Podcast

The Year Ahead: Labor Relations in 2021

By Jonathan J. Spitz & Richard F. Vitarelli

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Details

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Takeaways

The NLRB and labor and employment law will see significant changes with a new administration in the White House. While changes may not be immediate, they could be far reaching and will certainly impact businesses large and small across the country.

What Employers Need to Know

- Significant changes impacting employers are expected under the Biden Administration.
  - Jennifer Abruzzo, a CWA special counsel, was nominated General Counsel of the NLRB. As General Counsel, Ms. Abruzzo will influence what type of cases and prosecution theories will be brought before the Board.
  - Board Member Lauren McFerran, a former union-side labor practitioner, was appointed as the Board Chair.
- Employers likely can expect a return to a timeline and election process that more closely resembles the “quickie election" rules.
- Employers likely can expect that under Section 7 of the NLRA governing organizing rights and protected, concerted activity, there will be a move towards the following:
  - Limiting when an employer can keep workplace investigations confidential or prevent them from turning over information regarding investigations to

union representatives.
    - Broadening the definition of an employee for purposes of the law; limiting that of a supervisor.
    - Allowing student workers employee rights.
    - Increasing access to private property and computer systems.
    - Increased tolerance for disruptive workplace protests and conduct.
- The current Administration's Board may attempt to roll back Board precedent allowing unionized employers to act unilaterally in many instances.
- The Board cannot overrule Congress; if the Protecting the Right to Organize (PRO) Act passes, employers can expect that:
    - The independent contractor test will be softened;
    - The definition and responsibilities of "supervisor" will be limited;
    - The burden will be on the employer to demonstrate the proper classification of a supervisor;
    - Election rules will change making it easier for employees to organize and more difficult for the employer to educate employees during union organizing campaigns;
    - Unions will be given more opportunity to organize smaller groups and would also seek to preempt state right to work laws paving the way for compulsory membership and payment of dues;
    - A prohibition on the employer right to lock out or permanently replace employees; and
    - Compulsory interest arbitration if an employer and union cannot reach an agreement in the first contract setting within 90 days.
- Employers should position themselves to reduce the opportunity for third party interference by taking the following measures:
    - Anticipate increased organizing activity. Avoid union activity in the first place by treating people fairly and having an open-door policy to help take care of employees before they feel the need to look outside the company for help.
        - Revisit open door systems. Train managers to make sure that the doors are *really* open and that people know to listen and to address employee needs.
    - Be prepared for quicker elections. Train supervisors on their legal rights and responsibilities under the NLRA, the facts about labor unions and the employer's position on unions.
    - Prepare a communications strategy in advance.
    - Review handbooks and policies now and anticipate what might change or be called into question under the current Board.
    - Assess your independent contractor and joint employer relationships to ensure proper classification.
    - Revisit the Lafe Solomon memos that discussed lawful and unlawful policies under the NLRA.

Transcript

Alitia (00:06):

Welcome to Jackson Lewis' Podcast, We get work™, focused solely on workplace issues everywhere and under any circumstances, it is our job to help employers

develop proactive strategies, strong policies, and business oriented solutions to cultivate a workforce that is engaged, stable, and diverse. Our podcast identifies the issues dominating the workplace and its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted?

Union activity, the NLRB, and labor and employment law generally, will see significant changes with a new administration in the White House. While changes may not be immediate, they could be far reaching, and will certainly impact businesses large and small across the country. This episode of We get work™ outlines, the areas of focus for employers in 2021 to maintain healthy employer relations, avoid labor unrest and to ensure compliance with ever changing NLRB rules and precedents.

Our host today are Jon Spitz and Rick Vitarelli, principals, respectively, in The Atlanta and Hartford Offices of Jackson Lewis, and co-leaders of the firm's labor relations practice group. Jon partners with clients to design pragmatic strategies that minimize risk and maximize performance. His philosophy is to help clients understand what they can do to achieve their objectives as opposed to what they cannot do. Rick serves as strategic labor counsel for clients looking to reorganize and restructure, buy, sell, and merge business operations, and supports them in developing system-wide labor relation strategies.

Rick strives to align clients culture and business objectives, particularly within heavily unionized industries. Will the change in administration significantly impact labor law and labor relations, and if so, how will my business be impacted?

