

# FULL HOUSE: A FULLY CONSTITUTED BIDEN NLRB IS HERE

Insights  
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Since President Biden's inauguration, employers have known that the National Labor Relations Board (NLRB) would eventually return to a majority beholden to the interests of organized labor. However, the big question was *when* that would occur. After all, many still remember that the Obama administration faced an ongoing and uphill confirmation battle filling spots on the Board throughout his two terms in office, limiting his ability to effectively impact labor relations policy – and perhaps offering a glimpse of what President Biden might face in 2021 and beyond.

It's time for employers to brace themselves, however, because that day has now arrived. On July 28, the Senate confirmed two veteran union lawyers – Gwynne Wilcox and David Prouty – to fill one currently vacant seat and another that soon will be upon the expiration of Republican Member Emanuel's term later this month. Once future Member Prouty takes the latter seat, the Biden Board will have its Democratic majority for the first time, and you can expect to see seismic changes take place when it comes to national workplace relations policy.

## Showdown in the Office of the General Counsel

When President Biden was elected, employers did not anticipate any substantial changes in agency doctrine

## Service Focus

### Labor Relations

out of the gate. While the Board retained a single Democrat (Chair Lauren McFerran) along with a vacant seat, the party was outnumbered by a trio of incumbent Republican members. By the same token, the agency's highest-ranking enforcement seat was occupied by General Counsel Peter Robb, a Trump appointee in the midst of a four-year term. The NLRB's "top Sheriff" has traditionally been permitted to serve out the remainder of their term, regardless of regime change in Washington.

Not long after he took office, however, [President Biden gave Robb his walking papers](#), appointing Regional Director Peter Sung Ohr to assume the position on an acting basis, pending confirmation of the next nominee. Ohr quickly set to work advancing the president's declared pro-union agenda. He immediately rescinded a dozen guidance memoranda issued by his predecessor, touching on a host of issues ranging from employee handbook provisions to the rights of workers opposed to paying union dues. He also rescinded a memorandum advocating for a stricter standard for assessing neutrality agreements.

### **Three of a Kind: President Biden's Subsequent Board Nominations**

President Biden wasted little time stacking the deck with a trio of union supporters. Less than a month after taking office, he started by nominating Jennifer Abruzzo, a longtime NLRB attorney and former Special Counsel to the Communications Workers of America (CWA), to replace Ohr as the agency's General Counsel. This office is a familiar one for Ms. Abruzzo, having previously served as Deputy General Counsel and Acting General Counsel during the Obama administration. She was confirmed by the Senate on July 21 and sworn in the following day to begin a four-year term as the agency's prosecutor-in-chief.

President Biden then turned his attention to another labor organization — the Service Employees International Union (SEIU) – for nominees to fill the Board seats needed to return the agency to Democratic

control. His first nominee was Union attorney Gwynn Wilcox, a senior partner with Levy Ratner who had previously served as Associate General Counsel to 1199SEIU United Healthcare Workers East. The Senate subsequently confirmed Wilcox to serve a term through August 2023. The President then tapped SEIU Local 32BJ General Counsel David Prouty to fill Republican member Emanuel's seat upon the expiration of his term on August 27, 2021. In light of these appointments, we can soon expect the pendulum of NLRB doctrine to take a significant swing back toward the interests of organized labor.

### **The Flop, Turn, River: What Changes Can Employers Expect?**

President Biden has made clear that he intends to be "the most pro-Union president you've ever seen," and he has since nominated a team of former union-side attorneys to carry out that mission. In the coming months, employers can expect to see many of the changes that we initially predicted back in November, including:

- Codifying or returning to the worker-friendly 2015 *Browning-Ferris* standard for determining joint employer status, reversing the final rule adopted by the Trump Board in February 2020;
- Rolling back the two-prong balancing test for seemingly neutral work rules enumerated in *The Boeing Company* decision, potentially returning to the Obama-era interpretation of *Lutheran Heritage*;
- Returning to the *Register Guard* standard, which permits employees to use employer equipment — including IT resources — for Section 7 purposes on non-working time. by reversing the Trump Board's 2019 *Caesar's Entertainment* decision;
- Rescinding the Trump-era rulemaking on independent contractor status and changes to the agency's election rules.

- Increasing its reliance on injunctive relief under Section 10(j) of the National Labor Relations Act to remedy unfair labor practice allegations.

## **Implied Odds: What Does All This Mean for Employers?**

Employers should move quickly to begin preparing for a return to Obama-era Board doctrine. Without question, the Biden NLRB will take an aggressive approach to restoring the rights of organized labor in furtherance of President Biden's pro-union agenda. In the next few months, you can expect an onslaught of decisions, rules and regulations designed to roll back recent Trump-era changes to agency doctrine while restoring the agency to a decidedly pro-labor enforcement posture.

In the short term, unionized and non-union employers alike should work with counsel to review handbook rules, employment policies, and contract provisions in anticipation of a return to Obama Board rules, in preparation for the agency's seemingly inevitable return to these standards. Members of the [Fisher Phillips Labor Relations Practice Group](#) are well-equipped to help you navigate through these and other legal and strategic considerations governing the union representation process, unfair labor practices, collective bargaining and related issues.

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' Insight System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the authors of this Insight, or any member of our [Labor Relations Practice Group](#).