Weil

September-October 2011

Employer Update

Do Social Media Policies Violate Employees' NLRA Section 7 Rights?

By Jeffrey S. Klein, Nicholas J. Pappas, Andrea Y. Loh, and John P. Sullivan

In This Issue

Employees frequently engage in discussions regarding issues affecting the workplace on social networking websites such as Facebook, Twitter and LinkedIn. Because these discussions may involve statements that negatively affect employers, last year we recommended that employers adopt policies that "both educate employees as to the company's expectations of the appropriate norms for online behavior, and give managers and HR personnel guidelines on how to prudently leverage the information obtained from social-networking sites."[1] One issue that has been the subject of much discussion recently with respect to such policies is the question of whether discipline imposed because of an employee's statements on a social networking website violates the employee's rights under Section 7 of the National Labor Relations Act ("NLRA"). Section 7 of the NLRA creates a right for private-sector employees who are covered by the NLRA,[2] whether unionized or not, "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." National Labor Relations Act § 7, 29 U.S.C. § 157 (2006).

On August 18, 2011, the Office of the General Counsel ("OGC") of the National Labor Relations Board ("NLRB") released a report discussing the application of Section 7 to social networking activity by employees. In that report, the OGC catalogued a variety of cases being prosecuted involving the OGC's application of Section 7 in various circumstances. Of greatest significance to private employers, the OGC's report asserted that certain policies regarding employees' use of the social media which prohibit harassing or otherwise offensive communications may violate employees' Section 7 rights. The OGC reasoned that such policies have the potential to "chill" employees' exercise of their rights. This article examines several cases prosecuted in recent years by the OGC and proposes policy language employers may wish to add to their social networking policies to avoid any unintended infringement of employees' legitimate Section 7 activities.

NLRA § 7

Section 8(a)(1) of the NLRA prohibits an employer from engaging in conduct that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in Section 7." In determining whether an employer policy violates Sections 7 and 8(a)(1) of the NLRA, one factor that the NLRB considers is whether the policy "would reasonably tend to chill employees in the exercise" of their Section 7 statutory rights. *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998). "If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage*, 343 N.L.R.B. 646, 647 (2004).

Recent OGC Challenges

Two recent OGC opinions illustrate the Office's increasingly aggressive stance toward social media policies that target employees' use of harassing and offensive language. In the first case, arising out of the discharge of an employee over Facebook postings she made that were derogatory toward her supervisor, the OGC issued an Advice Memorandum concerning the lawfulness of the American Medical Response of Connecticut's ("AMR") blogging and internet posting policy. Memorandum from Barry J. Kearney, Associate General Counsel, Nat'l Labor Relations Bd. Div. of Advice, to Jonathan B. Kreisberg, Regional Director, Nat'l Labor Relations Bd. Region 34, No. 34-CA-12576 (Oct. 5, 2010).[3] The policy at issue prohibited employees from "making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors." *Id.* at 5. The AMR employee handbook likewise prohibited the "use of language or action that is inappropriate in the workplace . . . of a general offensive nature; and rude or discourteous behavior to a client or coworker." *Id.* Upon examination of these policies, the OGC found that the Regional Director for Region 34 should allege that both of the AMR's policies violated Section 8(a)(1) because employees could reasonably construe the provisions as prohibiting Section 7 activity. Specifically, the OGC found fault with both policies' proscription of "a broad spectrum of conduct" while at the same time failing to provide limiting language that would remove the rule's "ambiguity" as to whether it prohibited Section 7 activity. Simply maintaining such a rule, according to the OGC, is sufficient to violate Section 8(a)(1). *Id.* at 11.

In another case, the OGC likewise determined that a hospital's social media, blogging, and social networking policy prohibiting harassing and defamatory communications violated Section 8(a)(1) for reasons similar to those cited in AMR. Here, a nurse was reprimanded and terminated for Facebook posts in which she had "talked badly about the hospital" in violation of the hospital's social media policy. The specific social media rules at issue were incorporated into an employee handbook, the first of which prohibited "any communication or post that constitutes embarrassment, harassment or defamation of the hospital or of any hospital employee, officer, board member, representative, or staff member."

The OGC's report asserted that certain policies regarding employees' use of the social media which prohibit harassing or otherwise offensive communications may violate employees' Section 7 rights.

Nat'l Labor Relations Bd., Office of the Gen. Counsel, Report of the Acting General Counsel Concerning Social Media Cases 19 (2011).[4] The second rule at issue similarly prohibited statements lacking truthfulness or that might damage the reputation or goodwill of the hospital, its staff or employees. The OGC concluded that the provisions of the social media policy were unlawful as they "included broad terms that would commonly apply to protected [Section 7 activity]," yet failed to define the "broad terms" or "limit them in any way that would exclude Section 7 activity."

Judicial Approach

These recent OGC opinions stand in stark contrast to case law evaluating similarly worded employer policies that have arisen outside the context of employees' social media usage. For example, in *Adtranz ABB Daimler-Benz Transp., N.A., Inc.* v. *NLRB*, 253 F.3d 19, 25 (D.C. Cir. 2001), the Court of Appeals for the District of Columbia Circuit examined an employer's policy prohibiting the use of "abusive or threatening language to anyone on company premises." The court vacated the NLRB's determination that the policy had the "unrealized potential to chill the exercise of protected activity [because it] could reasonably be interpreted as barring lawful [Section 7 activity]." The Court reasoned that the NLRB's findings were "not reasonably defensible . . .[and that] the Board's position that the imposition of a broad prophylactic rule against abusive and threatening language is unlawful on its face is simply preposterous." *Id.* at 25–26, 28. The court took issue with the NLRB's "remarkabl[e] indifferen[ce] to the concerns and sensitivity which prompt many employers to adopt [similar rules]." The court described an employer's potential liability under both federal and state laws "should they fail to maintain a workplace free of racial, sexual, and other harassment," and reasoned that "any reasonably cautious employer would consider adopting the sort of prophylactic measure contained in the Adtranz employee handbook." *Id.* at 27.

Finally, the *Adtranz* court found that under current law, "the only reliable protection is a zero-tolerance policy . . . [and that] to bar, or severely limit an employer's ability to insulate itself from such liability is to place it in a 'catch 22'."

Two years later, the Court of Appeals for the District of Columbia Circuit again upheld an employer policy that prohibited "insubordination, refusing to follow directions, obey legitimate requests or orders, or other disrespectful conduct towards a supervisor or other individual." *Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1088–89 (D.C. Cir. 2003). In denying the NLRB's application for enforcement of its holding that such a rule violated the NLRA, the court disagreed with the Board's concern that an employee "might interpret the term 'disrespectful conduct' to include [Section 7 activity], and that such protected activity might be chilled as a result." Instead the court found that when read in context the rule "clearly" did not apply to Section 7 activity – instead being applicable to incivility and insubordination. Rather, "any arguable ambiguity in the rule arises only through . . . attributing to the employer an intent to interfere with employee rights." *Id.* at 1089.

