

Top Five Labor Law Developments for March 2021

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1. *On March 31, 2021, National Labor Relations Board (NLRB) Acting General Counsel Peter Sung Ohr issued a memorandum stating his office will return to “vigorous enforcement” of employee rights under Section 7 rights of the National Labor Relations Act (NLRA).* Ohr encouraged a broader view of Section 7’s protections to cover a wide range of conduct, including “employees’ political and social justice advocacy when the subject matter has a direct nexus to employees’ ‘interests as employees.’” The memorandum provided examples of conduct the acting general counsel believes falls within this protected area of workplace “political or social justice advocacy,” such as media interviews regarding living on minimum wage, an employee’s “solo” strike to join a demonstration advocating for a \$15-per-hour minimum wage, and protests over workplace immigration raids by the government. Ohr said, “[E]mployee activity regarding a variety of societal issues will be reviewed to determine if those actions constitute mutual aid or protections under Section 7 of the Act.” As a result, although private sector employees generally do not have free speech protections in the workplace, employers must be mindful that an incoming NLRB may view political expression as protected under Section 7 of the NLRA.
2. *The House of Representatives has voted 225-206 to pass the Protect the Right to Organize Act, or PRO Act, the most pro-worker labor reform in decades, according to the bill’s sponsors.* The PRO Act is included in President Joe Biden’s \$2.5 trillion infrastructure plan, which awaits a Senate vote. The expansive and multi-faceted PRO Act aims to weaken “right-to-work” laws, codify an Obama-era standard for joint employers, limit independent contractor status, and install hefty monetary penalties for labor law violations, among other extensive changes. However, because the bill lacks enough support to overcome the 60-vote filibuster in the Senate, some Democrats are exploring the budget reconciliation process as a possible path forward for at least parts of the bill, because the procedure allows certain changes to the law to move through the Senate with just a simple majority. It is not clear which parts of the bill would have a clear budgetary impact, which the reconciliation process requires. Establishing greater penalties and fines for violations for NLRA violations may have a chance at passing through budget reconciliation. Further, Congress could change the labor landscape through the reconciliation process by providing more funding for agency enforcement and programs aiding workers.
3. *The NLRB withdrew a proposed rule that would have excluded student-workers from NLRA coverage.* The Board withdrew the rule it proposed in September 2019 to exclude student-workers at private colleges and universities from coverage under the NLRA. As proposed, the rule excluded students working as teaching or research assistants at private higher education institutions from the definition of “employees” under the NLRA with the protected right to unionize and engage in collective bargaining. While the NLRB has shifted its position on the status of student-workers, since 2016, the Board has held that an employment relationship can exist under the NLRA between a private college or university and its employee, even when the employee is a student. The proposed rule would have reversed *Columbia University*, 364 NLRB No. 90 (2016), and placed the non-employee status of student-workers beyond the reach of NLRB case decisions.
4. *The Senate has confirmed Boston Mayor Marty Walsh to be Secretary of Labor.* Secretary Walsh was confirmed by a bipartisan vote of 68 to 29. Walsh has a long pro-union track record, beginning with joining the Laborers’ Union Local 223 at age 21. By 2011, he led the Boston Trades Council, representing ironworker and electrician unions, among others. Since 2014, he has served as Boston’s mayor. Walsh had a powerful endorsement from AFL-CIO President Richard Trumka, who rallied his federation of 56 unions to back Walsh when President Biden was elected in November. At his confirmation hearing, Walsh said, “Workers’ protection, equal access to good jobs, the right to join a union, continuing education and job training, access to mental health and substance use treatment. These are not just policies to me, I lived them Millions of American families right now need them. I’ve spent my entire career at different levels fighting for them.”

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5. *The NLRB extended the time for filing briefs regarding whether the Board should adhere to or overrule its Johnnie's Poultry standard until April 19.* In *Johnnie's Poultry*, 146 NLRB 770 (1964), the Board held that, before asking an employee any questions that could relate to their union activity, the employer must: (1) inform the employee of the purpose of the questioning; (2) assure the employee that no reprisals will take place for refusing to answer any question or for the substance of any answer given; and (3) obtain the employee's participation in the interview on a voluntary basis. The request for briefing came in *Sunbelt Rentals, Inc.*, 18-CA-236643 *et al.*

Please contact a Jackson Lewis attorney if you have any questions about these developments.

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