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NLRB On Right Path With Joint Employer, Elex Regs: Ex-Chair

By **Vin Gurrieri**

Law360, Washington (June 11, 2018, 7:49 PM EDT) -- Turning to agency rulemaking — a mechanism the National Labor Relations Board has used just a handful of times in its 82-year history — to resolve when businesses can be deemed joint employers was the right move, as was the NLRB's call for input on whether to scrap Obama-era regulations meant to streamline the union election process, former NLRB chair and current Morgan Lewis partner Philip Miscimarra told Law360 in an exclusive interview.

Miscimarra, who was appointed to the labor board by President Barack Obama in 2013 and named chairman by President Donald Trump in early 2017, left after his term expired on Dec. 16. He rejoined Morgan Lewis & Bockius LLP as a partner a short time later.

In a wide-ranging interview conducted May 24 at the firm's Washington, D.C., office, Miscimarra offered his thoughts on a series of issues, questions and controversies facing the board, some of which existed during his tenure and others which have arisen since he left. Two of those issues are the board's moves to potentially reevaluate its 2014 rule updating the agency's representation case process and the controversy surrounding the board's joint employer standard, which recently led the board's current chair, John Ring, to announce that it would seek to enshrine a standard through regulation.

Miscimarra noted that the pursuit of rulemaking on both of these high-profile issues is a departure from the board's history, which has been to focus on case adjudication, but said the process is appropriate in both of these circumstances.

"The advantage of rulemaking is that it permits the board to permit a regulatory scheme addressing a range of issues all at one time without waiting for particular cases to be presented, which places the board in a position of formulating public policy one sliver at a time," Miscimarra said.

But the former board chair, six months removed from the end of his term, acknowledged that rulemaking does have certain drawbacks, most notably putting board members in a position of having to consider hypothetical situations that haven't yet arisen.

"The challenge with rulemaking is that in certain ways it requires the board to predict the future," Miscimarra said. "Rulemaking requires board members to anticipate the most important variations that may exist when a particular set of rules … will be applied on the ground, and that task is much more challenging than taking a case that involves specific parties and specific facts and deciding what's the appropriate resolution of that case. There are advantages and drawbacks to both approaches."

Joint Employer Regs Are Right Call

Although questions surrounding the union election rule have provoked ardent responses from both business and union advocates, no issue facing the NLRB in recent years has generated as much controversy as the standard by which two or more entities are considered joint employers for purposes of collective bargaining and liability for labor law violations.

In its seminal 2015 decision involving Browning-Ferris Industries of California, a 3-2 ruling that saw Miscimarra and former board member and current Morgan Lewis partner Harry Johnson in the minority, the labor board expanded its test for determining joint employment from one that rested on a business having "direct and immediate" control over workers' terms and conditions of employment to a standard that included "indirect control" or the ability by businesses to exert such control.

Just days before Miscimarra's term ended, the board overruled BFI, which was still on appeal at the D.C. Circuit at the time, in a case known as Hy-Brand. The labor board later had to vacate Hy-Brand and reinstate the BFI standard after NLRB Inspector General David Berry issued a pair of reports concluding that board member William Emanuel should have recused himself from the December case since his former firm, Littler Mendelson PC, represented BFI's contractor.

Then came the announcement from current NLRB Chair John Ring, himself a former Morgan Lewis attorney who was nominated and confirmed after Miscimarra left the agency, that the labor board will address the joint employer question through rulemaking.

In his interview with Law360, Miscimarra called Ring's recent announcement "a positive step for the agency to be taking" and concurred with Ring's public statements that the joint employer issue is one of the most critical in labor law.

"Rulemaking has its advantages and disadvantages, but in relation to the joint employer issue, and given where the board currently is, I think it could be a constructive matter for the board to address," Miscimarra said, adding that he believes the standard adopted in Browning-Ferris lacks merit and is "a betrayal" of the board's primary responsibility to foster stability in labor-management relations.

"In my opinion, the board's Browning-Ferris Industries decision in 2015 created enormous uncertainty for millions of employees who can no longer tell who their employer was," Miscimarra said. "I think it's a very unfortunate situation for everybody, especially for an agency that regulates employment, if you ask someone 'who is your employer?' and nobody can give you a reliable answer with confidence that it's correct."

