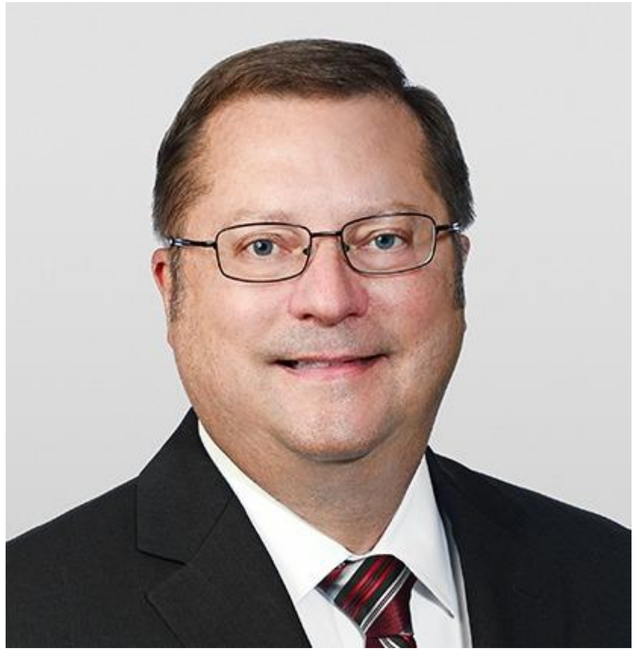
Clark Hill

The Current Whipsaw in Labor Law: *Recent National Labor Relations Board Developments and the Direction of the Biden Administration*

July 20, 2021

Today's Players



James R. Stadler

jstadler@clarkhill.com

Stephanie V. Romeo

sromeo@clarkhill.com

Today's Agenda

- Current and Anticipated Makeup of the NLRB
- Expectations of President Biden's NLRB
- Significant 2020/2021 Labor Law Developments

Current and Anticipated Makeup of the NLRB

NLRA and NLRB

What are they?

- NLRA = National Labor Relations Act of 1935
- NLRB = National Labor Relations Board (Two Applications)
  - The federal agency responsible for enforcing the NLRA
  - The 5 Presidential Appointees who act as an appellate body and who, along with the General Counsel of the NLRB and the Division of Advice, determine labor policy
- General Counsel = Presidential appointee who is responsible for legal representation of the NLRB

NLRA and NLRB

What is their scope and purpose?

- NLRA and NLRB provide mechanisms for labor and management to peacefully bargain over mandatory and permissive subjects of bargaining
- Mandatory subjects of bargaining include wages, benefits, hours of work, and just about every other term and condition of employment
- Gives employees the right to form unions and to engage in mutual aid and protected, concerted activities (or to refrain from the same) without fear, coercion, or retaliation
- The protection of the right to engage in protected, concerted activities applies equally to non-union employers

NLRB

The federal agency

- Currently organized into 26 geographic regions
- Receive and investigate alleged unfair labor practices committed by either employers or unions
- Conduct administrative hearings before administrative law judges

NLRB

The Five Presidential Appointees

- A quorum of three Board Members hear and decide appeals of the decisions of the Administrative Law Judges
- The five Board Members are appointed by the President of the United States
- They serve 5-year terms

NLRB

Current Board Members

Name	Political Party	Term Expires
William J. Emmanuel	Republican	August 27, 2021
John F. Ring	Republican	December 16, 2022
Vacant Since 8/27/2018	TBD	August 27, 2023
Lauren McFerran (Chair)	Democrat	December 16, 2024
Marvin E. Kaplan	Republican	August 27, 2025

NLRB

Nominee for Vacant Board Member Seat

- Nominee = Gwynne Wilcox
- Nominated by President Biden on May 26, 2021
- Currently Assistant General Counsel to the Service Employees International Union Local 1199 in New York, the largest healthcare unit in the U.S. with 365,000+ members
- Party Affiliation = Democrat
- Long-time advocate for very progressive, pro-employee labor reforms such as expanding scope of coverage of the NLRA to independent contractors, undocumented workers, incarcerated workers, card-check recognition without a secret ballot election, and banning state right to work laws

