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An Overview of the NLRB's Enforcement Priorities Under the Biden Administration and Its Game-Changing Significance For Employers

Health Care Association of New Jersey (HCANJ)
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BACKGROUND: NLRA & NLRB

- National Labor Relations Act (1934, amended in 1947 and 1959) is the federal law governing labor relations in the private sector
  - ***Applies to virtually all private-sector employers, regardless of size or union status***
- National Labor Relations Board is charged with enforcing the Act
- 5-member Board in Washington D.C. – presidential appointees
- NLRB General Counsel prosecutes alleged violations of the NLRA
- NLRB decides whether employers or unions have violated the NLRA by engaging in "unfair labor practices"
- The NLRB conducts and oversees union elections

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NLRA – Basics of Existing Law

- NLRA applies to virtually all private sector employers
- Section 7 of the Act provides that employees may support, form or join a labor organization, or engage in other concerted activity for mutual aid or protection, or refrain from doing so
  - PCA includes criticizing/disparaging supervisors, managers, the company
- Section 8(a) proscribes various employer unfair labor practices.
  - 8(a)(1): ER may not restrain or coerce employees in the exercise of Section 7 rights
  - 8(a)(3): ER may not discriminate against employees based on their support for a Union
  - 8(a)(5): ER may not fail or refuse to bargain in good faith with a Union certified as the representative of its employees

NLRA – Collective Bargaining Basics

- If employees vote for union representation, the union serves as the exclusive bargaining representative for all employees in the unit. Typically, the union's goal is to negotiate a contract covering wages, benefits and working conditions for employees in the unit.
- Bargaining starts from the status quo. The parties are required to bargain in good faith. This includes making and responding to proposals, but not necessarily *agreeing* to any particular proposal or a contract as a whole.
- Neither the union, nor the NLRB, nor the courts can force an employer to agree to a contract. Instead, the union can try to exert pressure through various means, including publicity, work stoppages and filing charges, while the employer can lock out employees and/or replace strikers to put pressure on them.
- Frequently takes more than 1 year to negotiate a first contract.

NLRA – Union Gripes

- "*The NLRB favors employers*."
  - Not so.
- "*Employers intimidate and coerce employees*."
  - Already illegal.
- "*The law's enforcement provisions are too weak*."
  - No punitive damages, compensatory damages or attorneys' fees in ULP cases. THIS IS CHANGING . . . .
  - No mechanism to impose CBA on recalcitrant employers.
  - Bosses do not face liability for their illegal actions.

Enter: The PRO Act – What is it?

- Protecting the Right to Organize Act
- Laundry list of pro-union "reforms" to existing labor law (NLRA)
- Every aspect of PRO Act is designed to expand **union** rights and enhance **union** power at the expense of employers, and, to an extent, employees.
- H.R. 842 passed the US House in February on a 225-206 vote.
- Bill is pending in the Senate – has 47 co-sponsors.
  - Dem holdouts are Warner (VA), Sinema (AZ) and Kelly (AZ)

Enter: The PRO Act – What is it? (con't.)

- Would **drastically change** the labor law landscape in the following areas:
  - Union organizing of non-union employers
  - Work stoppages and picketing
  - CBA negotiations
  - More litigation, increased penalties and expanded remedies for Employer ULP's
  - Employees covered by NLRA/worker misclassification

Work Stoppages: *Un*-leveling the Playing Field

The PRO Act would upend current law by:

- Prohibiting employers from permanently replacing striking workers
- Prohibiting employers from "offensively" locking out employees
- Permitting unions and employees to picket and strike the employer's suppliers, vendors, customers and other business relations in connection with their dispute with the employer
- Permitting unions and employees to engage in intermittent strikes, quickie strikes and possibly work slowdowns.
  - Corresponding repeal of Section 303 of LMRA permitting employers to sue unions in federal court for illegal secondary conduct.

