That Didn't Take Long: What Employers Need To Know As Biden Fires NLRB's Top Sheriff – And His Deputy

Insights
1.22.21

Within hours of being sworn in, President Biden took the unprecedented step of firing the NLRB's chief prosecutor, General Counsel Peter Robb. Robb's abrupt termination represents the first time in the agency's 85-year history that an incumbent General Counsel has been fired before the end of their term (although President Truman did seek and receive the resignation of the NLRB's General Counsel in 1950, which is the closest the agency has ever come to a scenario like this). The move was prompted by Robb's refusal to voluntarily resign as requested. Shortly thereafter, the new administration issued additional walking papers to Robb's second in command, Deputy General Counsel Alice Stock. The next step will presumably be to appoint an acting General Counsel more sympathetic to union interests, as Biden's team ponders potential candidates to submit to a Senate confirmation process that is not subject to filibuster. Businesses large and small will soon feel the impact of these moves as the new administration fulfills prior campaign pledges to organized labor.

Robb Leaves Behind A Robust Legacy – For Now

The NLRB's General Counsel wields extensive authority over the cases and issues pursued by the agency, and in the years since the Senate confirmed Robb to serve a four-year term in this role in the fall of 2017, he used this power in significant ways. Robb had an immediate impact on the agency and workplaces across the country as he sought to bring the Board and its case precedent in line with a number of business-friendly initiatives set forth in his Mandatory Submissions Memo. Over the last several years, the Board proceeded to scale back pro-union doctrine by issuing decisions:

- Restricting employee access to employer premises and IT systems for organizing activity;
- Relaxing rules regulating employer handbook rules and workplace policies; and
- Allowing unilateral actions by employers concerning various subjects of bargaining.

Under Robb's guidance, the Board also took up an aggressive rulemaking agenda:

- Putting in place a narrower joint employer standard;
- Updating representation election rules to provide more pre-election due process; and
- Moving to stop the unionization of graduate student teachers and research assistants at colleges and universities.

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Robb also achieved a number of efficiencies during his term of office, reducing agency backlogs while upgrading its technology and infrastructure.

Bracing For Immediate Impact

While the Board will remain in Republican control until at least August 2021, Robb's legacy will be difficult to maintain. His termination demonstrates that the Biden administration is intent on shifting the regulatory pendulum back to the interests of organized labor. As noted above, President Biden will most likely move swiftly to install someone into the General Counsel role who is more aligned with his political philosophy and empower them to begin unwinding Robb's enforcement policies and related administrative initiatives. The new General Counsel is also expected to loosen the reigns on Regional Directors across the agency's 26 Regions, allowing them to pursue cases *they* believe have merit – regardless of the views of a Republican Board majority that (at least for now) retains control.

Besides terminating Robb, President Biden similarly wasted no time in designating Member Lauren McFerran, the Board's only current Democratic member, to replace Republican John Ring as Chair. Member McFerran's appointment to Board Chair is also expected to have a significant impact over the next year and beyond. The new administration will no doubt pursue additional plans to fill the vacant fifth seat with an eye toward shifting the balance of power upon the August expiration of Republican member Emanuel's term. McFerran's role as Chair will ultimately afford her the opportunity to relitigate cases in which she provided a dissenting opinion, including issues related to joint employment, mandatory bargaining subjects, and employee misclassification.

While it remains to be seen whether President Biden will have enough support in the Senate to secure passage of the controversial Protecting the Right to Organize (PRO) Act, which passed the House in 2020, a new General Counsel acting in concert with a soon to be Democratic Board majority could do much of the work for him by:

- Returning to the expansive *Browning-Ferris* "joint employer" rule;
- Forcing mediation in deadlocked collective bargaining negotiations;
- Banning employers from holding mandatory "captive audience" meetings;
- Imposing costly financial penalties against employers for "interfering" with organizing efforts; and
- Allowing secondary boycotts and preventing employers from permanently replacing economic strikers.

It's less a question of "if" and more a question of "when," but sooner or later these anticipated developments will work to the detriment of unionized and non-union businesses alike. Employers should therefore take immediate steps to prepare by training their supervisors and managers on

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compliance with the inevitable return to more restrictive Board doctrine. You will also want to review existing policies and procedures to ensure that they are likely to survive increased scrutiny.

Fisher Phillips will continue to monitor any further developments in this area as they occur, so you should ensure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. For guidance and support in preparing for these developments, we would encourage you to contact your Fisher Phillips attorney or any member of our Labor Relations Practice Group.

This Legal Alert provides an overview of a specific development. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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