NLRB

Shift of Labor Policy and Ideology

- Democrats will not enjoy a majority of the five Board seats until sometime after William Emmanuel's term expires on August 27, 2021, and President Biden's subsequent nominee is confirmed by the Senate

- Labor policy and ideology will then fully shift to Biden's pro-labor agenda

- Commencement of reversals of prior labor policies which favored employers

General Counsel of the NLRB

Current Controversy

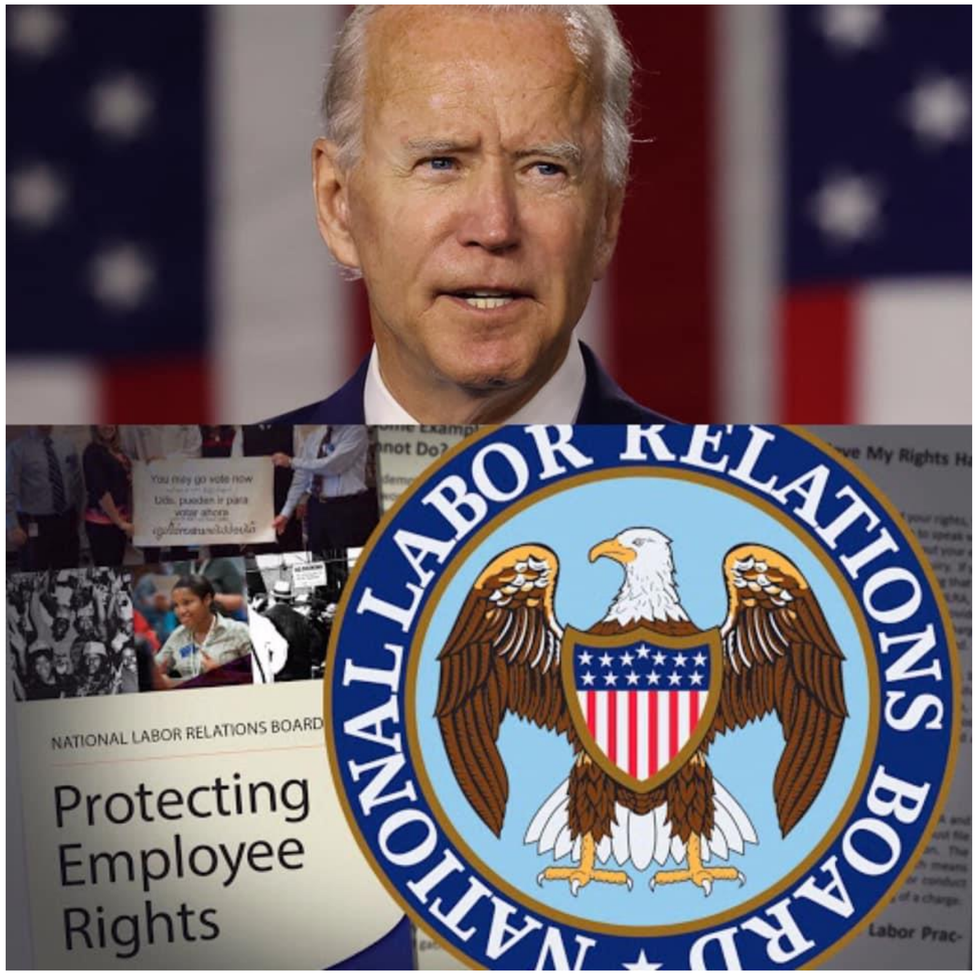
- Presidential appointee
- 4-year terms
- President Trump appointed Peter Robb to GC position in November 2017
- Term to expire November 2021
- In his first day in office, President Biden terminated Robb – unprecedented
- The next day, President Biden terminated Assistant GC Alice B. Stock – Unprecedented
- Acting GC – Region 13 (Chicago) Director Peter Sung Ohr

General Counsel of the NLRB

Current Controversy

- February 17, 2021, President Biden nominated Jennifer Abruzzo as General Counsel
- 23-year career NLRB employee
- 11-11 tie vote in Senate Health, Education, Labor and Pensions Committee
- Will get a full Senate vote