Jon Spitz (02:11):

Thanks, Alitia. As Alitia noted, I'm Jon Spitz, co-chair the Jackson Lewis Labor Relations practice group. With me is my co-chair and better half, Rick Vitarelli. Alitia asks, Rick, does the change in administration really matter, and if so, how quickly will change come? To me, the answer to those questions are, yes, the change really matters, and change will come immediately, and in fact it has already come. I would start just to see the harbinger of things to come on his very first day in office, President Biden asked that the current general counsel of the National Labor Relations Board, Peter Rob, resign from his position.

That is virtually unprecedented, and perhaps not surprisingly, Mr. Rob declined, at which point he was summarily terminated by President Biden. President Biden has since nominated Jennifer Abruzzo, a CWA special counsel, to be the next general counsel of the board, and she's going to be different. Peter Rob has been described by the president of Ms. Abruzzo's union, the Communication Workers of America as "a union buster." In contrast AFL-CIO president, Richard Trumka issued a press release touting Ms. Abruzzo, her qualifications when she was nominated by President Biden.

The press release issued by Mr. Trumka was entitled, NLRB general counsel nominee is a lifelong protector of working people, so it's definitely going to be a change. The reason why the general counsel matters is he or she determines what cases to prosecute and the theories under which to prosecute cases. So, if the labor board is going to change law, somebody's got to put a case in front of it and ask the

board to change the law. So, the prosecutor determines the theory of the case. We expect that Ms. Abruzzo would bring some novel cases that she would attempt to change some of the current precedent to make it more union and employee friendly.

For sure, that's coming down the pike, and of course, it doesn't just take a general counsel to change the law, the board itself would have to change its own precedent. What do you see coming in terms of the composition of the board and how that will matter, Rick?

Rick Vitarelli (04:48):

Well, as we stand presently, a couple of things have already happened with the board. Just as the president ultimately removed the general counsel of the board, and then the general's number two was also appointed and removed. The president has also taken action with the board. The president has designated that, or appointed Lauren McFerran, who is a former union attorney, to be the board chair. So, knocked out the existing board chair, John Ring, who was a former partner at a management-side law firm. You could see right away that, not only at the GC level, do you have somebody who is essentially a union lawyer, now you have one on the board who is sitting there as the chairman, despite the fact that the democratic appointees are not the majority.

So, you have that starting right out of the gate. If you think about things that a board chair can do and use discretion, whatever that might be, now the sort of a labor appointee is on the board, making those decisions, just like the general counsel is deciding what gets prosecuted. When you think about it, we know where this is going to go. The actual board itself is not going to turn over to be majority democratic appointees until sometime in the fall. We think it would probably happen as soon as August, and that will also be significant, because not only will you have a prosecutor and a chair, you'll have a majority to decisions in contested cases.

We're right back to where we were in 2009, let's say, where you will have the Democrats fully entrenched in the board, making decisions that are going to influence how the law develops over the next several years. That's going to be a big deal.

Jon Spitz (06:13):

I think we are going to see significant changes under a newly constituted board, and I think for most employers, the majority of whom are non-union, the most significant rule is going to be changes to the election rules. Under the Obama board, the board engaged in rulemaking and implemented what was called the quickie or expedited election rule, and the most significant change in that rule was that it shortened the typical NLRB election timeline from 42 days to roughly 23 days, and it also deferred a lot of issues that employers litigate prior to elections, such as the composition of who would be eligible to vote, supervisory status, and other key issues.

The quickie election rule deferred a lot of those issues until after the vote, and that created a lot of uncertainty for employers. Employers now wouldn't necessarily

know who was a supervisor, who could be enlisted to communicate with employees, and employer wouldn't necessarily know exactly what the composition of the voting unit would be. Instead, many employees would vote subject to challenge. A lot of this was changed under the Trump board, which rolled back the quick election will with its own rulemaking, and most significantly, it changed the timeline from having the hearing as to who would be eligible to vote from eight calendar days to 14 business days, effectively pushing back the timeline by 13 days, right?

