

The Labor President:

A Discussion on How the Biden Administration's New NLRB May
Impact Employers

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The New NLRB

- President Biden promised to be the most labor friendly President in history.
- On January 20, 2021, President Biden fired Former NLRB General Counsel, Peter Robb.
 - Robb's 4 year term expired in November of 2021
 - Unprecedented move by Biden
- President Biden stripped NLRB Chairman John Ring of his Chairmanship.
 - Appointed current Democrat Member Lauren McFerran as the new NLRB Chairman

The New NLRB

- Democrat appointees will soon control the NLRB:
 - Lauren McFerran-Chairman (D)-Term expires December 16, 2024.
 - William Emanuel (R)-Term expires August 27, 2021.
 - John F. Ring (R)-Term expires December 16, 2022.
 - Marvin Kaplan (R)-Term expires August 27, 2025.
 - Vacancy-President Biden appointed Gwynne Wilcox (D) to fill the vacancy.



President Biden's Support of the Pro Act

- March 9, 2021, The House of Representatives passed the “Protecting the Right to Organize (PRO) Act”
 - Extend Joint Employer Liability:
 - ✓ The PRO Act creates liability based on the mere existence of reserved or indirect control over the employer's employees.
 - Expand definition of “Employee”:
 - ✓ The Act would eliminate the two elements of the “supervisor” analysis, “assign” and “responsibly direct” and work as a supervisor for the majority of their work time.
 - ✓ Independent contractor use the “ABC” test.
 - Codify the “Quickie” Elections:
 - ✓ Employers would no longer be parties to the Petition and could not have mandatory meetings to educate employees on unionization.
 - Eliminate Right-to-Work Protections:
 - ✓ PRO Act would allow unions to insist a collective bargaining agreement to compel all employees to pay union dues and fees.



- Handbook Policies and Work Rules

- Under the new NLRB, will we see a return to the Obama-era *Lutheran Heritage* standard of analyzing whether an employer’s policies violate the NLRA?
- *Lutheran Heritage* standard barred employee handbook policies and work rules that could be “reasonably construed” by employees to prohibit them from exercising their rights under the Act.
 - ✓ This standard was nearly impossible for employers and practitioners to navigate.
- *The Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017)
 - ✓ Overruled *Lutheran Heritage*.
 - ✓ New Test—the NLRB will evaluate (1) the nature and extent of the potential impact on NLRA rights; and (2) legitimate justifications associated with the rule.



- Handbook Policies and Work Rules

- The Boeing decision established three (3) “categories” of policies/rules:

- ✓ Category 1: Rules which are always lawful to maintain because:

- (i) when reasonably interpreted, the rule does not prohibit/interfere with Section 7 activity or the Act; or

- (ii) potential adverse impact on protected rights is outweighed by justifications associated with the rule.

- ✓ Category 2: Rules that warrant individualized scrutiny as to whether they would prohibit or interfere with NLRA rights.

- ✓ Category 3: Rules that are unlawful to maintain.



- Category 1: Generally Lawful to Maintain
 - Rules prohibiting recording and photography
 - Rules against workplace violence
 - Insubordination or on-the-job conduct that adversely affects business or operations
 - Rules prohibiting disruptive behavior
 - Rules protecting confidential, proprietary customer information or documents
 - Rules against defamation or misrepresentation
 - Rules prohibiting use of company logos and intellectual property
 - Rules banning nepotism, disloyalty, and self-enrichment
 - Rules requiring authorization to speak on behalf of the company



- Category 2: Warrant Individualized Scrutiny
 - The reasoning behind a rule determines if it can lawfully remain in a handbook.
 - Examples:
 - ✓ Confidentiality rules that encompass the “employer’s business” or “employee information.”
 - ✓ Rules regarding disparaging the employer.
 - ✓ Social Media rules
 - ✓ Rules banning off-duty conduct that might harm the employer.

- Category 3: Unlawful to Maintain
 - ✓ Confidentiality rules regarding wages, benefits, or working conditions.
 - ✓ Rules prohibiting employees from joining outside organizations.