Prophylactic Rule

As demonstrated above, the OGC and the Court of Appeals for the District of Columbia Circuit have expressed different standards applicable to the assessment of Section 7 rights of employees with respect to use of social networking websites. Specifically, when considering similarly worded policies which prohibit inappropriate language in the workplace, the OGC has found that such policies may be construed by employees to prohibit Section 7 activity, while the Court of Appeals has rejected that interpretation. Putting aside whether the OGC *should* adhere to its currently articulated positions in the face of contrary judicial opinions, employers nonetheless may be left in a quandary as to how they should word their social networking policies.

While employers may rely on the judicial interpretations described above to adhere to broadly worded policies, employers also may wish to modify their policies by revising them to define more precisely the type of language that is prohibited, and also to make clear that nothing in the policy should be construed to limit employees' exercise of Section 7 rights.

An example of the type of disclaimer that would survive even OGC scrutiny is discussed in a recent Advice Memorandum entitled *Sears Holdings*. Memorandum from Barry J. Kearney, Associate General Counsel, Nat'l Labor Relations Bd. Div. of Advice, to Marlin O. Osthus, Regional Director, Nat'l Labor Relations Bd. Region 18, No. 18-CA-19081, 2009 NLRB GCM LEXIS 67 (Dec. 4, 2009).[5] At issue in this case was Sears Holdings' social media policy, which prohibited associates from discussing certain subjects "in any form of social media," including "disparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects." In this instance the OGC found that the Regional Director for Region 18 should dismiss the complaint because the policy could "not reasonably be interpreted to prohibit Section 7 protected activity." As justification for this conclusion the OGC discussed Sears Holdings' inclusion of the following limiting language: "The intent of this Policy is not to restrict the flow of useful and appropriate information, but to minimize the risk to the Company and its associates." On this basis the General Counsel concluded that "no employee could reasonably construe the Employer's Social Media Policy to prohibit Section 7 activities."

Employers may wish to implement limiting language into their policies governing employees' use of social media.

In light of the OGC's recent opinions concerning social media policies prohibiting harassing and offensive communications, employers may wish to implement similar limiting language into their policies governing employees' use of social media. In addition to the language approved by the OGC in *Sears Holdings*, employers may wish to consider the following language that expressly protects Section 7 activity: "Nothing in this policy should be interpreted to prevent, interfere with, or otherwise restrain an individual's legitimate exercise of his or her Section 7 activities under the National Labor Relations Act."

Reprinted from the October 3, 2011 edition of the New York Law Journal.

1 Jeffrey S. Klein, Nicholas J. Pappas & Jason E. Pruzansky, *When Social Networking and the Workplace Collide* (June 16, 2010), http://www.weil.com/news/pubdetail.aspx?pub=9848.

2 Although the term "employee" is read broadly in the NLRA, there are certain

specified classes of workers who are not covered: agricultural laborers, domestic servants, children or spouses of the employer, independent contractors, supervisors, and employees of persons who are not "employers" under the NLRA. N. Peter Lareau, *National Labor Relations Act: Law and Practice* § 2.03(4) (2d ed. 2011). Also excluded are railroad and airline employees, because they are protected instead by the National Mediation Board under the Railway Labor Act, *id.* § 2.02(2)(c), as well as retired or confidential employees, medical interns, residents, and fellows, graduate assistants, and certain handicapped workers. *Id.* § 2.03(4).

3 http://www.scribd.com/doc/66219433/American-Medical-Response-of-Connecticut-GC-Advice-Memo-NLRB-2010 (last visited Sept. 26, 2011).

4 http://www.scribd.com/doc/63821019/NLRB-GC-Memo-on-Social-Media-Cases-Aug-18-2011 (last visited Sept. 26, 2011).

5 http://www.scribd.com/doc/42238834/Sears-Holding-Advice-Memorandum-NLRB-Dec-4-2009 (last visited Sept. 26, 2011).

"There's No Such Thing as Work-Life Balance" in Title VII

by Emilie Adams

In a significant victory for Bloomberg L.P. ("Bloomberg"), the international financial services and media company founded by current New York City mayor Michael Bloomberg, Chief Judge Loretta Preska of the United States District Court for the Southern District of New York granted summary judgment for the company on August 17, 2012, rejecting the Equal Employment Opportunity Commission's ("EEOC") claim that the company engaged in a companywide pattern or practice of discrimination against pregnant women and mothers.

The Pregnancy Discrimination Act, first passed in 1978, amended Title VII to forbid sex discrimination on the basis of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth in any aspect of employment. The EEOC's lawsuit against Bloomberg, first filed in 2007 and one of the agency's highest-profile lawsuits, alleged that the company systematically discriminated against pregnant women and new mothers returning from maternity leave by reducing their pay, demoting them in title or in number of direct reports, excluding them from important management meetings, and subjecting them to gender stereotypes. The EEOC identified 78 women who had discrimination claims out of the more than 600 employees who were pregnant or took maternity leave during the seven-year class period of February 2002 through March 2009.

Pregnancy Discrimination Claims on the Rise

The EEOC has reported a dramatic rise in the number of pregnancy discrimination charges over the last decade. In 1997, 3,977 pregnancy discrimination charges were filed with the EEOC. By 2010, the number of charges jumped to 6,119 – an increase of more than 50%.[1] This surge in pregnancy discrimination charges makes it one of the fastest-growing types of employment discrimination charges filed with the EEOC, not to mention a costly one. In 2010, the EEOC collected a record $18 million on behalf of individuals alleging pregnancy discrimination, not including awards in pregnancy discrimination lawsuits.[2]

The EEOC has also increased its focus on pregnancy discrimination, culminating in a new guidance entitled *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, published only months before the agency initiated its suit against Bloomberg and describing a "maternal wall" or "glass ceiling" limiting employment opportunities for employees with work-life conflicts.[3] In a press release announcing the lawsuit, an EEOC attorney was quoted as saying that the agency's lawsuit against Bloomberg "exemplifies an increasing trend where employers engage in stereotyping of female caregivers and act to limit their employment opportunities." [4]

"J'accuse is not enough in court. Evidence is required."[5]