Because 14 business days is effectively 21 calendar days. The added days have resulted in elections being held in roughly 40 days as opposed to 23 days. That's critical for employers because, particularly an employer who's hit with a petition and doesn't know that a union is talking to its employees, 23 days is not a lot of time to train your supervisors to communicate with your employees, to provide them information that will help you educate employees on why a union may not be a good idea. So, by pushing the timeline back by roughly 17 days total, employers have a much better opportunity to educate employees and are much more likely to prevail in NLRB elections.

Also, the litigation timeline has changed allowing employers to prepare for elections and also less issues would be deferred until after elections, giving employers more certainty. For employers, certainty is always a good thing when they're facing an NLRB election. They want to be able to educate employees with a specific timeline. They want to know who's voting. They want to know who may lawfully communicate on the employer's behalf. That was the rollback under the Trump board. We would expect that under a Biden board, that we are going to return through more rulemaking, most likely, to a timeline and a election process that more closely resembles what we saw under the so-called quickie election rules.

Rick, the election rules were one of the highest profile changes under the Obama board, and of course, that was reassessed by the Trump board. I think the other one that was really high profile was protected concerted activity, both in terms of how the board looked at employer policies that could chill protected concerted activity, or how employers treated employees who were engaged in protected concerted activity. Why don't you talk a little bit about that and tell us where you see that precedent going?

Rick Vitarelli (10:01):

Well, protected concerted activity is protected by Section 7 of the Act. This is the part of the law that applies to all employers, all private employers covered by the NLRA. It is the heart and soul of the NLRA. It allows employees to engage in protected and concerted activities, to band together to organize and form unions, or to just band together with respect to addressing terms and conditions of employment with an employer. This is the part of the act that gives people the right to tell their employer what's up, ask them to change things or tell them that they should change things and express outrage in the workplace.

It's no surprise that under the Trump administration and the appointees on the Trump board were more conservative. What was to be tolerated in the workplace was shortened or trimmed so that there would be less tolerance for behaviors that went into more aggressive behavior bullying. Under the Obama administration, the

NLRB, at that point, was expanding what would be protected and was finding it to be much more limited than what it would find to go beyond the scope of protected activity that could be addressed with discipline.

We're going to see more of what happened during the Obama administration happen during the Biden administration so that protests and conduct that would be in furtherance of employee activity protected by Section 7 would be beyond the scope of discipline, and employers who decided to impose discipline, where that was occurring, would be subject to findings by the board and complaints. We're going to see a lot more tolerance of behavior within the workplace, the protesting employer policies and procedures.

Work rules will be looked at with skepticism, if there's any way in which they could be twisted to be found in violation of protected rights under the law or the right of employees to engage in certain activities, they will be struck down, or they could be used as a basis to object to elections that may be going in favor of the employer. The same thing with other rules that the board is going to be looking for, the board will try to increase the ability of employees in unions as well to engage in activities to support unionization or just protected concerted activity.

The board is going to limit certain situations in which an employer can keep workplace investigations confidential, or prevent them from turning over information and investigations to a union representative. They're going to try to make it more, I think the employer has to disclose that information earlier, and more often. Some things the board is also going to do just, they're going to try to increase who can be an employee for purposes of the law. They're going to limit what a supervisor is.

They're going to allow student workers to have rights as employees, where that has been sort of minimized under the Trump administration. They're going to increase access to private property, access to computer systems, where under the Trump administration, the board had worked diligently to try to limit the use of those, either physical or virtual premises so that the employer can really meet or who is able to have access to employees through those means. You're going to see a lot more of that stuff. I think Jon, we've seen this several times in our careers, every time we get a change in administration, we see these types of changes.

Jon Spitz (13:04):

Rick, you're such a cynic. It's unfortunate to us as labor law practitioners, but I mean, that's the reality, is unlike the courts, the courts interpret the laws as enacted by Congress or the state legislature, and they're constrained by that and they don't flip flop on precedent. They interpret the law and you get some consistency. Unfortunately, the Labor Board is unabashedly partisan, at least it has been in the last few cycles, and we see the law flipping back and forth. A lot of what we've just talked about, I talked about the election rules that bounces back and forth in recent years to impact whether it's easier or harder for labor unions to organize.

