The NLRB Under the Biden Administration

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With the election in the rearview mirror, it is time to brace for potential changes to the National Labor Relations Board (NLRB) under the Biden administration. The last four years have provided several employer friendly NLRB decisions and rules. However, this will likely change under the Biden Administration which will be more focused on encouraging and incentivizing unionization and enacting a multitude of employee protections. What changes are anticipated and, more importantly, when will the changes take place?

PRO Act

One of the most significant pieces of labor legislation passed the House in February 2020. The Protecting the Right to Organize (PRO) Act, if passed by the Senate, would alter the labor landscape in favor of unions and employees. The major changes in the PRO Act include:

- Banning right to work laws that are currently in 27 states. The right to work laws prohibit employers and unions negotiating provisions that require employees to pay union dues.
- Codifying the ambush election rules. The ambush election rules shorten the amount of time that an employer can run a counter election campaign. These rules were first passed in 2015 and hampered employers' ability to win elections. The Trump Board overturned major portions of the ambush rules.
- Providing a private cause of action for certain violations with compensatory damages.
- Interfering with the attorney client privilege on certain labor law matters.
- Eliminating the secondary boycott prohibition.
- Expanding who is an employee under the National Labor Relations Act (NLRA). The PRO Act limits those individuals who can be classified as independent contractors.
- Expanding the definition of joint employer.

- Prohibiting class action waivers in arbitration agreements.

Whether the PRO Act will pass the Senate depends on the Georgia Senate runoff elections. If the Republicans maintain control of the Senate, there is little chance the PRO Act will pass or even be taken up by the Senate. If, however, the Democrats take control of the Senate, the PRO Act, or some version of it, may become law.

Reversing Trump Board Decisions

Regardless of whether the Democrats take control of the Senate and pass the PRO Act, there will be changes made by the Biden NLRB. The new Board will likely look to reverse recent changes, including:

- Reversing *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (2019). This decision held that employers could maintain and establish work rules prohibiting employees from using company email for union activities.
- Reversing *The Boeing Company*, 365 NLRB No. 154 (2017). This decision provided much needed certainty for employers with respect to workplace rules and policies. The Biden Board will likely return to the previous standard that if an employee "reasonably construes" a rule as interfering with Section 7 rights, then the rule is unlawful. The prior standard spawned many decisions that put an employer's obligations under the NLRA squarely at odds with workplace civility and an employer's obligations under Title VII and other laws.
- Reversing *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017). This decision returned to the traditional "community of interest" standard when determining the appropriateness of a bargaining unit. The Biden Board will likely return to the overwhelming community of interest standard, which more readily permits micro-units.
- Reversing *MV Transportation, Inc.*, 368 NLRB No. 66 (2019). This decision made it easier for an employer to make unilateral changes to a collective bargaining agreement. The Biden Board will likely return to the "clear and unmistakable waiver" standard, which requires the company and union to

unequivocally and specifically express the intent to permit unilateral company action with respect to a particular employment term.

When Will the Changes Take Place?

These anticipated changes by the Board will not happen immediately upon the inauguration in January. As seen with the Trump Board, significant changes did not happen until December 2017 – nearly two years after President Trump's inauguration. The full Board is made up of five members appointed by the President. Each member serves a 5-year term with the term of one member expiring each year. Currently, there is one vacancy.

The majority of the Board reflects the party of the President. Thus, the current Board majority consists of Trump appointments. The current three-member majority will remain in place until August 2021 when Member William Emanuel's term expires. In addition, General Counsel Peter Robb, who is assigned with prosecuting NLRB cases and determining which cases have merit, is also a Trump appointee. General Counsel Robb's term expires in November 2021. Because it will take several months for Biden appointments to comprise a majority of the Board, significant changes are not likely until the end of 2021, at the earliest.

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