In a 64-page opinion, Judge Preska concentrated much of her strongest language on the EEOC's reliance on anecdotes rather than statistics in its charge against the company, noting that "[t]he case law is weighty in favor of defendants in pattern or practice cases where plaintiffs present only anecdotal evidence and no statistical evidence."[6] Statistics are so central to pattern or practice cases, Judge Preska wrote, that statistics alone can make out a prima facie case.[7] The EEOC's only statistical evidence was excluded after Judge Preska rejected the report from the agency's statistical expert for failing to make a comparison to similarly situated employees.[8]

In the face of almost no statistical evidence, an omission described by Judge Preska as "severely damaging,"[9] the EEOC instead relied on anecdotal evidence by women who claimed that they were treated unfairly after announcing their pregnancies or returning from maternity leave. Such anecdotal evidence may serve effectively to bring "the cold numbers convincingly to life,"[10] but "rarely, if ever, can such evidence show a systemic pattern of discrimination."[11] The court also found the EEOC's anecdotal evidence woefully lacking, amounting to a handful of isolated remarks from a small group of managers over the seven-year class period in a company with well over 9,000 employees in 125 different offices. The court highlighted the fact that nearly 90 percent of Bloomberg's pregnant or mother employees during the class period had not come forward with affidavits – a damaging statistic left unrebutted by the EEOC.[12]

Concluding that much of the anecdotal evidence established only that individual class members were unsatisfied with the amount of their raise, or unhappy with the denial of a transfer or promotion, Judge Preska held that those were "ordinary business disagreements,"[13] which fell well short of the kind of probative evidence necessary to establish a pattern or practice of intentional discrimination. More damaging to the EEOC's pattern or practice claim, these claims stood in sharp contrast to Bloomberg's statistical evidence. Bloomberg's expert established that many of the class members received larger salary increases than those who took similarly lengthy leave for other reasons. For example, one class member's salary grew from $219,534 in 2001, the same year she announced her pregnancy, to $304,187 in 2008.[14] Another class member's salary rose from $110,000 in 2004, before her first pregnancy, to $127,500 in 2008.[15] The statistical evidence also demonstrated no statistically significant difference in the loss of directly reporting employees between class members and similarly situated employees.

In 2010, the EEOC collected a record $18 million on behalf of individuals alleging pregnancy discrimination, not including awards in pregnancy discrimination lawsuits.

Judge Preska concluded from this conflict between the anecdotes and the numbers that "[a]s its standing operating procedure, Bloomberg increased compensation for women returning from maternity leave more than for those with similarly lengthy leaves unrelated to maternity and did not reduce the responsibilities of women returning from maternity leave any more than those who took similarly lengthy non-pregnancy related leaves."[16] A reasonable jury hearing the EEOC's proffered anecdotes, and even accepting as true that isolated incidents of discrimination had occurred, nonetheless could not find that Bloomberg had engaged in a companywide pattern or practice of discrimination.

Judge Preska's Concluding Remarks

Arguably commanding as much, if not more, attention as the holding itself are the interesting legal and policy questions raised by Judge Preska's several pages of concluding remarks about work-life balance in the corporate arena, or lack thereof. Preska's remarks have reignited contentious debate about what the law requires and how far companies must go in accommodating pregnant employees and mothers in their workplaces.

"At bottom," Judge Preska deduced, "the EEOC's theory of this case is about so-called 'work-life' balance."[17] Absent an evidenced pattern of discriminatory behavior, however, this argument amounted to a subjective judgment that Bloomberg failed to provide its female employees with a sufficiently desirable work-life balance. That sort of subjective reasoning may be tempting to engage in, but as Judge Preska pointed out, it "is not the role of the courts . . . Nor is it the role of the courts to tell businesses what attributes they must value in their employees as they make pay and promotion decisions."[18] Quoting the former CEO of General Electric, Jack Welch, Judge Preska seconded the controversial sentiment that "[t]here's no such thing as work-life balance." Instead, there are "work-life choices . . . and they have consequences."[19]

However unfair in the eyes of many employees who wish to have it all, Title VII nonetheless allows employers to require employees to work hard and make difficult decisions so long as those difficult work-family tradeoffs are demanded of male and female employees alike. Remarking earlier in her opinion that "men and women have complained about their ability to balance family life and their workload at Bloomberg," Judge Preska quoted one male manager's conclusion that "everyone at Bloomberg has . . . a work/life balance issue because [everyone] work[s] very hard."[20] But poor work-life balance does not a Title VII claim make. Judge Preska ended with the following:

> In a company like Bloomberg, which explicitly makes all-out dedication its expectation, making a decision that preferences family over work comes with consequences. . . . Whether one thinks those consequences are intrinsically fair, whether one agrees with the roles traditionally assumed by the different genders in raising children in the United States, or whether one agrees with the monetary value society places on working versus childrearing is not at issue here. Neither is whether Bloomberg is the most "family-friendly" company. The fact remains that the law requires only equal treatment in the workplace.[21]

Conclusions and Practice Pointers

When it comes to decisions regarding how to treat pregnant employees and employees returning from maternity leave, honest employer mistakes can quickly become costly ones. Even in victory, Bloomberg still faces dozens of potentially expensive individual claims of pregnancy discrimination. However, several critical decisions made by Bloomberg before and during the EEOC's investigation and subsequent litigation helped to ensure a successful outcome for the company this summer. Given the potentially high damages associated with successful pregnancy discrimination claims, employers are well-advised to take steps to ensure that pregnancy discrimination claims are prevented, to the extent possible, and effectively countered when they arise.

"At bottom," Judge Preska deduced, "the EEOC's theory of this case is about so-called 'work-life' balance."

- Develop and/or maintain clear equal employment opportunity policies. Strong policies and procedures can draw helpful distinctions between "ordinary business disagreement," work-life balance complaints, and pregnancy discrimination claims.
- Train all employees, including upper and lower management, regarding relevant company policies and procedures, including employee grievance procedures, and the requirements of Title VII and the Family Medical Leave Act. Investing in employee and management training can make the difference in preventing and rebutting discrimination claims.
- Consistently apply compensation, promotion, leave, and other HR/employment policies in order to ensure that employees who take maternity leave are treated the same as other employees taking leave for other reasons.
- Lastly, while Title VII does not mandate a desirable work-life balance, in the war for talent, where recruiting the best minds can provide a decisive competitive advantage over others, taking affirmative steps to provide such a work-life balance may be necessary.

1 Pregnancy Discrimination Charges EEOC & FEPAs Combined: FY 1997 – 2010, U.S. Equal Employment Opportunity Commission, http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm.

2 *Id.*

3 Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, U.S. Equal Employment Opportunity Commission, http://www.eeoc.gov/policy/docs/caregiving.html.

4 Bloomberg L.P. Sued for Pregnancy Discrimination, U.S. Equal Employment Opportunity Commission, http://www.eeoc.gov/eeoc/newsroom/release/9-27-07.cfm.

