Back To The Future: It's Time To Prepare For A Rollback Of Employer Rights At The NLRB

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As you prepare for the prospect of a Biden presidency, businesses large and small should consider the potential impact on decision-making and regulatory reform at the National Labor Relations Board (NLRB) – whether or not your workforce is unionized. The new administration can be expected to fulfill promises made to organized labor by rolling back Trump Board measures that have inured to the benefit of unionized and non-union employers alike. As made clear in a recent campaign position paper, President-elect Biden plans to push for adoption of pro-union elements within the Protecting the Right to Organize Act (PRO Act) passed by the House earlier this year as a cornerstone of his Administration's regulatory labor agenda.

It remains to be seen what a Biden presidency could ultimately achieve on behalf of organized labor, but the answer may turn upon the outcome of the upcoming Georgia runoff elections for the final two U.S. Senators. Even if the Senate remains in Republican hands, however, employers can expect a Board comprised primarily of Democrat appointees to ultimately reverse dozens of Trump-era decisions and regulations in an effort to reinstate doctrine established under the Obama administration. While this effort is unlikely to unfold in earnest until a Board majority reverts back to the Democrats in August 2021, we can certainly assume that the more employer-friendly agency we have seen over the past four years will become a distant memory by this time next year.

It should come as no surprise that the next administration wants to put its own imprimatur on national labor policies. For much of its history, the NLRB has effectuated change in labor policy primarily by using its decision-making authority to establish new precedent. Ironically, the Obama Board set about to make its own mark by overturning a number of cases decided by the prior regime, commencing approximately one year into the President's first term of office. While it remains to be seen how far the Biden administration's agenda will go in this direction, there is reason to believe that it will ultimately exceed the pro-labor accomplishments of the Obama Board.

Who's In Charge – And When?

Over the past four years, the Trump Board has swept aside scores of controversial decisions in an effort to reinstate long-standing precedent. Beginning in late 2017, a Republican Board majority, joined by General Counsel Peter Robb, began tackling high-profile labor issues through the exercise of its rulemaking and decision-making authority. Since then, the agency has succeeded in upending the "quickie election" rules and overturning dozens of decisions that were adverse to employer interests.

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That pendulum is now poised to swing back in dramatic fashion as the next administration prepares to undo these changes – and perhaps take the agency even further down the trail blazed by the Obama Board. What will be the primary labor relations objectives of the Biden administration? How would a Democratic-controlled NLRB attempt to implement big labor's wish-list? And when can employers begin to feel the impact?

At the outset, it's important to remember that the Democrats are unlikely to assume control of the Board before Member Emanuel's term expires on August 27, 2021. President-elect Biden would have authority to appoint lone Democrat Board member Lauren McFerran to serve as Chair of the NLRB upon taking office, but her party would still be outnumbered 3-to-1 by Republican Board members. Her "first-among-equals" role would entail authority to set agendas and control the direction of some initiatives, but there would be no meaningful opportunities to overturn precedent until Democrats attain a majority.

Meanwhile, General Counsel Peter Robb's four-year term does not expire until November 2021. Pro-labor groups are already pressuring President-elect Biden to remove Robb from office before then, but the legality of such a move remains questionable. It is more likely that General Counsel Robb (the agency's top "sheriff") will serve out the remainder of his term, potentially stymying hopes of significant pro-labor gains until late next year. By next December, however, a Democratic majority could move swiftly to remake Board doctrine in earnest. Going forward, there is much a newly constituted Board could accomplish in the ordinary course of its business to tilt the playing field back in favor of organized labor.

Anticipated Workplace Changes Impacting All Employers

A return to the Obama Board's guiding principles (and perhaps some of its alumni) should be of some concern to all employers. One hallmark of the Obama Board was an intentional shift to expand its influence over all employees, union and non-union alike. President-elect Biden promises to take up this mantle again, and "appoint members…who will protect, rather than sabotage…workers' rights." Employers should prepare for changes in many areas – including the following:

Joint Employer Status

In February 2020, the Board adopted a final rule overturning the Obama Board's *Browning-Ferris* decision and fundamentally altering the definition of joint employment. Under the new rule, an employer is only considered a joint employer if it shares or co-determines essential terms and conditions of employment, including wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. This test requires that a joint employer actually exercise direct, immediate and regular control over those terms and conditions of employment.

The Board's 2015 *Browning-Ferris* decision held that an employer need only have the contractual right to control working conditions – whether or not such control is ever exercised. The PRO Act would formerly codify the *Browning-Ferris* joint employer standard. Even if the PRO Act does not become law, however, employers can expect the Biden Board to explore other vehicles for returning to the *Browning-Ferris* standard, including through regulation or by decision-making.