Expectations of Biden's NLRB



President Biden Labor Policy

Pro Labor

- Platform is predicated upon the following beliefs:
  - Strong unions built a strong middle class
  - Trumps policies weakened labor and thereby hurt the middle class
  - Red states “Right to Work” laws have hurt unions
  - You cannot rely on the free market to create fair compensation for workers

President Biden Labor Policy

Pro Labor

- According to President Biden, current labor policy has created:
  - Rising income inequality
  - Stagnant real wages
  - Loss of pensions
  - Exploitation of workers
  - Weakening of workers' voices in our society

President Biden Labor Policy

Promise to Labor: To Be The Most Pro-Union President Ever

- Aggressive enforcement of existing labor and employment laws
- Debarment of employers who violate labor and employment laws
- Seek new laws to:
  - Make it easier for employees to unionize
  - Prevent replacement of striking workers
  - Protect independent contractors and “gig economy” workers
  - Increase federal minimum wage to $15.00

Overturn Trump Era Policies

Joint Employer Standard – An Overview

- 2015 Standard: Board decision (*Browning-Ferris)* created two part test for determining Joint Employer
  - (1) Whether a common law employment relationship exists; and
  - (2) Whether the potential joint employer "possesses sufficient control over employees" essential terms and conditions of employment to permit meaningful bargaining.
- December 2017 (Trump era): Board decision (*Hy-Brand Industrial Contractors)*
  - Return to the former joint employer standard (and reviving precedent overturned by *Browning-Ferris)*
  - Joint employer status will be found only where two or more entities *actually* "share or codetermine those matters governing the essential terms and conditions of employment," such as hiring, firing, discipline, supervision, and direction, and where the kind or degree of "control" is direct and immediate, and not limited or routine in nature
  - Vacated two months later because of conflict of interest on part of a Board member so *Browning-Ferris* standard revived

Overturn Trump Era Policies

Joint Employer Standard – Today and Expectations

- 2018 – *Browning-Ferris v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018)
  - Affirmed general holding of 2015 *Browning-Ferris* decision. However, court found the Board applied concept of indirect control too broadly and failed to distinguish between indirect control over routine matters vs. essential terms and conditions of employment.
- **February 26, 2020 = Final NLRB Joint Employer Rule Issued (effective April 27, 2020)**
  - Reverts to pre-2015 standard
    - "Under this final rule, an entity may be considered a joint employer of a separate employers' **employees only if the two share or co-determine the employees' essential terms and conditions of employment**, which are exclusively defined as wages, benefits, hours of work, discharge, discipline, supervision, and direction."
    - Employer must exercise "substantial direct and immediate control" over terms and conditions of employment
- **Expect Biden's NLRB to revert to less stringent *Browning-Ferris* standard** – Consider direct or indirect control
  - Allows for increased bargaining in many industries and likely greater leverage on the part of the labor organization.

Overturn Trump Era Policies

Micro Units

- Current Standard under *PCC Structurals, Inc.*, 365 NLRB No. 160
  - A subset of employees of a larger group within the same department or workplace can form their own appropriate unit only where that smaller and defined group 1) has a "community of interest" among those within it, and 2) where that community of interest is "sufficiently distinct" from those of employees outside of the group.
- Expected Return to *Specialty Healthcare* (Micro-Units)
  - Under *Specialty-Healthcare*, employer had a burden to show "overwhelming community of interest" with those employees excluded from the bargaining unit selected by the union in order to seek a larger unit for organizing purposes.
    - Employer had to show there is no legitimate basis upon which to exclude certain employees from the petitioned-for unit
    - Unions used this standard often as a way to organize smaller sets of employees (micro-units) in hospitals and non-acute care settings
  - Micro-Unit organizing aligns with Biden's pro-union agenda