5 *E.E.O.C. v. Bloomberg L.P.*, 2011 WL 3599934, *1 (S.D.N.Y. Aug. 16, 2011).

6 *Id.* at *8.

7 *Id.* at *7.

8 *E.E.O.C. v. Bloomberg*, 2010 WL 3466370, at *17 (S.D.N.Y. Aug. 31, 2010). Judge Preska also excluded a second EEOC expert report which presented social framework analysis. So-called "social framework analysis" was also rejected in the Supreme Court's recent decision in *Dukes v. Wal-Mart*, rendering the future of "social framework analysis" in class-action discrimination claims decidedly unclear. *See* Patricia Wencelblat, *Social Framework Analysis After Dukes v. Wal-Mart*, EMPLOYER UPDATE, July-August 2011, at 7.

9 *Bloomberg*, 2011 WL 3599934 at *9.

10 *Id.*

11 *Id.* at *7.

12 *Id.* at *10.

13 *Id.*

14 *Id.* at *11.

15 *Id.*

16 *Id.* at *1.

17 *Id.* at *22.

18 *Id.* at *23.

19 *Id.* at *22.

20 *Id.* at *2.

21 *Id.* at *22.

Seventh Circuit Holds That Offering Retail Mutual Funds For Plan Investment Does Not Violate ERISA Fiduciary Duty Requirements; Other Circuit Courts Consider Issue

By Millie Warner

In recent years, 401(k) plan fiduciaries, fiduciaries and service providers have increasingly faced ERISA class actions asserting breach of fiduciary duty claims due to the fees charged by the funds offered in the plan as investment options. Some of the so-called ERISA "excessive fees" cases challenge the use of revenue sharing arrangements between the mutual fund providers and other service providers to the plans, and we previously have written about the potential circuit split that developed in 2009 on the issue of whether ERISA requires fiduciaries to disclose revenue sharing arrangements to plan participants.[1]

A number of recent excessive fee cases have focused on whether a fiduciary's decision to offer retail mutual funds as investment options in a 401(k) plan, when investment options with supposedly lower expenses, such as institutional share classes, collective trusts, and commingled pools, may be available to the plan, constitutes a breach of ERISA's fiduciary duty requirements. On September 6, 2011, the Seventh Circuit Court of Appeals in *Loomis v. Exelon*, — F.3d —, 2011 WL 3890453 (7th Cir. Sept. 6, 2011), held that neither the decision to offer retail mutual funds as investment options in a 401(k) plan, nor the decision to require plan participants, rather than the plan, to bear the costs of those retail funds, constitutes a breach of fiduciary duty. While this decision represents a significant victory for plan sponsors and administrators, the issue continues to be actively litigated, with one case presently pending before the Ninth Circuit. In this article, we will discuss the *Exelon* case and offer some advice for defined contribution plan fiduciaries with discretion to add and remove plan investment options, given the uncertain and rapidly changing state of the law.[2]

Background

Exelon Corporation ("Exelon") sponsored a defined contribution 401(k) plan (the "Plan"), which offered participants a choice of 32 investment options, 24 of which were "no-load" retail mutual funds open to the public. *Id.* at *1. These funds did not charge investors a fee to buy or sell shares, but instead covered their expenses by deducting them from the assets under management. *Id.* The expense ratios of the 32 investment options available under the plan ranged from three to 96 basis points. *Id.*

A group of Plan participants filed an action in the United States District Court for the Northern District of Illinois, alleging that Exelon and the Plan administrator violated their fiduciary duties under ERISA by (1) offering retail mutual funds, in which participants receive the same terms and bear the same management fees as the general public, rather than by securing access to allegedly less expensive institutional investment vehicles; and (2) requiring plan participants to bear the costs of the mutual fund fees themselves, rather than having the plan bear those costs. *Id.*

On December 9, 2009, the district court dismissed the complaint, holding that under the Seventh Circuit's decision in *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009), 401(k) plans are not required to offer only institutional funds, and asset-based revenue sharing arrangements, pursuant to which participants bear the cost of their investment options through a lower return on investment, are permissible. *Loomis v. Exelon Corp.*, No. 06-CV-4900, 2009 WL 4667092, at *4 (N.D. Ill. Dec. 9, 2009).

The participants appealed the district court's dismissal of their claims to the Seventh Circuit Court of Appeals. In connection with the appeal, the U.S. Department of Labor (the "DOL") submitted an amicus curiae brief in support of the participants, arguing that in dismissing the participants' fiduciary duty claims, the district court required an "unduly high pleading standard" not contemplated by ERISA, and misread the Seventh Circuit's decision in *Hecker*. According

The Seventh Circuit held that neither the decision to offer retail mutual funds as investment options in a 401(k) plan, nor the decision to require plan participants to bear the costs of those retail funds constitutes a breach of fiduciary duty under ERISA.

to the DOL, the Seventh Circuit dismissed the complaint in *Hecker* because the complaint "did not expressly allege that the price [the plan] paid as a large institutional investor was excessive in relation to the services received," and "[b]y continually returning to the point that the panel's opinion was limited to the particular facts as alleged, Hecker clearly and deliberately left the door open for other cases like [*Loomis*] in which the allegations about fees are tied directly to allegations about services."[3]

Seventh Circuit Decision

On September 6, 2011, Judge Easterbrook, writing for the three-judge panel, affirmed the district court's dismissal of all claims.

As to the plaintiffs' first theory – that the Plan should have offered institutional mutual funds or other non-public investment options – the Court rejected the plaintiffs' premise that, because the terms of an investment in an institutional investment vehicle would be negotiated by the fund and the Plan, the terms would be more favorable to participants than those of retail funds. *Loomis*, 2011 WL 3890453, at *2. As in *Hecker*, the Court observed that the fact retail funds are open to the public means that their fees are set by market competition, and there is no guarantee that negotiations between the Plan and institutional investment vehicles would produce lower expenses. *Id.* at *2, 4. Indeed, the Court cited an amicus brief submitted by the Investment Company Institute, according to which the average expense ratio of institutional-share classes in equity funds was higher than that of any of the retail funds offered in Exelon's Plan. *Id.*

Even if there were funds theoretically available with lower expense ratios than the funds offered in Exelon's Plan, the Court held, as it previously had in *Hecker*, that "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund." *Id.* at *2. Further, the Court noted that institutional investment vehicles have drawbacks that may outweigh the benefit of lower expenses, such as a lower level of liquidity than retail funds and the inability to make daily withdrawals. *Id.* at *4. The Court was unpersuaded by the plaintiffs' argument that the fiduciaries should have used the plan's $1 billion size to bargain for lower fees with "the same retail services (such as daily transfers) for which mutual funds charge their normal expenses." *Id.* The Court observed that unlike a rental car company that may receive a "fleet discount" by purchasing cars *en masse*, fiduciaries of a participant directed plan cannot guarantee that participant accounts will be invested *en masse* in any specific investment, and even if the fiduciaries could negotiate a flat per capita fee, as the plaintiffs suggested, that fee structure would benefit some participants at the expense of others, depending on the size of each participant's account. *Id.*