You talked about protected concerted activity. Again, being a cynic, as union density has dropped, a cynic like me would say, well, the Obama board was looking for a way to stay relevant by pushing the Section 7 rights that are applicable in non-union

settings such as work rules. We were seeing challenges to employ our handbooks in cases where no one had even contemplated having a union in a workplace. It's interesting to watch how this stuff ping pongs back and forth, and union workplaces are no different.

I think that the Biden board will try to roll back areas where employers tend to exercise discretion despite having a union relationship. For example, in the Raytheon network centric systems case, the Trump word looked at an employer's past practice of changing its health insurance. I believe it was health insurance, but it was a benefit, and the employer from year to year, made discretionary changes to its benefits. When a unionized employer made the changes in a union workplace, just like they had done time and again in prior years, the Trump board found that that was lawful, that it was not an unlawful unilateral change, that it was essentially maintaining a dynamic status quo, where if an employer had made changes in the past that did not explicitly violate a contract that, that became the law of the shop.

So, we're going to see that revisited. The Trump board also issued a very significant case in MV Transportation, in which the board found that, if an employer made a change that was arguably within the scope of the collective bargaining agreement, for example, the bargaining agreement speaks to scheduling, and the employer unilaterally changed the schedule, the union filed an unfair labor practice charge. The Trump board essentially said, we're going to defer that to arbitration, right? The board's role is not to interpret the contract. The board's role is simply to determine whether an employer is violating the act.

We think that'll get rolled back. Then another example of that is the total security management case, which was issued under the Obama board and then rolled back by the Trump board. But the total security management, the Obama board said that, when an employer is first organized and does not yet have a first contract, that it had to bargain with its union before disciplining or terminating employees in circumstances where it wasn't purely by rote, for example, purely by rote would be a no fault attendance policy.

But if an employer was interpreting conduct and interpreting its own rules, or even applying kind of its own, what is, and what is not appropriate in the workplace type of discretion, the Obama board said that the newly organized employer has to bargain with its union before exercising that kind of disciplinary or termination discretion. That was rolled back under Trump. I think we're going to see it again under a Biden board. But talking to all of that back and forth, the one thing that the board can't do is overrule Congress.

That brings us to the PRO Act. If the PRO Act was passed, Congress would set the law of the land in terms of a lot of issues that the board has addressed. Why don't you tell us a little bit about that, Rick.

Rick Vitarelli (17:27):

Yeah. Look, Jon, if we characterize everything we've talked about up until now, the points that we talked about PCA was the board is trying to expand the rights of individuals to engage in activities under Section 7, it's being very solicitous of that type of behavior. What you just talked about on the union side was the board is

giving the unions more of a seat at the table on decisions that are being made and requiring employers to be a much more solicitous of their involvement, and it gives the NLRB a little bit more of a role, for example, in the contract covers standard, it would take away from the board the ability to review cases.

The board puts itself back into the mix. The board wants more authority, wants unions to have more of a seat at the table. The PRO Act does basically those things as well. As we look at what the objectives were, the PRO Act would change the joint player analysis back to one that would bring in more employers as punitive joint employers into sort of a singular joint employer status. If you have a company with a staffing firm, for example, the standards that are under the PRO Act, if it ever gets passed, would make it easier for two employers to be considered a joint employer if they both work together in a workplace and they have employees performing similar functions.

In case a staffing agency, subcontractors, these situations would be clearly joint employment situations, where the Trump board made it more difficult to find a joint employment relationship. The independent contractor test would also be softened. It would be much more likely for individuals to be found to be employees versus independent contractors in the PRO Act. Supervisors, the definition of supervisors would be limited. There would be more of a tendency for the board to find, under this Act, that supervisors were employees.

The burden would be on the employer to try to show that, not only were people that they were claiming are supervisors carrying out those functions, but were carrying out those functions for the majority of time. Election rules would be changed to make it easier to organize, make it more difficult for the employer to fight organizing campaigns. It would give the union a lot more control over who they could organize smaller groups, and whether an election would be by manual versus a mail ballot. They would also seek to preempt state right to work laws so that in States right now, where it's illegal to have compulsory membership in the payment of dues, under a labor contract, that would be preempted by federal law and permitted everywhere.