CBA Negotiations -- Changing the Rules of the Game

- The PRO Act would establish an abbreviated timeframe for negotiations for a first contract, i.e.:
  - Once a union has been certified, the parties must begin bargaining within **10 days** of the union submitting a written request
  - If the parties have not reached an agreement after **90 days**, then either party may request mediation facilitated by the Federal Mediation and Conciliation Service (FMCS)
  - If the parties have not reached an agreement **30 days** after mediation is requested, then FMCS shall refer the dispute to a tripartite arbitration panel, which must render a decision on the parties' agreement within 120 days of referral (2-year CBA)
  - ***Game changer*** – focus is no longer on whether employer can withstand a strike
- Also prohibits employers from declaring impasse and implementing terms of CBA proposal during negotiations for a first contract

More Litigation, Increased Penalties and Expanded Remedies for Employer ULP's

- Prohibit employers from requiring employees to submit work-related litigation to single arbitration, re-opening the door to class and collective lawsuits, regardless of their union status.
- Enact civil penalties to violations of employees' rights under the NLRA, up to $50K per violation, or $100K for repeat violators.
  - In certain circumstances, the NLRB may assess civil penalties against officers and directors personally.
- Dramatically expand financial remedies to employees who have been discharged or suffered "serious economic harm" to include backpay without offsetting of interim earnings, front pay, consequential damages, and liquidated damages.
- Require the NLRB to seek temporary injunctive relief in all cases where there is a reasonable basis to find that an employer unlawfully terminated an employee or significantly interfered with his rights.
  - Create private right of action for employees/unions to bring ULP cases in federal court if the NLRB declines to seek injunctive relief in these cases within 60 days of the charge being filed.

Piecemeal PRO Act Thru Reconciliation?

- NOT GOING TO HAPPEN….. (we hope!)
- So, what is the Biden Administration's next best path….. The NLRB's enforcement mechanisms….

The Changing NLRB –Members of the Board

- Board Members are appointed by the President to 5-year terms
- Three members from the President's party; two from the opposition
- In January 2021, there were three "R" and one "D" members
  - "R" -- William Emmanuel, John Ring and Marvin Kaplan
  - "D" – Lauren McFerran (appointed Chair on Jan. 20, 2021)
- Today, there are three "D" and two "R" members
  - "D" – Lauren McFerran, Gwynne Wilcox, David Prouty
  - "R" – John Ring and Marvin Kaplan
- Wilcox and Prouty are career Union-side lawyers
- **Expect significant changes to Board jurisprudence!**

The Changing NLRB – General Counsel

- Presidential appointee – 4-year term
- The General Counsel has ***a lot*** of authority in shaping the Board's enforcement priorities and the development (or regression) of how the Act is applied and interpreted
- On Inauguration Day, President Biden fired GC Peter Robb
  - Appointed Peter Sung Ohr as Acting GC
- Ohr immediately set about reordering the NLRB's priorities by issuing "**General Counsel Memoranda**"
- Jennifer Abruzzo has continued and accelerated this trend

The Changing NLRB - GC Jennifer Abruzzo

- Biden appointee – began serving on July 22, 2021
- Career NLRB employee
  - Started as Field Attorney
  - Served as Deputy General Counsel and Acting GC
- **During Trump administration, Abruzzo worked for the CWA**
- Expect **major** changes ahead
- Ohr is now Deputy General Counsel

The Changing NLRB – Acting GC Ohr

- In just 6+ months on the job, Ohr set the tone for a massive pendulum swing in enforcement of the Act
- Within days of his appointment, Ohr issued a Memorandum pronouncing that it is **the policy of the United States** "*to **encourage** the practice and procedure of collective bargaining and to protect the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection*."

NLRB General Counsel Mem. GC 21-02 and GC 21-03

Vigorous Enforcement of Section 7

- GC 21-03 "Effectuation of the NLRA Through Vigorous Enforcement of the Mutual Aid or Protection and Inherently Concerted Doctrines"
- Section 7 provides that "employees shall have the right to self organization, to form, join or assist [unions], to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection . . . ."
- Ohr notes that protected concerted activity can occur outside the context of union activity, "such as [where] employees raise safety concerns or seek protection from government agencies."

Vigorous Enforcement of Section 7 (con't.)

- GC 21-03 (continued)
- "Mutual aid or protection" focuses on the goal of concerted activity, specifically, "whether there is a link between the activity and matters concerning the workplace **or employees' interests as employees**."
- "Mutual aid or protection" covers employee efforts to improve their lot as employees through channels outside the immediate employee-employer relationship **as well as** activities in support of employees of employers other than their own."
- Ohr continues: "employee advocacy can have the goal of mutual aid or protection *even when the employees have not explicitly connected their activity to workplace concerns*."

Vigorous Enforcement of Section 7 (con't.)

- GC 21-03 (continued)
- This includes employees' political and social justice advocacy when the subject matter has a direct nexus to employees' interests as employees:
  - Employee's interview with a journalist about how earning minimum wage affects her and her co-workers
  - A "solo strike" by a single employee to attend a demonstration where she and others (not her co-workers) advocated for a $15 minimum wage
  - Protests in response to enforcement of immigration laws
  - Wearing BLM insignia in working areas
  - Protesting "Don't Say Gay" bill in Florida

Vigorous Enforcement of Section 7 (con't.)