The Court distinguished the *Loomis* case from *Jones v. Harris Associates, L.P.*, 130 S. Ct. 1418 (2010), and *Branden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009), both of which involved conflict of interest allegations. *Jones* "dealt with the fiduciary duties of investment advisors, which . . . have a conflict of interest when seeking management fees from mutual funds under their effective control." *Id.* at *2. *Branden* was an ERISA excessive fees case in which the Eighth Circuit held that, at the pleading stage, allegations that the plan's fiduciary failed to use the supposed purchasing power afforded by the plan's size to negotiate cheaper institutional share classes for mutual funds were sufficient to state a claim for breach of fiduciary duty under

ERISA. In that case, however, the plaintiffs had alleged that the revenue sharing arrangement between the plan's mutual fund provider and trustee was not intended to compensate the trustee for services rendered to the plan, but was intended as kickbacks for including the mutual funds in the plan. 588 F.3d at 590. In contrast, the *Loomis* plaintiffs did not allege that Exelon suffered from any conflict of interest in selecting the funds offered in the Plan or that Exelon in fact "chose those funds to enrich itself at participants' expense." *Id.*

As to the plaintiffs' second theory – that Exelon should have borne the expenses charged by the retail funds – the Court held that the decision to have participants bear the investment expenses was a question of plan design and was not, therefore, susceptible to challenge as a breach of fiduciary duty. *Id.* at 83. Citing long-standing Supreme Court precedent, the Court reasoned that ERISA does not create any obligation to "make retirement plans more valuable to participants," and "[w]hen deciding how much to contribute to a plan, employers may act in their own interests." *Id.* (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999), and *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996)). Because the plaintiffs' argument was, in essence, that Exelon should have contributed more to the participants' accounts by covering mutual fund expenses, the Court held that ERISA did not support plaintiffs' theory of relief.

Advice for Fiduciaries

The *Loomis* decision represents a significant victory for defined contribution plan sponsors and fiduciaries. As noted above, the use of retail mutual funds as 401(k) plan investment options is a common industry practice, and the Seventh Circuit not only has rejected the claim that that practice violates ERISA, but also offered a strong justification of that practice.

Notwithstanding the victory in *Loomis*, fiduciaries should continue to exercise caution in selecting retail funds as investment options for defined contribution plans. Plaintiffs may endeavor to use the Seventh Circuit's effort to harmonize its decision with the Eighth Circuit's decision in *Branden* as grounds to argue that while *Exelon* held that offering retail mutual funds is not a *per se* breach of fiduciary duty, the Court left the door open for claims that the offering of retail mutual funds, plus some other conduct (such as acting based on a conflict of interest), constitutes a breach of fiduciary duty.

The Seventh Circuit reiterated that "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund."

Fiduciaries also should be mindful that the closely watched case, *Tibble v. Edison International*, is currently pending before the Ninth Circuit Court of Appeals. *See* Case Nos. 10-56406, 10-56415 (9th Cir.). On August 9, 2010, the United States District Court for the Central District of California, in the first judgment after a trial in an ERISA excessive fees case, ruled in favor of the defendants on several claims, but also held that plan fiduciaries breached their ERISA fiduciary duty of prudence by failing to investigate the merits of offering retail share classes, rather than institutional share classes of the same funds, when such an investigation would have revealed that "the institutional share classes offered the exact same investment at a lower cost to the Plan participants" and there was no other advantage offered by the more expensive retail share classes to justify the greater expense. *Id.* at *1747. While it remains to be seen how the Ninth Circuit will rule in the case, as long as the law continues to develop, fiduciaries should continue to look seriously at plan expenses and ensure that they engage in a procedurally prudent process for selecting investment options, and when fiduciaries have a choice between retail and institutional share classes of the same fund, fiduciaries should ensure that there is some advantage offered by the more expensive retail shares in the event that they do not choose to offer the institutional share class.

1 *See* Employer Update January-February 2010, Fiduciary Duty to Disclose Fee Sharing Arrangements Between 401(k) Plan Trustees and Investment Managers (discussing *Hecker v. Deere & Co.*, 556 F3d 575 (7th Cir. 2009), which held that ERISA does not require a plan sponsor to disclose to participants that the plan's investment advisor shares revenue with the plan's other service providers, versus *Branden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009), which held that ERISA plan fiduciaries may be required to disclose revenue sharing arrangements, if such information would be "material" to plan participants' investment decisions).

2 Notably, the issue of fiduciary obligations when selecting investment options for a defined contribution plan

only applies to the extent that plan fiduciaries have discretion to add or remove investment options. If the plan by its terms requires that the plan offer a certain investment option, the decision to offer that investment option is a settler, rather than a fiduciary, function.

3 *See* Brief of the Secretary of Labor, Hilda L. Solis, as Amicus Curiae in Support of Plaintiffs-Appellants, *Loomis v. Exelon Corp.*, No. 09-4081 (7th Cir. Feb. 2, 2010), *available at* http://www.dol.gov/sol/media/briefs/loomis(A)-03-10-10.htm.

New Law May Increase Burden on New York City Employers To Provide Religious Accommodations

By Emily Friedman

On August 30, 2011, Mayor Bloomberg signed into law the "Workplace Religious Freedom Act" (the "Act"), which amends the existing New York City Human Rights Law, N.Y.C. Admin. Code §8-101 et seq. ("NYCHRL"). The new law, which is more restrictive than Title VII of the Civil Rights Act of 1964 ("Title VII"), likely will place additional obligations on New York City employers to provide religious accommodations for their employees. Specifically, the Act sets forth a more onerous standard for a New York City employer to meet to justify the decision not to provide a religious accommodation for an employee or job applicant.

Background

The NYCHRL provides that it shall be an unlawful discriminatory practice for an employer (or an employee or an agent of the employer) to impose upon an employee or job applicant "as a condition of obtaining or retaining employment any terms or conditions, compliance with which would require such person to violate, or forego a practice of, his or her creed or religion." Accordingly, the law requires employers to "make reasonable accommodation to the religious needs of such person" where the individual's bona fide religious beliefs conflict with a job requirement. However, an employer need not provide an employee or applicant with a particular religious accommodation where doing so would pose an "*undue hardship* in the conduct of the employer's business." Thus, if an employer is able to demonstrate that the requested religious accommodation would pose an undue hardship on its business operations, it need not provide such accommodation.