Overturn Trump Era Policies

E-mail Access for Union Employees – *Purple Communications*

- December 2019 decision (Caesars Entertainment Inc., N.L.R.B., Case 28-CA-060841, decision 12/17/19) revoked rights granted to workers in *Purple Communications*
  - Allows employers to restrict use of their email and other information technology systems to certain purposes so long as they do not target union-related communications and activity
  - Creates exception for situations where there are not other reasonable means to communicate on non-working time
  - Employers have right to control the use of their equipment, including email and other IT systems
- Expected return to *Purple Communications*
  - 2014 decision that was issued under a Democratic majority board
  - Board said if an employer provides workers access to an email system for work functions, then there is a presumption that employees have a right to use that system to discuss union activity or other work-related concerns
  - Employees may also use employer-owned equipment for non-work purposes

Overturn Trump Era Policies

Withdrawal of Union Recognition

- *Johnson Controls, Inc.*, 368 NLRB No. 20 (July 3, 2019) – Allows employer to anticipatorily withdraw union recognition based on objective evidence that the union has lost majority support of employees without worrying about whether the union will reacquire majority support
  - **Established 2-step standard**
    - **Evidence of a union's actual loss of majority support**, if received by an employer **within 90 days prior to contract expiration**, conclusively rebuts a union's presumptive continuing majority status when the contract expires.
    - Once employer anticipatorily withdraws, **the union may attempt to re-establish majority status by filing an election petition to formally regain authorization from the employees within 45 day**s of the date the employer announces anticipatory withdrawal.
- Return *to pre-Johnson Controls* standard – No time limit restrictions
  - Permitted a union to defeat an employer's announced intent to withdraw recognition in an unfair labor practice proceeding by presenting evidence that the union reacquired majority status in the period between the employer's anticipatory notice of withdrawal and actual withdrawal

Overturn Trump Era Policies

Workplace Rules

- *Boeing Company,* 365 NLRB No. 154 (2017)
  - Former guidance, which indicated any rule that *could* be interpreted as covering Section 7 protected concerted activity would be so interpreted and prohibited, was withdrawn on December 1, 2017
  - **Introduced new Balancing Test – Considers the impact of the rule on the NLRA rights *and* an employer's business justification for the rule**
    - Categorize workplace rules in 3 ways (lawful, case-by-cases basis, and unlawful)
  - NLRB General Counsel issued report on June 2018 on the legality of common employer rules/handbook provisions
    - Helpful guide when revising/drafting Employee Handbooks
  - Employers enjoy greater flexibility concerning rules and policies

Overturn Trump Era Policies

Workplace Rules

- Expected Return to *pre-Boeing* Standard
  - Board previously evaluated whether an employee would "reasonably construe" the language of a work rule to prohibit the exercise of NLRA rights. If it did, then the rule—regardless of whether it *actually* restricted Section 7 activity—was found unlawful *[Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)]
  - Invalidated rules concerning civility, honesty, respect, and other norms of behavior in the workplace as these rules could be interpreted to hinder an employee's right to engage in protected concerted activity
  - **"Biden's NLRB" already taking action to return to more restrictive standard**
    - February 1, 2020 – Acting General Counsel revoked enforcement guidance that limited enforcement litigation
    - March 31, 2020 – Acting General Counsel issued new enforcement memorandum taking a very expansive view of protected, concerned activity under the NLRA and urged vigorous enforcement of "inherently" protected activities that may not even be conducted in a concerned fashion
    - Board's new chair, Lauren McFerran, was a member of Board who dissented in *Boeing*

Significant Labor Law Developments Throughout 2020 and 2021

General Counsel Memo on Bargaining in Emergencies

Issued by former GC Peter Robb on March 27, 2020

- Memorandum issued in light of COVID-19 Pandemic, which prompted many questions regarding the rights and obligations of both employers and labor organizations to bargain
- NLRB may show some leeway if employers can show why quick, decisive action was needed such that there was no time for bargaining and bargaining would have impeded objective of ensuring survival of the business
- Two categories of Emergencies
  - **Public Emergency Situations** – where unionized employers took unilateral action following natural disasters such as hurricanes (analogous to COVID-19 Pandemic)
    - In some cases, employer's unilateral actions not found to have violated NLRA because of "economic exigencies" resulting from "extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action."
  - **Emergencies Particular to Employer**
- Overall, memo suggests employers still need to notify union of changes and *offer* to bargain over them

