5376 dsdavis@morganlewis.com

Philadelphia
Joseph C. Ragaglia 215.963.5365 jragaglia@morganlewis.com

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