The amendment to the NYCHRL now defines "undue hardship" and lays out a more stringent standard that all New York City employers must meet to justify the rejection or denial of a claim for a reasonable religious accommodation.

Previously, the law did not define the term "undue hardship." Instead, the law provided a non-exhaustive list of relevant factors for employers to consider in making a determination of undue hardship with respect to requests for religious accommodations. They included:

(a) the nature and cost of the accommodation;

(b) the overall financial resources of the facility or the facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(c) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and

(d) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Because the term was undefined, employers had more flexibility in arguing what constituted an "undue hardship." For instance, New York courts have, at times, applied Title VII's undue hardship standard to discrimination claims brought under city law, rather than drawing any particular distinction between the city and federal law.[1]

New Law

The amendment to the NYCHRL now defines "undue hardship" and lays out a more stringent standard that all New York City employers must meet to justify the rejection or denial of a claim for a reasonable religious accommodation. Under the new law, "undue hardship" is defined as "an accommodation requiring *significant expense or difficulty* (including a *significant interference* with the safe or efficient operation of the workplace or a violation of a bona fide seniority system)." A revised non-exhaustive list of factors employers must consider when determining whether the accommodation constitutes an "undue economic hardship" include:

(i) the identifiable cost of the accommodation, including the costs of loss productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer;

(ii) the number of individuals who will need the particular accommodation to a sincerely held religious observance or practice; and

(iii) for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.

While the legal implications of the new law remain to be seen, New York employers are well-advised to ensure that (i) their religious accommodation policies and practices are in compliance with the new law and (ii) appropriate human resources and management personnel are properly educated on the subject of reasonable accommodations.

The amendment to the NYCHRL also allows employers to demonstrate "undue hardship" by making an additional showing that the particular accommodation would "result in the inability of an employee who is seeking a religious accommodation to perform the essential functions of the position in which he or she is employed."

Comparison to Title VII

The undue hardship standard recently codified in the New York City administrative code is a higher burden to meet than the standard under Title VII. Under Title VII, an employer may demonstrate that an accommodation constitutes an "undue hardship" when the requested accommodation would require "more than a *de minimis* cost."[2] The Equal Employment Opportunity Commission and courts construing federal law have found an accommodation to require more than a de minimis cost if the accommodation would, for example, (i) impact or impair safety or security in the workplace,[3] (ii) violate the law,[4] (iii) require the employer to regularly pay overtime for substitute employees,[5] or (iv) compromise the integrity of a seniority system.[6] While the impact of the amendment to the NYCHRL remains to be seen, categories (i) and (ii) above presumably will remain valid reasons upon which to base a denial of a religious accommodation. However, the validity of categories (iii) and (iv) are less certain given the NYCHRL's more restrictive language, which likely will elicit a stricter interpretation of "undue hardship" from New York courts.[7]

Steps Employers Should Take

While the legal implications of the new law remain to be seen, New York City employers are well-advised to ensure that (i) their religious accommodation policies and practices are in compliance with the new law and (ii) appropriate human resources and management personnel are properly educated on the subject of reasonable accommodations. Employers also should take this opportunity to remind relevant personnel and decision-makers of the following aspects of the anti-discrimination laws and/or best practices with respect to religious accommodations:

- There are no "magic words" required to place an employer on notice of an individual's need for a religious accommodation. Accordingly, human resources and management personnel should pay close attention when an employee or job applicant indicates there may exist a conflict between that individual's religious practice or belief and a work requirement.

- Employers should publicize to employees and job applicants the procedure for requesting a religious accommodation.
- Human resources personnel and/or the relevant decision-makers should meet with the employee or applicant to discuss a request for a religious accommodation and the decision to accommodate, and keep the lines of communication open. Specifically, this might include communicating with the individual to obtain additional needed information about the religious belief or requested accommodation, and keeping an employee or applicant updated during the consideration process.
- Determinations on the issue of whether to offer an accommodation and/or whether an offered accommodation is reasonable must be made on a case-by-case basis and always are fact-specific; there are no bright-line rules. Accordingly, best practice is to engage legal counsel to clarify employer responsibilities, especially before denying a request for accommodation based on undue hardship. In addition, consult counsel when exploring options for alternative accommodations other than the one requested.

1 *See, e.g.*, *Waltzer v. Triumph Apparel Corp.*, 2010 WL 565428 (S.D.N.Y. Feb. 18, 2010) (discussing undue hardship under Title VII's standard and noting that Title VII's analytical framework continues to apply to NYCHRL claims even in light of Restoration Act, which requires courts to review claims under the city law "independently from and more liberally" than its federal counterpart); *see also Goldschmidt v. New York State Affordable Housing Corp.*, 380 F. Supp. 2d 303 (S.D.N.Y. 2005) (addressing plaintiffs' Title VII and city law claims together and applying same analysis to failure to accommodate claim).

2 *See, e.g.*, *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). It is worth noting that the undue hardship standard under Title VII is lower than the undue hardship standard under the Americans with Disabilities Act, which requires employers to show that the accommodation would cause "significant difficulty or expense."

3 *See, e.g.*, *Balint v. Carson City, Nevada*, 180 F.3d 1047, 1054 (9th Cir. 1999); *EEOC v. Oak-Rite Mfg. Corp.*, 2001 WL 1168156 (S.D. Ind. Aug. 21, 2001).

4 *See, e.g.*, *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826 (9th Cir. 1999).

5 *See* 29 C.F.R. § 1605.2(e)(1).

6 *See, e.g.*, *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 134-35 (1st Cir. 2004).

7 New York City employers also should be mindful of other more restrictive features of the NYCHRL. For instance, Title VII applies to all employers that employ at least fifteen individuals, but the NYCHRL covers employers who employ four or more individuals.

Proposed Amendments to NLRB Rules Would Drastically Alter Existing Procedures Related to the Conduct of Union Representation Elections

By Jonathan Sokotch

Recently, the National Labor Relations Board ("NLRB") published sweeping proposed amendments (the "Proposed Amendments") to existing NLRB rules and regulations related to the conduct of union representation elections. The NLRB's stated purpose for its proposed rule-making is "to better insure that employees' votes may be recorded accurately, efficiently and speedily and to further the [National Labor Relations] Act's policy of expeditiously resolving questions concerning representation."[1] However, as written, the Proposed Amendments would impose material alterations to the current union election process by dramatically reducing the period of time between the filing of a union representation petition and the conduct of an election. This shortened time period would limit an employer's ability to communicate with its employees about the disadvantages of union representation. Thus, the Proposed Amendments, with their compressed election timetable, would give unions a new arrow in their quiver, as statistics show that employee support for unions tends to wane the *longer* the period between the petition and election. Notably, because the Proposed Amendments come on the heels of the Obama administration's failed bid to gain passage of the Employee

Free Choice Act ("EFCA") – which would have reformed the union election process in a similar union-friendly manner to the suggested revisions contained in the Proposed Amendments – many critics perceive the Proposed Amendments as an effort by the Obama appointees on the NLRB to achieve through executive fiat the unrealized legislative goals of the Obama administration in failing to obtain passage of the EFCA.

