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Labor Law Developments to Expect During a Biden Administration



President-elect Biden has long been allied with the labor movement, and during his tenure as vice president, the administration pursued policies favorable to organized labor. The same should be expected following his January 2021 inauguration. At least two union presidents were named early to his transition team's advisory board, and at least five other union leaders served on the committee that published formal recommendations for inclusion in the Democratic Party's official 2020 platform. Finally, President-elect Biden has promised to create a cabinet-level working group tasked to "deliver a plan to dramatically increase union density and address economic inequality." What follows is a brief summary of developments to watch for in a Biden administration.

National Labor Relations Board Composition: The Board's five members customarily reflect a 3-2 majority in favor of the president's party. President-elect Biden will have an immediate opportunity to fill one current vacancy, and then the seat of current Republican appointee William Emanuel when his term expires in August of 2021. Likewise, the term of Republican appointee Peter Robb, general counsel of the National Labor Relations Board, runs until November 2021, after which a Biden appointee may assume that role. Accordingly, while we should expect the decisions of a Biden administration Board to act more favorably toward labor, as the Obama administration Board did previously, those decisions are unlikely to come before 2022. But employers can prepare for changes now as the regional offices responsible for the preliminary investigation of these cases will be fielding charges as vehicles for these changes immediately. Among the likely topics to be addressed are increased scrutiny of facially neutral workplace rules and handbook policies; expanded union access to employer property and equipment for union activity; and enlarging the scope of employee activity protected by the National Labor Relations Act (NLRA).

Facilitation of Private Sector Union Organizing: President-elect Biden has proudly stated that union organizing should be encouraged and easier to accomplish. A sponsor of the Employee Free Choice Act while in the Senate, Biden has asserted that he will support "card check" as an option for obtaining union recognition. His administration will also seek to outlaw state "Right to Work" statutes, which prohibit union security agreements between employers and labor unions. This will require either amendment of the NLRA or a broad effort to lobby

individual states. He will likely pursue legislative and administrative efforts to minimize employer opportunity to influence employees about union representation—by prohibiting mandatory workplace meetings on the subject; reducing the time between the filing of a petition and a representation election; and placing significant regulatory barriers on employers' retention of attorneys and consultants by reviving the Obama administration's controversial "Persuader Regulation" changes. Finally, his NLRB will likely seek to reinstate the standards permitting "micro-unit" organizing.

Provision of Additional Economic Leverage to Unions: President-elect Biden has expressed an intention to prohibit companies from hiring "permanent replacement" workers during economic strikes. In addition, the president-elect has pledged to remove the legal prohibition on secondary boycotts and to protect "intermittent" strikes by workers.

Joint Employer Status: In the 2015 Browning-Ferris Industries decision, the Board overruled decades of precedent and adopted an expansive view of joint employment. Under that standard, joint employment could be found when an entity directly or indirectly controls, or reserves the authority to control, the essential terms and conditions of employment of another entity's workers. Earlier this year, the Board finalized regulations reversing the Browning-Ferris rule and restoring the previous standard. President-elect Biden has indicated he will withdraw the rule, codify the Browning-Ferris standard, and ensure its application to a broad variety of contexts including franchise relationships and contractor/vendor relationships.

The Protecting the Right to Organize (PRO) Act: In 2018 congressional Democrats introduced a sweeping bill designed to overhaul federal labor law to be more favorable to employees and labor unions than current law. President-elect Biden has expressed support for this bill which includes many of the initiatives mentioned above. While we believe that passing such an expansive piece of legislation is unlikely in a roughly evenly divided Congress, the bill nevertheless sets the parameters within which a significant debate over labor law reform will occur. As noted above, the administration will likely pursue component elements either via legislation or otherwise.

In addition to including many of the provisions described above, the PRO Act would establish civil monetary penalties against employers for unfair labor practices (ULP); individual liability for corporate directors and officers of offending employers; preliminary injunctions in a wide range of ULP cases; self-enforcing Board orders; a private right of action for individuals and unions; and mandatory interest arbitration to settle first contracts after just 150 days of negotiations.

Public and Public/Private Sector Issues: President-elect Biden has promised to restore the "Fair Pay and Safe Workplaces" executive order issued by President Obama. The order, which permitted debarment of federal contractors accused of violating the NLRA and other labor and employment laws, was enjoined by a federal court in 2016. President Trump rescinded it in 2017.

Cabinet-Level Working Group to Promote Union Organizing: The administration will likely assemble a working group, including a team of labor leaders and corporate leaders, tasked with providing recommendations on how to increase unionization. This group will also be responsible for ways to facilitate the expansion of sectoral bargaining whereby all employers in an industry are engaged in collective bargaining with a single union or coalition.

Takeaways

With the status of Senate control presently unclear, the prospect of achieving some of these goals by legislation is still difficult to ascertain, as is the impact of congressional oversight over the administrative process. But employers should start preparing for significant shifts in the regulatory landscape now.

Employers with questions or concerns should seek advice from experienced counsel.

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