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Employee vs. Independent Contractor

In January 2019, the Board issued a ruling reaffirming its adherence to traditional common-law factors for determining an individual's status as employee or independent contractor. This reversed a 2014 Obama Board decision that had modified the test to "severely limit the significance of a worker's entrepreneurial opportunity for economic gain." In so doing, the Trump Board returned to a longstanding test and made it easier to classify workers as independent contractors.

A Biden Board can be expected to take aim at the test for independent contractor status — deemed by pro-labor advocates as "worker misclassification" — in an effort to extend organizing and bargaining rights to a broader class of workers. In the process, the agency may soon return employers to the days when any such misclassification could be deemed an independent unfair labor practice.

Workplace Rules

In its hallmark *Boeing Companies* decision, the Trump Board overturned precedent that stood for over a decade in the form of the *Lutheran Heritage* case. Under *Lutheran Heritage*, seemingly neutral work rules that did not explicitly restrict rights to engage in union or protected concerted activity were nevertheless unlawful if they could have been "reasonably construed" to "chill" employees in the exercise of such rights. The Obama Board extended the *Lutheran Heritage* doctrine to rules governing workplace civility, confidentiality, third-party interactions, employee logo and trademark use, and workplace recording and photography. Along the way, the Board aggressively extended the impact of Section 7 to many more non-union employers.

In *The Boeing Companies*, the Trump Board created a two-prong balancing test for evaluating facially-neutral policies, examining: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule. The Board also created three categories of policies: Category 1: lawful; Category 2: warranting individualized scrutiny; and Category 3: unlawful.

A Biden Board can be expected to return to a more expansive interpretation of Section 7. That could mean overturning *The Boeing Company* in its entirety or establishing new procedures for eroding the balancing tests. In the short term, employers should carefully review their handbooks, policies, and employee agreements in anticipation of closer Board scrutiny.

Access to Employer Property

The president-elect has gone on record in stating that his administration will be committed to making it easier for unions to organize workers. Employers should therefore anticipate efforts to overturn recent Trump Board decisions limiting union access to employer property. In recent years, the Trump Board has significantly restricted such access:

- In 2019, the Board ruled that employers may enforce no-solicitation policies to exclude non-employee organizers, so long as they are enforced on a non-discriminatory basis and the organizers have other reasonable means of communication. The Trump Board has also ruled

organizers have other reasonable means of communication. The Trump Board has also ruled that employers may lawfully bar such activities even if they allow charitable groups or other community members, because "protest and boycott activities are not sufficiently similar in nature to charitable, civic, or commercial activities to warrant a finding of discrimination based on disparate treatment of such conduct."

- In *Caesars Entertainment*, the Board overruled the 2014 *Purple Communications* decision, returning to its 2007 *Register Guard* standard that employees have no statutory right to use employer equipment — including IT resources — for Section 7 purposes on non-working time. A limited exception exists for the "rare cases" where the employer's email system is the only reasonable means for employees to communicate.

A Biden NLRB will be looking for opportunities to reverse what they see as limitations on union organizers and employers. The only question is when those changes will begin to occur.

Changes Impacting Unionized Employers and Those Confronting Organizing Activity
President-elect Biden's campaign has made clear that he wants to expand collective bargaining rights and corresponding results for labor unions. The Biden Board will likely:

- Return to the so-called "micro-unit" standard allowing unions to organize smaller employee groupings within a particular business. As affirmed by many reviewing courts, this shift in approach, previously rejected by the Trump Board, has made it easier for unions to organize and improved their win rates – particularly against smaller employers.
- Expand its use of mail (or even electronic) ballots in representation elections. While previously reserved for cases involving voters scattered over broad areas or on different work schedules, the COVID-19 pandemic has seen a resurgence in mail ballots at the expense of a manual election process that was traditionally deemed to be more reliable.
- Increase its reliance on injunctive relief under Section 10(j) of the Act to remedy unfair labor practice allegations for purposes of securing reinstatement of employees discharged during organizing campaigns; prohibiting allegedly discriminatory work relocation or subcontracting; and rescinding unplanned changes in employment terms or conditions allegedly made for purposes of discouraging union support.
- Utilize its rulemaking authority to rescind a number of recent regulations relaxing expedited timetables associated with the agency's "quickie election" rules, and with them a number procedural safeguards affording due process before rendering determinations on the composition of employee voting units.

What Can Employers Do Now to Prepare?
Without question, the Biden Board will take an aggressive approach to restoring the rights of organized labor – at the expense of all businesses. Employers should therefore be prepared for exhaustive scrutiny of their handbook rules, policies, and procedures. Given the impending shift in agency ideology by the summer of 2021, employers would be wise to seize this limited window of opportunity to audit all such provisions – and to begin training their supervisors and managers on

the inevitable return to more restrictive Board doctrine. Members of the Fisher Phillips Labor Relations Practice Group are well-equipped to help you navigate through these and other strategic considerations.

Fisher Phillips will continue to monitor these developments over the next four years and provide updates as appropriate. In the meantime, make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney or any member of our Labor Relations Practice Group.

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