In addition to reducing the pre-election time period, the Proposed Amendments would also limit the right of parties to appeal pre-election decisions delegated by the NLRB to its Regional Directors, limit the ability of parties to contest the eligibility of potential voters pre-election, drastically change the procedure for pre-election hearings, impose a pre-election "pleading" requirement with employers risking forfeiture of their right to contest issues that they fail to timely raise, and expedite and expand the requirement that employers' produce lists of potentially eligible voters.

The NLRB convened a public hearing on July 18 and 19, 2011 (the "July Hearing"), at which it solicited oral comment on the Proposed Amendments. The NLRB also provided a 60-day period for the public to submit comments to the Proposed Amendments which closed on August 22, 2011, with an additional period for reply comments which closed on September 6, 2011.

The following describes the more significant changes that will occur in the NLRB representation election process if the Proposed Amendments are promulgated into a final agency rule.

Compression of Time Period between Petition and Election

Currently, the median time from the filing of a union petition to the holding of an election is 38 days. Commentators have estimated that the Proposed Amendments would reduce the time between the filing of a petition and the holding of an election to as little as 10 to 21 days, thus roughly cutting more than in half the median time for holding elections under the current system.

[T]he Proposed Amendments, with their compressed election timetable, would give unions a new arrow in their quiver, as statistics show that employee support for unions tends to wane the *longer* the period between the petition and election.

The mechanisms by which the Proposed Amendments would decrease this pre-election time frame include the following:

- Regional Directors would be required to hold pre-election hearings no more than seven calendar days (i.e., five business days) after hearing notices are served.[2] As hearing notices are typically served when a petition is filed, under the Proposed Amendments employers would generally have no more than a week to prepare for the hearing after a petition is filed. Currently, there is no uniform rule concerning the timing of pre-election hearings, but parties typically have longer than seven days before hearings are held.
- Employers would be required to produce final voter lists with voters' full contact and shift information for each prospective voter – including emails, phone numbers[3] and job classifications – within two days after the Regional Director decides that an election should take place. Under the current practice, employers have seven days after the direction of election to produce voter lists.[4]
- Currently, the rules require a waiting period of at least 25 days after the Regional Director decides that an election should be held, before the election is actually held. The NLRB designed this waiting period to provide the parties the opportunity to seek and obtain pre-election NLRB review of decisions made by the Regional Director at the pre-election hearing. The Proposed Amendments would eliminate the right to any pre-election review by the NLRB and thus eliminate the 25-day pre-election waiting period, deferring NLRB review until after the election.
- The current rules generally allow the adjudication of disputes concerning voter eligibility at the pre-election hearing. The Proposed Amendments would defer adjudication of voter eligibility issues until after the election, unless the eligibility of 20% or more of all potential voters is contested. Thus, under the Proposed Amendments time spent adjudicating voter eligibility issues would shift from the pre-election phase to the post-election phase, thus further compressing the pre-election time period.[5]

Effect of Shortening the Period Prior to Election on Communication between Employers and Employees about Union Representation

Employers argue that this compression of the election process threatens to deny the free speech rights of employers and employees – protected in Section 8(c) of the National Labor Relations Act (the "Act") – by drastically limiting the amount of time employers have to communicate with their employees about union representation. Employer groups contended at the July Hearings and in public comments that Unions already have months and sometimes years to plan for an election because they engage in "stealth" campaigning prior to the filing of a petition; whereas employers may not be aware of the campaign until a petition is filed, with too little time under the Proposed Amendments to respond to the arguments and promises made by the union to its employees.

However, rather than deny that the Proposed Amendments would reduce employer-employee communication about elections, unions instead have attempted to characterize employer communications with their employees as coercive and intimidating, and openly favor its limitation. Unions say that employers try to extend election periods to buy more time to intimidate and coerce their employees, which leads to withdrawn petitions and adverse election results for unions. Thus, unions favor limiting the election period via the Proposed Amendments. Employer and business groups vehemently disagree with these characterizations and contend that they have the right to free and liberal communication with their employees about unionization campaigns. Business groups say employers need more time than provided for in the Proposed Amendments prior to elections to respond to the many contentions and promises made by unions during their campaigns – many of which are false and misleading.

Business groups also disagree that the current election process takes too long, citing the fact that currently 95% of all elections are completed within 56 days and that the median election takes just 38 days from petition to election.

Deferral of Eligibility Disputes and 20% Rule

As mentioned above, the Proposed Amendments would defer the resolution of any disputes concerning eligibility of voters until after an election, unless the dispute concerns 20% or more of the potential members of the bargaining unit. If, under the Proposed Amendments, an employer disputes the eligibility of less than 20% of the voters, the disputed voters would be permitted to vote subject to post-election challenge. The NLRB touts this deferral of voter eligibility disputes as an effective way to "streamline" elections, and contends that most eligibility disputes are better resolved post-election, because they are not usually election determinative and their resolution is not needed to decide if a question of representation exists.

Nevertheless, as many business and employer groups have pointed out, eligibility disputes concerning less than 20% of a unit can affect the outcome of an election, as election margins are often far narrower than 20%. Moreover, where disputes concern the eligibility of potential supervisors, deferring resolution will change the way employers can conduct their election campaigns. Employers campaigning against unionization often rely on their supervisors, who are in direct daily contact with members of the bargaining unit, to communicate the employers' position to voters. If, however, the union and employer dispute whether certain employees are supervisors or should be included in the bargaining unit (as they often do), and those individuals are directed to vote pending resolution of their eligibility post-election per the Proposed Amendments, then the employer may be restricted from using those supervisors to campaign on its behalf.

Pre-Election Hearings and Position Statements: Remodeled on Rules of Civil Procedure

The Proposed Amendments would substantially revise the procedures for pre-election hearings, and would institute a new requirement that parties file a detailed position statement by the first day of the pre-election hearing.