Decision Regarding Abusive Misconduct and Concerted Activity

***General Motors,* LLC, 369 NLRB No. 127 (July 21, 2020)**

- **Employees engaging in abusive conduct in the course of protected, concerted activities are not automatically shielded from discipline**
- Employee misconduct cases must be handled under *Wright-Line* burden shifting framework regardless of setting involved (*i.e.* union activity such as picketing, social media, workplace)
  - General Counsel/Charging Party must make initial showing that
    - Employee engaged in activity protected by Section 7;
    - Employer knew of such activity; and
    - Employer's decision was motivated by that knowledge (and GC/Charging Party must establish a causal link).
  - If GC/Charging Party meets *prima facie* case, the company can show it would have taken the same action anyway regardless of protective activity (*i.e.* employee would have received written warning in absence of protected activity)
- "We read nothing in the Act as intending any protection for abusive conduct from nondiscriminatory discipline, and, accordingly, we will not continue the misconception that abusive conduct must necessarily be tolerated for Section 7 rights to be meaningful."

The “PRO” Act

The Protecting the Right to Organize Act

- The Protecting the Right to Organize (PRO) Act is a labor law and civil rights reform, and an economic stimulus proposal.
- On March 9, 2021, the US House of Representatives passed the PRO Act on a mostly partisan vote, 225 to 206.
  - 5 House Republicans voted in support of the PRO Act
- **The PRO Act would expand protections for workers to exercise their rights to join a union and bargain collectively for better wages and working conditions.**
  - By narrowing the definition of “supervisor” and clarifying the definition of “employee,” the PRO Act would help to remedy exclusions for low-level supervisors and managers from anti-union discrimination, protecting the right of these workers to organize without fear of retaliation.
  - Overturn state “right to work” laws; Prohibit employers from using mandatory arbitration agreements; Implement other expected changes discussed today (joint employer standard, micro units, etc.)
- Unlikely to pass in the Senate given lack of Republican support for the legislation

Return of Manual Elections

First In-Person Union Vote since November 2020 held in May 2021

- Workers at a California waste and recycling collection facility voted in person on unionizing with a Teamsters local on May 28, 2021, marking the first time a NLRB official approved a manual election since the Board issued rules for conducting votes during the COVID-19 Pandemic in November 2020
- **NLRB Los Angeles regional director Mori Rubin determined improving COVID-19 metrics in the areas surrounding the facility allowed for workers to safely vote in-person**
  - Conditions were no longer sufficient to justify directing a mail-ballot election under *Aspirus* decision giving guidance as to when election should be held in person or by mail
  - Also considered Board decision at end of April 2021 noting concerns about COVID-19 variants are not on their own enough to justify mail-in elections
- Used large tent at the facility to conduct election; company agreed to disclose the number of people who tested positive or experienced symptoms at the facility in the previous 14 days by the day before the election
- Manual elections likely to continue, but still unsure of the future considering rising COVID-19 cases across the country as vaccination rates decline

Supreme Court Issues Pro-Employer Decision Involving Farm Property Rights

***Cedar Point Nursery v. Hassid,* 141 S. Ct. 2063 (June 23, 2021)**

- The US Supreme Court in a 6-3 decision ruled that a **California law allowing union organizers access to farms to organize workers is unconstitutional because it in effect deprives farm owners of their property rights without just compensation**.
  - The California law allowed union organizers access to growers' property for organizing activities up to three hours per day during non-working hours like lunch and before and after work, for up to 120 days per year.
  - Lawyers for the state defended the 1975 law on the grounds that it did not do significant harm to farmers' businesses.
- Six republican-appointed justices ruled for the businesses, while the three democratic-appointed justices dissented, siding with state officials who defended the pro-union rule.
- Takeaway: Conservative Supreme Court may hinder Biden's pro-Union agenda.

Questions?

Thank You

Legal Disclaimer
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