

NLRB May Overturn Employer-Friendly Decisions During Biden Administration

By Allen Smith, J.D.

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President-elect Joe Biden's administration may have difficulty getting the congressional votes needed to pass the Protecting the Right to Organize (PRO) Act, legal experts say, but Democrats are likely to eventually gain control of the National Labor Relations Board (NLRB). A Democrat-controlled board might overturn employer-friendly decisions.

PRO Act

The PRO Act would be the most significant change to labor laws since the National Labor Relations Act (NLRA) was passed in 1935. If enacted, the bill would make at least 50 changes to the NLRA to make it easier for labor to achieve its organizing goals, said Michael Lotito, an attorney with Littler in San Francisco.

Larry Lorber, an attorney with Seyfarth in Washington, D.C., said that the bill would:

- Give the NLRB the authority to impose civil fines of \$50,000 for labor violations, which could be doubled for a repeat violation.
- Greatly expand the definition of "employee" and almost expunge the concept of independent contractor.
- Expand the content of the lists of employee contact information to be provided to unions prior to an election.
- Prohibit mandatory arbitration.
- Greatly expand the whistle-blower laws administered by the Department of Labor (DOL).

Seth Ford, an attorney with Troutman Pepper in Atlanta, also noted that the PRO Act would:

- Weaken right-to-work laws in 27 states by permitting unions to require workers at unionized companies to pay dues. Currently, employees in right-to-work states may choose not to pay union dues.
- Prevent employers from permanently replacing striking workers in economic strikes. Employers already are prohibited from permanently replacing striking workers in unfair-labor-practices strikes.
- Allow workers to bring private lawsuits for violation of the NLRA.
- Codify the DOL's persuader regulation, which narrowed the "advice exception" of the Labor-Management Reporting and Disclosure Act, by requiring law firms to participate in financial disclosures about their relationships with employers.
- Prohibit mandatory meetings called by employers to present their views on union-organizing efforts.

Derek Barella, an attorney with Schiff Hardin in Chicago, said the PRO Act would:

- Make it easier to establish that two or more employers are joint employers.
- Codify many union-friendly NLRB decisions.

In addition, David Pryzbylski, an attorney with Barnes & Thornburg in Indianapolis, said that the PRO Act would codify the "ambush election rule," drastically reducing the amount of time a company has to campaign and speak to its employees about unionization once a union election petition is filed.

The PRO Act "has no chance of passing if Republicans maintain control of the Senate," said Sara Jodka, an attorney with Dickinson Wright in Columbus, Ohio.

"If the Democrats win the Senate, the PRO Act will get glowing hearings in both the House and the Senate," Lotito predicted. But he said, "Given the increased numbers of Republicans in the House, any slight defection from some moderate Democrats might make its passage close. The same can be said of the Senate."

"It bears mentioning that a less ambitious labor reform bill failed to pass a Democratic-controlled Congress in 2009," Pryzbylski said.

"If the Democrats do win both Senate seats in Georgia, there may be a scaled-down PRO Act focused on independent-contractor changes, some changes to arbitration rules and other technical legislative action," Lorber said.

The Society for Human Resource Management (SHRM) supports balanced labor-management relations and recognizes the inherent rights of employees to form, join, assist or refrain from joining a labor organization. When Congress considered the PRO Act earlier this year, SHRM opposed the legislation (https://advocacy.shrm.org/wp-content/uploads/2020/11/SHRM-Letter-PRO_Act_HouseVote_02.05.20_FINAL.pdf?_ga=2.210648019.779811207.1606138792-1500963456.1602108623&_gac=1.181486165.1602874018.CjwKCAjwiaX8BRBZEiwAQQxGx_KrGXD8TF3tv9wT3foNYupHvjjaN5N2zAt1j0B5EB_kZ__UcxvPpRoCLpEQAvD_BwE).

NLRB Changes

Once it's controlled by Democrats, the NLRB may upend existing precedent. But that will take some time. The board currently has three Republican-appointed members: William Emanuel, Marvin Kaplan and John Ring. Lauren McFerran is the lone Democrat. One seat remains vacant after Mark Gaston Pearce left the board in 2018. It is customary for the president to maintain a 3-2 majority in favor of his party on the board, Pryzbylski noted.

Board members are sworn into NLRB seats that have continuously running five-year terms. This means that a member could be appointed to a seat that has less than a full term remaining. The current board terms are:

- William Emanuel: term on his seat expires Aug. 27, 2021.
- Marvin Kaplan: term on his seat expires Aug. 27, 2025.
- Lauren McFerran: term on her seat expires Dec. 16, 2024.
- John Ring: term on his seat expires Dec. 16, 2022.
- Vacant seat: term on this seat expires Aug. 27, 2023.

President-elect Biden likely will nominate at least one person to fill the vacant seat at the NLRB in 2021, creating a 3-2 Republican majority. That majority would exist until Emanuel's seat expires next year, at which point Biden could appoint another member, giving the Democrats a 3-2 majority.

"There could be delay in confirming the Emanuel replacement in 2021," Pryzbylski said.

Decisions That May Be Reversed

Barella said that decisions that are prime targets for reversal by a Biden board include:

- *Caesars Entertainment*. The Trump board overturned Purple Communications and held that employees do not generally have a protected right to use their employers' e-mail systems for purposes of union-organizing activity.
- *The Boeing Company*. The Trump board issued a new standard for evaluating challenges to employee-handbook provisions and work rules, overturning a previous standard that held neutral rules were unlawful if an employee could reasonably construe them to interfere with protected rights.

- *Johnson Controls*. The Trump board upheld the employer's right, within 90 days of labor contract expiration, to suspend bargaining and withdraw recognition from the incumbent union based on objective evidence that the union no longer has majority support.

Prybylski said that another decision that could be overturned includes *PCC Structural*s (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/labor-relations-nlr-micro-bargaining-units.aspx?_ga=2.73606993.2147308733.1606741415-1500963456.1602108623). This decision overturned the Obama board's micro-unit decision in *Specialty Healthcare*. *Specialty Healthcare* made it easier for unions to organize tiny bargaining units.

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