CORPORATE COUNSEL INSIGHT

Unprecedented Ouster at NLRB a Sign of Things to Come

Board's new acting general counsel begins rollback of Trump policy

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LAW WEEK COLORADO

It has been a dramatic few weeks at the National Labor Relations Board. On his first day in office, President Joe Biden fired Trump-appointed general counsel Peter Robb. Days later, Biden named Peter Sung Ohr as the board's acting general counsel. Ohr has already taken steps to roll back many of his predecessor's policies, and lawyers have been watching his actions to divine what might lie ahead under Biden's NLRB.

One of the biggest winners to emerge from the shake-up at the NLRB has been Scabby the Rat, the large inflatable rodent that often appears outside businesses and construction sites as a sign of protest in a labor dispute.

Robb had wanted to rid sidewalks, picket lines and protests of Scabby, Bloomberg Law reported in 2019, and he pursued multiple cases alleging that deployment of the balloon rat is a form of unlawful picketing. But on Feb. 2, Ohr filed a motion to dismiss a high-profile case about whether Scabby's appearance at an RV trade show amounted to an illegal secondary boycott that puts pressure on employers not directly involved in the employment dispute.

"General Counsel Ohr is going to release Scabby from the very temporary cage that Scabby was in during the General Counsel Robb years, and Scabby is going to be out there in full effect," said Sherman & Howard member Patrick Scully. "And I think that's quite clear, based on [Ohr's] action so far in abandoning that prosecution."

According to Scully, Ohr's motion to dismiss isn't just a green light for Scabby but also a sign that unions will be free to engage in other forms of non-picketing protest, such as stationary banners and street theater, under Biden's NLRB.

BOARD SHUFFLE

Biden had promised to be an advocate for labor on the campaign trail, but few had expected the swift and unprecedented replacement of employer-friendly Robb. Polsinelli partner Mark Nelson noted that Biden is the first president to fire an incumbent general counsel, and former presidents Donald Trump and Barack Obama both allowed their predecessors' appointees to serve out the remainder of their terms. The decision to fire Robb also came quickly — just hours after Biden took office.

"This signals a very ambitious and aggressive agenda by the administration to make profound changes in current board law," Nelson said.

"On the day of the inauguration, it strikes me that the White House should have had other issues more important than the NLRB's general counsel during the first 23 minutes of the new administration," Ballard Spahr attorney Steven Suflas said during a Feb. 10 webinar. "But I think that is a measure of the influence that organized labor is going to have in this White House."

Republicans will remain the majority on the five-person board until August, which will delay some of the more drastic policy changes. But after Democrats secure a 3-2 majority, Nelson said, "I would expect them to be very, very active in reversing decisions that the union community thinks are very pro-employer."

It's not unusual for a new administration to bring reversals to NLRB decisions, and significant changes also happened under the Obama and Trump administrations, Nelson noted. "I think that is likely to continue for the unforeseeable future," he added.

"The NLRB is on the verge of becoming an illegitimate agency because the substantive law is going to change so dramatically with each change in administrations at the White House," Suflas said. "As a result, the opinions of the circuit courts of appeal are going to become more important as employers look for guidance as to what the governing legal principles are."

Scabby the rat is displayed at a protest in 2010. NLRB acting general counsel Peter Sung Ohr recently sought dismissal of a case challenging whether Scabby's use at a trade show amounted to an illegal secondary boycott. / **JOSEPH BARILLARI**

ON THE HORIZON

Since his appointment, Ohr has rescinded a slew of Trump-era memoranda, many of which provide guidance on the handling of cases and investigations. Scully said a number of themes stand out

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lege of Law and a bachelor's degree from Yale University.

Moye White announced **Nick Herrick** has joined the firm as an associate in the trial section.

Herrick represents individuals, small businesses, and public and private corporate clients in a range of commercial disputes and risk avoidance. He focuses his practice on construction disputes, employment litigation and general business litigation.

In his construction practice, Herrick works with developers, general contractors, design professionals and trade contractors in developing contract documents and best practices, code compliance, easement disputes, delay claims and construction defect litigation.

