

EMPLOYMENT LAWSCENE ALERT: BIDEN ADMINISTRATION WILL PROMOTE A SIGNIFICANT SHIFT IN RECENT FEDERAL LABOR LAW

In our series discussing the new workplace initiatives under the Biden Administration, we will next address the Biden Administration's desire to make significant changes in National Labor Relation Board ("NLRB" or "Board") policy and to roll back the labor law precedent of the Trump Administration's NLRB. The Biden Administration's labor policy through the NLRB will focus on two primary goals: (1) the promotion of collective bargaining and (2) the protection of employees' rights to join and form unions. In pursuing this focused labor policy, the Biden Administration is keeping the promise it made during the Presidential campaign that it will pursue policies and the development of labor law that serves the interests of unions. All employers will need to pay attention for the next four years to the NLRB's development and application of the Biden Administration's labor policies.

Through the former NLRB's General Counsel, Peter Robb, the Trump Administration made significant pro-management policy changes and shepherded pro-management developments in labor law under the National Labor Relations Act (the "NLRA" or the "Act"). Under the Obama Administration, the Democratically-led Board took an expansive view on how the Act should be interpreted and enforced, including a very broad reading of Section 7 of the Act, which provides that employees have the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Trump-era Board then narrowed this expanded reach of Section 7.

During the Trump Administration, many of the Obama-era Board policies and decisions were overturned by the Board or by the federal courts, including: (i) overturning of the Board's *Specialty Healthcare* decision that allowed unions to define their own bargaining units, including the recognition of micro-units; (ii) allowing employers, in the Board's decision of *Johnson Controls*, to withdraw union recognition at the expiration of a collective bargaining agreement if the employer can prove that the union does not continue to have majority support amongst bargaining unit employees; (iii) the U.S. Supreme Court's decision in *Epic Systems* overturning the Board's *Murphy Oil* decision where the Supreme Court held that an employer's requirement that employees agree to class- and collective-action waivers in

mandatory arbitration agreements does not violate the NLRA; (iv) the Board's *MV Transportation* decision that applied a "contract coverage" analysis instead of a "clear and unmistakable waiver" standard in determining whether an employer with a collective bargaining agreement has the duty to bargain over, or has the right to implement, work or safety rules without bargaining that are within the scope and compass of the parties' existing collective bargaining agreement; (v) overturning, in *Caesars Entertainment*, the Board's 2014 controversial *Purple Communications* decision, which had held that employees have the right to use their employers' email systems for non-business purposes, including communicating about union organizing; and (vi) overturning, in *Apogee Retail*, the Board's decision in *Banner Estrella Medical Center* where the Board ruled that employees have a Section 7 right to discuss discipline and ongoing investigations involving themselves and other co-workers despite an employer's confidentiality policy that prohibits such communications during a workplace investigation.

To follow through on his pledge made during his campaign to be "the most pro-union president," President Biden, as part of his first executive actions, took the unprecedented step to fire Mr. Robb as the NLRB's General Counsel. President Biden broke 85 years of tradition by being the first U.S. President to remove an incumbent NLRB general counsel before the end of his term. Mr. Robb's term was set to end in mid-November. President Biden's termination of Mr. Robb signals a shift in NLRB policy objectives under the Biden Administration and sets the stage for a roll back of the Trump-era NLRB policies and precedent.

President Biden quickly replaced Mr. Robb with Peter Ohr as NLRB's acting General Counsel. Mr. Ohr comes from the NLRB's Chicago Regional Office where he was its Regional Director. Mr. Ohr did not waste any time as the NLRB's acting General Counsel when, in a two-day span, he rescinded 10 Trump-era NLRB General Counsel Memoranda and two NLRB Operations-Management Memoranda issued by his predecessor. Mr. Ohr cited that the rescinded memoranda guidances were either not necessary or in conflict with the NLRB's policy objective of encouraging collective bargaining. Those guidances rescinded by Mr. Ohr, among others, included: (i) holding that employers may violate the Act when they enter "neutrality agreements" with unions to assist unions in their organizing efforts; (ii) on handbook rules developed following the Board's decision in *Boeing*; (iii) on a union's duty to properly notify employees subject to a union security clause of their *Beck* rights not to pay dues unrelated to collective bargaining and to provide further notice of the reduced amount of dues and fees for dues objectors in the initial *Beck* notice; (iv) on deferral of NLRB Charges under *Dubo Manufacturing Company* that instructed NLRB Regions to defer under *Dubo* or consider deferral of all Section 8(a)(1), (3), (5) and 8(b)(1)(A), and (3) cases in which a grievance was filed; and (v) on instructing NLRB Regions and Board agents on how to proceed during investigations in connections with securing the testimony of former supervisors and former agents and how audio recordings should be dealt with during investigations.