- Applying *Boeing* standard, in the past year, the NLRB has upheld several employer's policies such as:
 - cell phone policies
 - bans on use of email systems for non-work purposes
 - ban on union solicitation, confidentiality policies
- Cell Phone Policies:
 - *Cott Beverages, Inc.*, 369 NLRB No. 82 (2020), the Board upheld a cell phone policy that prohibited the use of cell phones on the floor.
 - ✓ Slight impact on Section 7 was outweighed by the Company's need to protect product from contamination and prevent accidents.
- Email Policies:
 - *T-Mobile USA*, 369 NLRB No. 90 (2020), the Board upheld a policy that banned employees from sending non-work related mass emails.
 - ✓ No evidence that employer's email was the only means for mass communications.
 - ✓ Employer had property right to the email/IT systems.

- Union Solicitation Policies:

- *Wynn Las Vegas, LLC*, 369 NLRB No. 91 (2020), the Board held the employer issuing discipline to an employee for violating its solicitation policy by encouraging another employee to join the union during working time was lawful.
 - ✓ The Board overturned previous case, redefining “union solicitation” to mean conduct promoting and urging the rejection of the services of a union.

- Confidentiality Policies:

- *Interstate Management Company, LLC*, 369 NLRB No. 84 (2020), among other things, the Board upheld the employer’s confidentiality policy using the *Boeing* standard.
 - ✓ The employer’s legitimate interests of protecting employees’ information from potential data breaches outweighed the potential adverse impact on Section 7 interests.

- Arbitration Agreements and Class and Collective Action Waivers

- The Supreme Court in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018), held agreements that waive class or collective actions do not violate the NLRA.
- The Board in *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (2019), held agreements that waive class or collective actions in all forums interfere with the access to the Board.
 - ✓ Under the analytical framework of *Boeing*, the agreement was reasonably interpreted to prohibit the filing of claims with the Board.
- Employers should check their arbitration agreements to make sure they cannot be interpreted to prevent employees from filing a charge with the NLRB.
- Include language that makes clear employees *CAN* file claims with the Board.

What Do We Expect from the Biden Board?





- A Biden Board will return to a broader interpretation of employer work rules.
 - Biden has made it clear that he intends to appoint Board members who will protect workers and support unionization.
 - Employers should expect a complete change backwards to the Obama-era Section 7 precedent.
 - ✓ *Lutheran Heritage*
 - ✓ *Purple Communications*
 - In the meantime, employers must carefully review their handbooks, work rules, and arbitration agreements with anticipation of a vigilant and activist Board.

- Biden’s Acting General Counsel of the NLRB, Peter Sung Ohr has made it clear that he will take a *very* different approach.
- General Counsel Memo GC 21-03
 - Mutual Aid or Protection
 - ✓ Covers employee efforts to improve their lot as employees through channels outside the immediate employer-employer relationship.
 - ✓ Activities in support of employees of employers other than their own.
 - ✓ Section 7 Activity includes fundamental precursor action such as discussing wages, hours, and working conditions.
 - Includes political and social justice advocacy when the subject matter has direct nexus to employees’ “interests as employees.”
 - Even when no group action contemplated.
 - Inherently Concerted
 - ✓ Wages
 - ✓ Work Schedule
 - ✓ Job Security
 - ✓ Health and Safety
 - ✓ Racial Discrimination

Quickie Elections

- Starting in May of 2020:
 - Notice of Petition for Election: 5 business days to post notice (up from 2 days).
 - Pre-Election Hearing: Generally 14 business days from the service of the notice of hearing (up from 8 calendar days).
 - Statement of Position: Respondent's due 8 business days (up from 7 calendar days). Petitioners are now required to file a Responsive Statement of Position in 3 business days.
 - Pre-Hearing Briefs: Reinstated right to file post-hearing briefs

What Do We Expect from the Biden Board?





THE RETURN OF THE QUICKER QUICKIE ELECTIONS

- All indications lead us to believe the NLRB will return to the Quicker Quickie elections.
- The Biden Board will do all it can to assist unions win.
- Biden wants to codify the Obama-era NLRB election rules.

What Should Employers Do?

- Be proactive.
- Train supervisors on unionization and card signing now!
- Determine appropriate units and prepare for those arguments now
 - Review job descriptions and adjust
 - Supervisory status
 - Community of Interest
- Evaluate your likelihood for organizing now
 - Evaluations
 - Self assessments

Questions?