In his employment practice, Herrick works with employers of all sizes in developing training and governance materials, compliance with the Fair Labor Standards Act and Americans with Disabilities Act, wage and hour disputes, as well as avoiding and defending claims of retaliation and discrimination.

Herrick received a law degree from the University of Colorado School of Law and an undergraduate degree in business administration from the University of Iowa Tippie College of Business.

JUDICIAL ANNOUNCEMENTS

Gov. **Jared Polis** on Thursday appointed **Joseph Whitfield, Jr.** to the 18th Judicial District Court. The vacancy was created by the resignation of Judge **Michael Spear** and is effective Feb. 28.

Whitfield is currently a deputy district attorney in the 18th Judicial District, a position he has held since 2011. His practice consists of criminal matters. He received a law degree from Washington University in St. Louis School of Law and a bachelor's degree from Occidental College.

The 20th Judicial District Nominating Commission will meet via videoconference on March 1, to interview and select nominees for appointment by the governor to the office of district judge for the 20th Judicial District (Boulder County). The vacancy will be created by the retirement of Judge **Andrew Macdonald**. The vacancy will occur on April 1.

Application forms are available from the office of the ex officio chair of the nominating commission, Justice Monica Márquez, 2 E. 14th Ave. in Denver, and the office of the court executive, Amy Waddle, 1777 Sixth St., P.O. Box 4249, Boulder, CO 80306. Applications also are available on the court's home page at www.courts.state.co.us/Careers/Judge.cfm. Applications must be submitted by 4 p.m. Feb. 22. Suggestions for candidates to fill the vacancy must be submitted by 4 p.m. Feb. 15.

NEW PARTNERS

Davis Graham & Stubbs on Jan. 1 promoted **Jim Henderson**, **Sam Seiberling** and **Taylor Smith** to partner.

Henderson focuses his practice on complex commercial litigation. He has represented a diverse range of clients, from family-owned businesses to Fortune 500 companies, in matters ranging from real estate disputes to product liability issues, contract and warranty disputes, and employment matters.

He received a law degree from the University of Denver Sturm College of Law, a master's degree from Yale University, and a bachelor's degree from Life Pacific College.

Seiberling focuses his practice on acquisition transactions, public and private placements of debt and equity securities, securities law disclosure and compliance, corporate governance and entity formation. Seiberling received a law degree from the University of Denver Sturm College of Law and a bachelor's degree from Dartmouth College. He interned at the U.S. Securities and Exchange Commission and for then Judge William Hood of the 2nd Judicial District.

Smith focuses his practice on the representation of borrowers and lenders in debt finance transactions. He recently joined the Board of Trustees of the Arrupe Jesuit High School Corporate Work Study Program and previously served on the Young Professionals Council of Denver Kids, Inc. Prior to joining DGS, he practiced for three years in the corporate department of Simpson Thacher & Bartlett in New York. He received a law degree from Georgetown University Law Center and a bachelor's degree from the University of Virginia.

CORRECTION

The Feb. 8 New Partners feature incorrectly listed **Habib Nasrullah**. Nasrullah joined Davis Graham & Stubbs on Feb. 1 as a partner but was not recently promoted to partner. We apologize for the error. •

NLRB SHAKEUP
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from Ohr's actions so far, giving clues about what's to come.

The General Counsel's Office is likely to try to reverse the NLRB's 2017 decision in The Boeing Company, Scully said, referring to a landmark case that instituted a more lenient test for employer handbook rules and policies.

According to Scully, Ohr has also indicated there will be more lenience when it comes to unions' duty of fair representation. In addition, he expects the General Counsel's Office will be sympathetic to making it more difficult to decertify a union and will be less inclined to defer cases — the process by which the NLRB allows an employer and union to resolve issues through grievance and arbitration mechanisms rather than litigation.

Nelson said he expects a return to Obama-era "quickie" or "ambush" election rules allowing an accelerated timeline for union elections.

He added there are also concerns about the future of mail ballot union elections, which have been permitted during the pandemic but are disfavored by employers, who prefer elections to be held on their premises.