In the meantime, President Biden has nominated Jennifer Abruzzo to become the next NLRB General Counsel. Ms. Abruzzo was the second-ranking NLRB official under the Obama Administration as the agency's Deputy General Counsel. Most recently, Ms. Abruzzo was special counsel for the Communications Workers of America. The White House referred to Ms. Abruzzo as "[a] tested and experienced leader, [who] will work to enforce U.S. labor laws that safeguard the rights of workers to join together to improve their wages and working conditions and protect against unfair labor practices." Richard Trumfka, president of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) supported Ms. Abruzzo's nomination by stating that "the days of the NLRB actively blocking workers from organizing a union are over." Ms. Abruzzo's nomination will have to be confirmed by consent of the Senate, which is currently evenly divided between Democrats and Republicans. Ms. Abruzzo's road to confirmation could be bumpy given the strong criticism by some Republican Senators of President Biden's unprecedented decision to fire Ms. Abruzzo's predecessor, Mr. Robb, before the end of his term.

Biden Administration Will Push Pro-Union Legislation, Including the PRO Act

Besides the change in the NLRB's General Counsel and the effects that change will have on the development of federal labor policy, the Biden Administration, together with the Democratically controlled Congress, is also planning sweeping legislative changes to the Act with the objective to make union organizing easier for employees. The proposed legislation that employers should pay most attention to is the Protecting the Right to Organize (PRO) Act (H.R.2474 and S.1306).

Specifically, pro-union allies of the Biden Administration are pushing the administration to pass the PRO Act, which would be an overhaul of federal labor law under the NLRA. The PRO Act, which the U.S. House of Representatives passed in February 2020, includes in its current form several controversial and seismic shifts in established federal labor law, including:

- Permitting the NLRB to assess civil penalties against employers, ranging from \$50,000 to \$100,000, for each unfair labor practice violation, which also includes personal liability for managers of alleged violations;
- Providing employees with a private cause of action against an employer for unfair labor practice violations;
- Permitting secondary strikes by a labor organization to encourage participation of union members in strikes initiated by employees represented by a different labor organization;
- Terminating the right of employers to bring claims against unions that conduct such secondary strikes;
- Superseding state's right-to-work laws, by requiring employees represented by a union to contribute fees to the labor organization for the cost of such representation;
- Expanding unfair labor practices to include prohibitions against replacement of, or discrimination against, workers who participate in strikes;
- Making it an unfair labor practice to require or coerce employees to attend employer

- meetings designed to discourage union membership;
- Prohibiting employers from entering into agreements with employees under which employees waive the right to pursue or join collective or class-action litigation;
- Requiring the NLRB to promulgate rules requiring employers to post notices of employees' labor rights and protections and establishing penalties for failing to comply with such requirement;
- Prohibiting employers from participating in any NLRB representation proceedings;
- Requiring employers to provide a list of voters to the labor organization seeking to represent the bargaining unit in an NLRB-directed election;
- In initial contract negotiations for a first contract, compelling employers and unions to mediation with the Federal Mediation and Conciliation Service in the event the parties do not reach an agreement within 90 days after commencing negotiations;
- Compelling employers to bargain with a labor organization that has received a majority of valid votes for representation in an NLRB-directed election; and
- Providing statutory authority for the requirement that the NLRB must set preelection hearings to begin not later than 8 days after notifying the labor organization of such a petition and set postelection hearings to begin not later than 14 days after an objection to a decision has been filed.

President Biden promised during his campaign to sign the PRO Act. This legislation, however, is currently stalled in the U.S. Senate and may face an uphill battle given the Senate's current cloture rule to end a filibuster—which requires 60 votes to cut off debate on most matters. Consequently, to the extent that the PRO Act is subject to a filibuster in the Senate, it is unlikely that the PRO Act will become law in its current form. Nonetheless, all employers should pay careful attention to the PRO Act and its movement through the U.S. Congress.

What Employers Should and Can Do

Given the Biden Administration's priority of encouraging employees to unionize, and with the pro-labor individuals that President Biden has placed in top leadership positions in the U.S. Department of Labor, including the nomination of Marty Walsh, the former two-term mayor of Boston and former union leader, to become the next Secretary of Labor, union organizing activity is likely to increase. To lawfully counter those activities, employers can help ensure that employees are accurately informed about unionization to allow employees to make free and clear decisions without coercion about their rights under Section 7. To do so, employers should make sure that their supervisors are properly trained on how to recognize the signs of union organizing activities and how to lawfully respond to employees' questions about unionization.

As always, the labor and employment law team at O'Neil Cannon is here for employers to answer your questions and address your concerns about the changes to federal labor policy and law under the Biden Administration. We encourage you to reach out with any questions, concerns, or legal issues you may have.