The New NLRB: Protecting Workers from Their Own Employers?

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During the Trump years, the National Labor Relations Board (meaning, the actual five-member Board in Washington, whose decisions drive interpretations of federal labor law) got a lot less friendly to organized labor, and a lot friendlier to employers. That meant a lot of things, including making it easier for unions to prove that two employers were really one "joint" employer, harder for employees to organize, and harder for employers to unilaterally change terms and conditions of employment without bargaining.

The Board is less like the lifetime-appointed Supreme Court and more like your new boss who doesn't care how your old boss did things. That's because Board members serve out fixed but limited terms—meaning that a new Presidential administration brings new Board members when the terms of existing Board members expire. While the Board claims to rely on its own precedents (and, to some extent, does), Board members are fundamentally political appointees, and their interpretations of labor law mirror the labor agenda of the Presidents who appoint them.

Enter Biden's appointment of Gwynne Wilcox to the Board on May 26. Biden has not exactly been subtle about his labor policy agenda: as he announced the American Jobs Plan on March 31, he reminded us that he's "a union guy. I support unions. Unions built the middle class. It's about time they start to get a piece of the action."

A piece of the action, indeed. Ms. Wilcox clearly knows what she's doing when it comes to federal labor law, but what she's doing is deeply informed by what she has done. She's a dyed-in-the-wool union-side attorney from a law firm that exclusively represents unions, and from a position with one of the largest and most powerful unions in the Northeast, which is part of the SEIU.

To be clear, that's not an inherent criticism. I work with labor reps all the time to negotiate collective bargaining agreements, to reach resolutions to labor disputes, and generally to try to impose order on the often-chaotic world of real workers with real issues working for (and sometimes against) the interests of real employers with their own very real problems. At its best, the relationship between labor and management is collaborative. At its worst, it can be a fistfight, and often is. So while it would be easy to characterize Wilcox's appointment as nakedly political, that may miss the real point.

The real story here is the perspective of Board members—literally, of the lens through which they view the world of labor relations. Union-side attorneys and representatives have an almost congenital distrust of management, just as management innately suspects that unions don't care much about how they can negatively impact workplaces by creating an us-and-them, divisive,

adversarial environment. Those perspectives aren't usually the express issue in a case, but they are an incredibly important dynamic that drives how Board rulings are made.

When Biden's increasingly Democratic Board is called on to resolve closer questions of federal labor law, its Democratic appointees will be operating with the assumption that the NLRB's job is to protect employees from their own employers, and that is certain to create an increasingly pro-labor tilt to their decisions. (Management usually finds this assumption, which isn't inevitable, pretty odd, since employers are the ones creating jobs, paying employees, providing health benefits, and so on.) Unions will have the benefit of the doubt, and management won't. In this context, the "benefit of the doubt" will mean erring on the side of allowing unions to make demands, to bargain, and thus to have a larger say in how a business is run.

Starting this year, then, expect that when a case comes up on review before an increasingly pro-labor Board, the Board will resolve ambiguities in ways that favor unions and curtail employers' rights to act unilaterally, without negotiation with (or interference from) organized labor. The Biden administration has already started taking steps to reverse the Trump Board's most employer-friendly rules and decisions. The momentum of that trend will only increase.

For now, we have to wait and see what the impacts will be. As we've shared in prior blogs, employers should keep a watchful eye on developments at the NLRB, remembering that the National Labor Relations Act applies in many respects to both unionized and non-union employers. NLRB rules about how employees can communicate about work-related issues via email, for example, have been applied just as often to employers who aren't unionized at all. The Board's willingness to regulate outside of a unionized context, and to regulate unionized employers in increasingly pro-union ways, will pick up speed. We'll be there to update you as it happens.