Miscimarra declined to comment directly on the reports issued by the NLRB's inspector general regarding the conflict of interest controversy surrounding Emanuel and his recusal. But the former board chair did speak at length about the board's recusal standard, which the NLRB said last week it would be comprehensively reviewing.

Miscimarra said that during his tenure, board members took recusal issues seriously and that he isn't aware of either Emanuel or any other board member failing to follow ethics recommendations that were provided by the agency's ethics officials.

Emanuel consulted with agency ethics officials immediately after Miscimarra swore him in, Miscimarra

said, adding that the former Littler Mendelson attorney “didn’t have any obligation to recuse himself from the Hy-Brand case” under the ethics rules that existed at the time.

Emanuel’s former firm didn’t represent any party in Hy-Brand, no party in Hy-Brand requested his recusal, and the BFI case that Littler participated in had left the board more than two years before Emanuel became a board member, with Littler playing no part in the appeal, according to Miscimarra.

“What’s actually occurred in relation to Hy-Brand is the board issued an opinion that a number of people are unhappy with and they have attempted to focus on recusal issues with the objective of invalidating a decision that they disagreed with,” Miscimarra said. “And I think that focus and the use of recusal issues in that way is inappropriate, and I think it’s very damaging to the parties that rely on the board to decide cases with some confidence that the board’s decisions will end up being a final resolution of the matters they have in dispute.”

Right Time to Review Election Rule

Even though the NLRB's joint employer controversy has been at the forefront of labor law observers' minds in recent months, the agency's reevaluation of its union election rule has also garnered much attention, with more than 6,000 labor groups, businesses and workers submitting comments ahead of an April deadline.

When the labor board streamlined the rules for union election procedures in December 2014, it did so on a party-line vote over dissents by Miscimarra and Johnson.

Among the grounds covered by the controversial rule was the adoption of a standard that representation elections take place at the earliest practicable date after a petition for representation is filed.

But just days before Miscimarra’s term expired, the board issued a request for information — this time over the objection of its two Democratic members — asking the public to weigh in on whether the rule should be kept without change, modified from its current form or rescinded entirely.

With the rule being on the books for several years, Miscimarra told Law360 that now is an appropriate time for the board to solicit input from the public on all three questions and evaluate how the rule has functioned.

Miscimarra noted that one of the areas the board majority in 2014 declined to specify was the acceptable length of time for elections to be held, adding that the board still hasn’t done so in the time since the rule was passed.

“The majority never actually addressed … what’s the right speed with which elections should take place, like how fast is too fast and how slow is too slow?” he said. “In election cases, that continues to be an area that the board has not addressed.”

Drawing on history, Miscimarra pointed out that during Senate debates about potential changes to the National Labor Relations Act in 1959, then-Sen. John F. Kennedy commented that there should be at least 30 days between petition and election.

If the board does decide to revise the 2014 rule in the future, Miscimarra said it would “still be helpful

for the board to simply weigh in on what are reasonable parameters" for conducting representation elections, regardless of the standard it adopts.

"Whether or not the board would agree with 30 days, or a longer period of time, or a shorter period of time — I think that's as relevant for the board to address now as it was when Congress was evaluating that issue in 1959," Miscimarra said. "Like many other people, I'm very interested in seeing what the board will do prospectively on that."

Moreover, Miscimarra also identified the board's so-called blocking charge doctrine as "being appropriate for the board to reconsider" as it takes a fresh look at the union election rule.

During the process that led to the 2014 regulation, the NLRB had asked for comments on whether to change its doctrine, under which the processing of union election petitions gets put on hold when an unfair labor practice charge is filed with the NLRB alleging that a party to the election interfered with a fair election by illegally coercing workers to vote a certain way.

Miscimarra noted that multiple alternatives to the doctrine were raised as part of the 2014 rulemaking process but that the board majority "ended up effectively incorporating the blocking charge doctrine wholesale" into the union election rule without any substantial changes.

"I think there is an inconsistency with saying on the one hand that representation elections are so important that people should be voting at the earliest practicable time, but on the other hand if there's just a claim of some type of objectionable conduct it should prevent an election from occurring," Miscimarra said.

--Editing by Pamela Wilkinson and Aaron Pelc.

This is the first article in a two-part series. Check back tomorrow as the former NLRB chair discusses politics at the NLRB and the U.S. Supreme Court's blockbuster Epic Systems ruling on class action waivers.

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