- GC 21-03 (continued)
- "Finding Certain Conduct to be Inherently Concerted"
  - Conduct generally becomes concerted when it is engaged in **with** or on the **authority of other employees**," or when an employee seeks either to initiate or to induce or to prepare for group action.
  - Employees are acting in concert when discussing shared concerns about terms/conditions of employment and it "involves only a speaker and a listener."
  - Employee discussion about wages, benefits, working conditions, job security, workplace health and safety and even racial discrimination all may be "inherently concerted."

Mandatory Submissions to Advice

- GC 21-04 "Mandatory Submissions to Advice" (Aug. 12, 2021)
  - NLRB's Division of Advice reports up to the GC
- Mandatory submissions to advice signal the GC's interest in pursuing changes in a certain area of the NLRA
- **GC 21-04 signals that virtually every major decision of the Trump Board will be up for review. E.g.,**
  - Employer handbook rules (*The Boeing Co.*, 365 NLRB No. 154 (2017))
    - Suggests a return to the prior standard where a handbook rule will be viewed as unlawful if an employee reasonably would view it as limiting Section 7 rights.

Mandatory Submissions to Advice (con't.)

- Confidentiality provisions / Separation Agreements
  - Reflects hostility to Board's decision in *Baylor University Medical Center* approving inclusion of confidentiality and non-disparagement clauses in separation agreements, as well as those clauses prohibiting departing employees from participating in third party claims against the employer in exchange for severance monies.
  - Seeks to revisit the Board's recent decision in *Apogee Retail LLC d/b/a Unique Thrift Store* assessing confidentiality rules applicable to workplace investigations.
- Union access
  - Seeks to revisit Board decisions upholding employers' rights to limit access to its property by union representatives and off duty employees.

Mandatory Submissions to Advice (con't.)

- Employer Duty to Recognize and Bargain
  - With regard to managements' rights in a CBA, a possible return to the "clear and unmistakable waiver" standard instead of the "contract coverage" standard the Board adopted in *MV Transportation*
  - Cases involving application of *Raytheon Network Centric Systems*, where the Board held that actions consistent with past practice did not constitute a "change" triggering a notice/bargaining obligation
  - Successorship cases involving an employer's discriminatory refusal to hire predecessor's workforce and its impact on the right to set initial terms and conditions of employment
  - Cases involving application of *Care One at New Milford*, where the Board ruled that employers bargaining for a first contract are not obligated to bargain over discrete acts of discipline consistent with past practice; suggests a return to *Total Security Management*

Mandatory Submissions to Advice (con't.)

- Employee Status
  - Cases involving applicability of *Velox Express, Inc*., where the Board found that misclassification of employees as contractors is not a ULP; and other cases pertaining to the burden of proof in establishing whether a worker is a contractor or employee
- *Weingarten* rights
  - Cases involving the applicability of Weingarten principles in non-unionized settings
  - Cases involving whether *Weingarten* creates a right to information before the disciplinary interview, including the questions to be asked

Mandatory Submissions to Advice (con't.)

- Employer interference with employees' Section 7 rights
  - Cases involving employer statements to employees that "employee access to management will be limited if employees opt for union representation"
  - *Joy Silk* bargaining orders (discussed below)
- Employees' Section 7 right to strike and/or picket
  - Cases involving an allegation that an employer's permanent replacement of economic strikers had an unlawful motive
  - Cases assessing the contours of an illegal "intermittent strike"
  - Cases holding that an employer has the right to set terms/conditions of employment for striker replacements superior to those offered to striking employees

Injunction Junction, What's Your Function?

- GC 21-05 "Utilization of Section 10(j) Proceedings" (Aug. 19, 2021)
- Section 10(j) of the Act authorizes Regional Directors to seek interim injunctive relief in federal court to restore or preserve the status quo ante pending resolution of the ULPs through the Board's (*slow*) processes
- Historically reserved for "major" cases involving serious ULPs
  - E.g., withdrawal of recognition, mass terminations in context of union organizing, runaway shop
- Abruzzo suggests that Section 10(j) should be used more often
  - Notes that cases in which Section 10(j) relief was authorized had near 100% "success rates" in FY 2020 and 2021.