Suflas said that under the Biden NLRB, employers can expect a return to Obama-era precedent when it comes to speech. Under Obama, the board had ruled vulgar and abusive speech could be protected as long as it arose in the context of a union campaign or other protected concerted activity. The Obama NLRB had also held that employees with access to employer e-mail systems had the right to use those systems for protected purposes, such as union organizing.

Another area to watch, according to Suflas, is how the Biden NLRB will deal with the challenges employers face in balancing sensitivity to diversity, equity and inclusion issues and respectful workplace policies that could be inconsistent with the "expansive decisions of the Obama NLRB that went far afield on protected concerted activity."

Non-union employers shouldn't think the changes at the NLRB won't apply to them, Suflas said. "The non-union sector of the workplace is going to see a return of Obama-era law, which [took] a sleepy old agency designed to deal with union-management relations and injected that agency and that law into the non-union workplace," he said. •

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IMPEACHMENT
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old. Sixteen Republican senators are up for reelection in 2022 and they may face the risk of a primary challenger if they turn on Trump. Moreover, recent polling shows that about 70% of Republican voters would consider a vote to convict Trump to be an act of party disloyalty.

For Bender, such modern political considerations have rendered the impeachment process one that would be unrecognizable to the framers, who "thought these senators were going to be picked by state legislatures, not by popular election." Even if the men who wrote the Constitution in 18th century Philadelphia had anticipated the 17th Amendment, they would not recognize our modern political party system. The drafters of the impeachment clauses, Bender explained, would not have "conceived the political parties the way we have them now and certainly not primaries and being primaried." They "wouldn't have known what you're talking about," he said.

Nor can those senators count on a secret ballot to conceal their decision from their state's electorate. Article I, Section 5 of the Constitution provides that, in both chambers of Congress, "the Yeas and Nays … on any question shall, at the Desire of one fifth of those Present, be entered on the Journal." That clause means a public vote will be inevitable if as few as 20 senators demand one.

Of course, it is still possible, at press time, that Trump could be convicted. If so, he will not have any recourse to the Supreme Court or any other federal judge to question the Senate's procedures or its decision. In a 1993 case called United States v. Nixon (no, not that Nixon), the justices ruled that disputes over how the Senate conducts an impeachment trial cannot be heard by U.S. courts.

While conviction would require two-thirds of senators present, disqualification does not. A decision to bar Trump from future federal office could pass with 51 votes. There may also be a possibility that, even if Trump is not convicted, the Senate could seek to impose such a ban under the 14th Amendment to the Constitution. The Article of Impeachment approved by the House on Jan. 13 includes reference to section 3 of that amendment, which prohibits any person who "shall have engaged in insurrection or rebellion" against the United States from holding "any office, civil or military, under the United States, or under any State."

While the Constitution does not define "insurrection," Congress did so during the Reconstruction Era. According to a Congressional Research Service report released Jan. 29, the term covers efforts to "oppose[] or obstruct[] the execution of the laws of the United States or impede[] the course of justice under those laws."

The report concluded that interference with Congress "fulfilling the constitutional duty of certifying electoral votes" may "qualify as an execution of the laws of the United States."

The report also found that Congress could likely invoke the 14th Amendment by the simple majority needed to enact a statute that bars Trump from future political office. While not a complicated process, it may not lead to a quick outcome. According to Daniel Hemel, a professor at the University of Chicago Law School, any effort to bar Trump could result in a court challenge. "Trump's defenders would no doubt argue that the law violates the bill of attainder clause," Hemel wrote in a Jan. 12 editorial column in The Washington Post. While that challenge may not succeed, there are serious constitutional arguments around the question.

For Bender, the best course of action may simply be to leave Trump's fate to the kinds of prosecutors that work in courthouses instead of the halls of Congress. "He can now be prosecuted, and maybe the best thing would be for him to be prosecuted now," Bender said. "I really would be very disappointed if it doesn't happen."

— Hank Lacey, HLacey@circuitmedia.com

NOTE: The reporter is acquainted with Professor Paul Bender as a result of his attendance at Sandra Day O'Connor College of Law, Arizona State University, between 1988-1991.