In these position statements, which employers would only have seven days from the filing of a petition to prepare, the Proposed Amendments would require that parties include, among other substantive topics: a list of the persons whose eligibility the employer intends to contest, whether the unit identified in the petition is appropriate (and, if not, the composition of any similar unit that the employer concedes is appropriate), any bar to election, and a list of all potential voters with their work locations, shifts and job classifications. Moreover, the Proposed Amendments would require parties to identify in their position statements every issue they intend to raise at the pre-election hearing, or they face waiver and forfeiture of the right to raise any issue or present or contest evidence on an issue not raised in the position statement.[6]

Additionally, the Proposed Amendments would require that parties provide "offers of proof" to the hearing officer at the outset of the hearing, in the form of written or oral statements on the record, identifying each witness the party plans to call to testify, identifying the disputed "issue" that the testimony would address, and summarizing the expected testimony. After reviewing the offers of proof, the hearing officer will only hear testimony if it decides that the offers of proof raise a genuine dispute as to any material fact.

The NLRB states that it designed its Proposed Amendments on position statements and offers of proof to narrow the subject matter and duration of pre-election hearings and by adopting principles from the Federal Rules of Civil Procedure ("FRCP"). These include the principle that evidence presented at civil trials must relate to genuine issues in dispute, and the principle that parties should be precluded from submitting evidence as to issues they hadn't previously identified. But business groups have criticized these proposals as being draconian and unfair to employers in comparison with the FRCP.[7] Of greatest concern to business and employer groups is the seven-day period to prepare a position statement and the penalty of waiver and forfeiture of issues not raised in that position statement. Business and employer groups submitted extensive testimony at the July Hearing and in public comments, showing that this seven-day period is insufficient, on its face, to complete the many tasks involved in preparing a position statement, which tasks include retaining labor counsel, gathering the necessary information, evaluating and identifying the many complex issues likely to be presented at the representation hearing, and drafting the position statement and the offers of proof. Moreover, the seven-day period leaves no room for the ordinary work conflicts and scheduling difficulties that counsel and businesses face, but instead would force employers to drop everything to meet these burdensome obligations. These requirements would impose even heavier burdens on small employers that don't have, and may not even know, competent labor counsel, and they would lose precious time prior to the hearing just retaining counsel.

If the Proposed Amendments are adopted in full, employers will likely approach the preparation of position statements by taking a "kitchen sink" strategy, in which they raise every conceivable issue they can think of in order to avoid forfeiture of any possible arguments.

If the Proposed Amendments are adopted in full, employers will likely approach the preparation of position statements by taking a "kitchen sink" strategy, in which they raise every conceivable issue they can think of in order to avoid forfeiture of any possible arguments.

Final Rule Not Yet Issued

The NLRB has yet to issue its final rule amending its existing rules and regulations governing election procedures, and may experience some delay because of, among other things, Republican legislative efforts to block rulemaking by the NLRB and a lack of the three board votes that the NLRB typically requires to approve changes of this nature. Currently, only three of five NLRB seats are filled, and one of those three board members, Brian Hayes, in a highly unusual move, filed a dissent to the Proposed Amendments. Member Hayes is expected to oppose the final rule. Therefore, unless and until the Senate acts on President Obama's nominations for the remaining board seats, the NLRB will likely not have the three votes in favor of issuing these final amendments to its election procedures. Additionally, Republican legislators have been endeavoring to block rulemaking and other activity by the NLRB, including through a September 29, 2011 House Appropriations Committee draft funding bill that would slash the NLRB's budget and bar the NLRB from using funds to, among other things, amend its election procedures.

Nevertheless, if and when the NLRB issues final amendments concerning its election procedures, we will explain and analyze them, and will keep our clients apprised of any other related developments as they arise.

1 Proposed Amendments, Supplementary Information, Section I (C).

2 Pre-election hearings are only held only if the parties do not come to a stipulated agreement to hold an election.

3 Employer representatives argued at the July Hearing and in public comments that the proposal that employers disclose employee phone numbers and email addresses (currently employers must only disclose home addresses of eligible voters) to the unions raises substantial privacy concerns involving possible misuse of employees' personal information.

4 Under the Proposed Amendments, the Regional Director would typically issue the decision as to whether an election should take place at the end of pre-election hearing.

5 The NLRB's proposed deferral of voter eligibility disputes is discussed further below.

6 This preclusive effect does not extend to challenging the eligibility of any voters.

7 The NLRB states that it imported the proposal to use position statements and offers of proof to identify genuine disputed issues prior to the hearing from the summary judgment motion process in FRCP 56. The NLRB further claims to have based its proposal to preclude parties from raising issues they fail to identify in their position statements on the initial disclosure requirements in FRCP 26(a). However, while employers, under the Proposed Amendments, would have only seven days to raise all factual and legal issues they intend to raise at the hearing, civil litigants operating under the FRCP typically have far more extended periods to brief and argue summary judgment motions, and, rather than face preclusion, are permitted to amend their FRCP 26(a) disclosures if they learn new information.

Employer Update is published by the Employment Litigation Practice Group and the Executive Compensation and Employee Benefits Group of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, http://www.weil.com.

Editors

Lawrence J. Baer	(lawrence.baer@weil.com)	+ 1 212 310 8334
Allan Dinkoff	(allan.dinkoff@weil.com)	+ 1 212 310 6771

Practice Group Contacts

Jeffrey S. Klein
Practice Group Leader
New York
+1 212 310 8790
jeffrey.klein@weil.com

Boston
Thomas Frongillo
+1 617 772 8335
thomas.frongillo@weil.com

Dallas
Yvette Ostolaza
+1 214 746 7805
yvette.ostolaza@weil.com

Frankfurt
Stephan Grauke
+49 69 21659 651
stephan.grauke@weil.com

Houston
Melanie Gray
+1 713 546 5045
melanie.gray@weil.com

London
Joanne Etherton
+44 20 7903 1307
joanne.etherton@weil.com

Ivor Gwilliams
+44 20 7903 1423
ivor.gwilliams@weil.com

Miami
Edward Soto
+1 305 577 3177
edward.soto@weil.com

New York
Lawrence J. Baer
+1 212 310 8334
lawrence.baer@weil.com

Allan Dinkoff
+1 212 310 6771
allan.dinkoff@weil.com

Gary D. Friedman
+1 212 310 8963
gary.friedman@weil.com

Andrew L. Gaines
+1 212 310 8804
andrew.gaines@weil.com

Mark A. Jacoby
+1 212 310 8620
mark.jacoby@weil.com

Michael K. Kam
+1 212 310 8240
michael.kam@weil.com

Steven M. Margolis
+1 212 310 8124
steven.margolis@weil.com

Michael Nissan
+1 212 310 8169
michael.nissan@weil.com

Nicholas J. Pappas
+1 212 310 8669
nicholas.pappas@weil.com

Shanghai
Helen Jiang
+86 21 3217 9511
helen.jiang@weil.com

Washington, DC
Michael Lyle
+1 202 682 7157
michael.lyle@weil.com