Expanded (More Painful) Remedies for ULPs

- GC 21-06 "Seeking Full Remedies" (Sept. 8, 2021)
- Under Section 10(c) of the Act, the Board possesses "broad discretionary authority to fashion just remedies to fit the circumstances of each case it confronts."
- Regions should request from the Board "**the full panoply of remedies available**" to ensure that victims of ULPs are made whole for losses
- Notes Trump Board's willingness to explore new remedies, such as compensation for health care expenses occasioned as a result of loss of health insurance, or compensation for credit card late fees incurred as a result of unlawful discharge

Expanded (More Painful) Remedies for ULPs (con't.)

- In cases involving discriminatory firings under Section 8(a)(3), in addition to backpay and reinstatement or front pay, Regions should seek compensatory damages and even **emotional distress** damages in some circumstances
- For ULPs committed during a union organizing drive, Regions should consider seeking the following remedies:
  - Union access to employees, including provision of employee contact information, access to Employer bulletin boards and "**equal access to address employees" if they are convened for a captive audience speech by the Employer**
  - Reimbursement of the Union's organizing costs
  - Reading of Notice Postings by Board Agent or ***Employer principal***, with Union reps being permitted to attend

Expanded (More Painful) Remedies for ULPs (con't.)

- SHAMING -- Publication of the Notice in newspapers and/or online forums chosen by the Regional Director and *paid* for by the Employer
  - Stated goal is to "reach all current and former employees, as well as potential hires."
- Visitorial and discovery clauses to assist the Board in monitoring compliance with Board orders
- Training of employees, supervisors and managers on employees' rights under the Act and/or compliance with the Board's Orders
  - Training curriculum to be approved by the Board, or ***conducted*** by the Board
- Instatement of a qualified applicant of the Union's choice in the event a discharged discriminatee is unable to return to work

Expanded (More Painful) Remedies for ULPs (con't.)

- In cases where unlawful "disruptions to bargaining have occurred," Regions are instructed to seek in all appropriate cases:
  - Bargaining schedules (e.g., *requiring Respondent bargain not less than 2x per week, at least six hours per session, until an agreement or impasse is reached*)
  - Submission of sworn "periodic progress reports" to the Board showing in detail the nature and course of bargaining
  - Reinstatement of unlawfully withdrawn bargaining proposals
  - Reimbursement of the other party's bargaining expenses for expenses incurred during the entire period in which the party fails to bargain in good faith
  - Training of current and/or new supervisors and managers
  - Electronic dissemination of Notice Postings

Illustrative Cases - 1

Home Depot

- HD maintains uniform dress code requiring employees to wear the orange apron, and most adornments are prohibited
  - Employee wrote "BLM" on his apron
  - HD says this is not permitted by policy; employee refuses to comply
  - Employee quits and files a ULP charge
  - NLRB issues complaint, arguing that HD's dress code policy is unlawful
  - HD moves to dismiss on First Amendment grounds – compelled speech

Illustrative Cases - 2

Amazon.com Services, LLC

AMZN fulfillment center in Staten Island (JFK8)

- In March-April 2020, several employees agitating for COVID protections, including closure of facility for deep cleaning, paid leave and other demands
- Several employees allegedly engaged in unprotected activity, such as trespassing, violation of quarantine requirements, etc.
- One employee "GB" engaged in a profane outburst directed to a female colleague who expressed disagreement with his views
  - E.g., "c-word," "b-word" and "crack ho," among other lovelies
- AMZN fires GB for these statements
- NLRB issues Complaint, alleging that AMZN would not have fired GB but for his having engaged in PCA, applying *Wright Line* framework

Illustrative Cases – 2 (con't.)

NLRB seeks an order requiring AMZN to:

- Reinstate GB with full backpay and benefits
- Pay "compensatory damages" to GB
- Post, email and ***READ*** a Notice to Employees in the presence of a Board Agent
- Convene training sessions conducted by a Board Agent of NLRB for all managers and supervisors re: employees' Section 7 rights
- Issue a formal *letter of apology* to GB apologizing for any hardship and distress arising from his termination and assuring him that AMZA will take necessary steps to ensure his Section 7 rights are protected

No More Elections?

- In both GC 21-04 and 21-06, GC Abruzzo has suggested an Employer may violate the Act where a Union presents evidence of a card majority and the employer is unable to establish a good faith doubt as to majority status; specifically, where the employer has either engaged in ULPs **or** where the employer is unable to explain its reason for doubting majority status in rejecting the Union's demand for recognition
- *Joy Silk Mills, Inc.* 85 NLRB 1263 (1949)
- Is this legal??

Conclusion

MAY YOU LIVE IN INTERESTING TIMES

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