Other things that would come up would be enhanced remedies for violations of the lock and giving the NLRB a bigger seat at the table. There would be a prohibition on employer work stop, or just so that even though you might be able to negotiate and be required to negotiate over more subjects, the employer couldn't exercise the right to lock out or permanently replace employees. There would be compulsory interest arbitration if an employer and union could not reach an agreement in the first contract setting within 90 days.

An arbitrator would decide what the terms of the contract would be rather than the parties themselves through a normal contract negotiation, where they would get to impasse or agreement. The PRO Act is a scary thing for employers, but the PRO Act is legislation. Right now, the way we're set up in Congress, unless there are 60 votes in the Senate, the likelihood that the PRO Act will pass with a wishlist of items that I just described is relatively low. If things change in the constituency of the houses, especially the Senate, then this could be something that labor could go after, but I think we can all remember that there have not been legislative changes in many,

many years to the NLRA, but it's something that employers are concerned about.

Jon, do you have any suggestions on what employers can do right now to try to position themselves to operate with proactive workplaces, fair workplaces without third parties representing employees?

Jon Spitz (20:54):

Sure, Rick. The key thing here is whether it's through legislation or rule making by the NLRB or case law, there are changes coming, right? I think both union and non-union employers need to give some thought to what life under a Biden board looks like first, for a non-union employer. We would anticipate increased organizing activity. As a non-union employer, I want to get ahead of that curve. I want to avoid union activity in the first place, which is treat people right, have an open door policy, which is a hardcore business policy that helps you take care of employees before they ever need to look outside the company for help.

That way they don't look to a labor union, they don't look to the EEOC, they don't look to a plaintiff's lawyer. Their needs are met and you are interference free. I would look at my open door systems. I would train my managers to make sure that the doors are really open and that people know to listen and to address employee needs. I would be prepared for quicker elections. I would make sure that all of my supervisors are also trained on their legal rights and responsibilities under the national labor relations act, what they can and can't say, what they should and shouldn't say, and what the facts are about labor unions, and most importantly, what's the employer's position?

Because your frontline supervision may not know. In the event you have card signing or talk about labor unions, you want your managers to be very comfortable speaking to your employees about that. That is training, training, training. You also may want to prepare in advance a communications strategy, perhaps even an anticipated calendar of communications and the actual communications themselves so that, in the event a union organizes, you've got a general game plan about how you would educate your employees. Related to the PCA issues that you talked about, Rick, it would be helpful for employers to review their handbooks and policies now and anticipate what might change and what might be called to question under a Biden board.

Because the last thing you want to do is be put on the defensive by having unfair labor practice charges filed against you during an organizing drive, or frankly, at any time. You should also assess your independent contractor and joint employer issues to make sure you know who is and who is not an independent contractor or a joint employer, and that's not just an NLRB issue, but that's a, who do you pay taxes on issue? It's a, do other fair employment practices laws apply to those individuals, etc?

Then, if on the union side, realize that some of the cases that give you discretion are going to be rolled back, so you really need some very strong management rights language. If you think you need discretion under your contract for certain things, you need to put that in the contract. You can't rely upon these cases addressing past practice or broadly interpreting management rights. I think those will be under a

microscope under the Biden board. Those are a few things that I think employers should be thinking about. Rick, what are your thoughts?

Rick Vitarelli (24:13):

I agree with everything you said, Jon. I think employers right now need to be prepared in the union sector for bargaining the way you described it. I think that employers need to understand their workplaces, keep the lines of communications open, the fundamentals. If employers want to prepare for how to look at their employee policies, just go back to the old Lafe Solomon memos of about nine, 10 years ago that talked about what were lawful and unlawful policies under the act. I think that will serve folks well. I have nothing more to add than that, Jon.

Jon Spitz (24:39):

It's been a great time. By the way, for those listeners who don't keep copies of those Lafe Solomon memos by their night-side table, as Rick and I, of course do, they're available on the board website at nlrb.gov. But anyway, thanks for listening. Rick, it was even more of a pleasure for me to spend some time with you then than it was for you to spend some time with me, I'm sure, but we had a great time, and we're always available if there are questions, and thanks for joining us today.

Rick Vitarelli (25:06):

Take care, everybody.

Alitia (25:08):

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