

John Wright: Welcome to Business Better, a podcast designed to help businesses navigate the new normal. I'm your host, John Wright. After serving nearly 15 years as senior vice president and general counsel at Triumph Group Incorporated, a global aerospace component supplier, I'm now a member of the Securities and M&A groups at Ballard Spahr, a national law firm with clients across industries and across the country.

Today's episode is a follow-up to a recent episode featuring Ballard Spahr attorneys, Meredith Dante and Steve Suflas, discussing labor and employment law changes expected with the arrival of the Biden administration. In this episode, Meredith and Steve look at recent developments at the National Labor Relations Board and discuss the challenges employers will face as we return to a more activist NLRB like that in place during the Obama administration, which work to remake the rules of the workplace. With that, let's turn to Meredith and Steve's conversation.

Meredith Dante: Welcome to our latest podcast in the Biden update series. My name is Meredith Dante, and I am joined by my colleague, Steve Suflas. Both of us are partners in Ballard Spahr's Labor and Employment Group, and collectively have been representing employers in connection with union-related activities and other labor issues for a cumulative several decades. So we are glad you can join us here today as we talk about an update on Biden's labor issues. Some of you may recall at a Labor Day event sponsored by the AFL-CIO back in September, that Biden vowed if he was elected, he would be, and I quote, "The strongest labor president you have ever had." Biden then added, "You can be sure you'll be hearing that word, union, plenty of times when I'm in the White House."

True to his word, Biden has already delivered on that pledge as 27 members on his team are labor officials. Both union and non-union employers alike need to pay attention. There are significant changes underway at the board that impact all employers and perhaps in some ways have the potential to impact non-unionized employers far more than those with established unions. Indeed, we are seeing unions expand into traditionally non-unionized sectors like technology and target companies of all sizes. So the timing of this podcast is somewhat uncanny in that we have seen some of the biggest developments so far from the Biden administration in the last week or so. So, Steve, I'm wondering if you can talk to us about some of the recent developments involving the former general counsel of the National Labor Relations Board.

Steve Suflas: Thank you, Meredith. If you need a clearer indication that President Biden is prepared to make good on his Labor Day pledge to organize labor, you need to look no further than the NLRB. On Inauguration Day, 23 minutes after President Biden was inaugurated, a letter was sent to Peter Robb, the general counsel of the National Labor Relations Board demanding his resignation by 5:00 that day. When Robb failed to tender his resignation and indeed said that he would not, he was immediately discharged. The next day his successor, the number two

person at the NLRB, Alice Stock, who was serving as acting general counsel was also fired by the Biden administration.

On the following Monday, January the 25th, the new administration appointed Peter Sung Ohr who was the regional director of the Chicago Regional Office of the NLRB to serve as the acting general counsel. Mr. Ohr is most famous for having been the regional director to issue the Northwestern University case in which he concluded that football players at Northwestern University were employees for purposes of the National Labor Relations. That decision was rejected by the full National Labor Relations Board. To show that things are moving quickly, Meredith, yesterday, Mr. Ohr designated Iva Choe, who was the regional attorney for the NLRB's region eight office in Cleveland to serve as his second-in-command at the NLRB.

Now, unsurprisingly, we have already seen litigation crop up over the precipitous removal of GC Robb. In a case called H & M International Transportation, the employer filed a motion in the middle of an unfair labor practice hearing, demanding that the proceedings be terminated because the counsel for the general counsel prosecuting the case, according to the employer, was acting ultra vires due to the improper removal of GC Robb from his position.

So, what does this mean as a practical matter? Remember that the five member National Labor Relations Board is the adjudicative arm of the agency, and it is the office of the general counsel that not only is the administrative arm, but conducts the investigations of unfair labor practice charges and prosecutes them. So it is the general counsel that really drives the agenda of cases that are presented to the board for adjudication. You may recall that immediately after taking office, General Counsel Robb issued a memo listing approximately 24 Obama era cases that he designated for re-examination by a new Trump NLRB. I've predicted that you could expect the same from the Biden administration, and Meredith, what has acting General Counsel Ohr done already.

Meredith Dante:

Thanks, Steve. So, as I mentioned at the outset of this podcast, the timing is actually quite uncanny because I think one of the biggest steps that acting General Counsel Ohr took happened yesterday, and that was the rescission and withdrawal of 10 guidance memos that were issued by the former General Counsel Peter Robb. Acting General Counsel Ohr's stated official position is that the memos were rescinded because they are inconsistent with the National Labor Relations' stated goal of encouraging collective bargaining, protecting workers' rights and the like, or because they were either obsolete or contrary to board law. It was interesting to see the 10 that he chose to rescind. Many of those rescinded memos deal with matters that critics of former General Counsel Peter Robb claimed were very anti-union.

So memos dealing with things like individual employees back rights and the duty of fair representation. So I think even more importantly, Ohr said that he

intends to issue memos setting out new policies in the near future, and I think that when he does that, that will certainly give us a much better insight into what Ohr's priorities are for the agency going forward. That said, I don't think it will come as a surprise to anyone that we can anticipate a return to many of the Obama era policies with the tilt, of course, being a little bit in favor, or a lot in favor, depending on the particular policy of the unions and the right to organize. So, Steve, we've talked a bit about the general counsel. But there's also the actual board. The NLRB is comprised of five board members. What does the current complement look like? What can we expect in 2021 from the board itself?

Steve Suflas:

Yeah, very interestingly, Meredith, the board composition is going to remain unchanged until the end of the summer. The traditional makeup of the board is two seats designated by Democrats, two seats designated by Republicans, with the swing seat going to the White House. However, with the way the terms for board members came up during the Trump administration, we currently have a three member majority of the Board being Republicans until August of 2021. They are now former Chairman John Ring, whose term ends in December of 2022, Marvin Kaplan whose terms ends in August of 2025, and William Emmanuel whose term ends in August of this year, 2021. One of the first things the Biden White House did was designate the current board's lone Democrat Lauren McFerran to take over as the chairman of the board. Her term ends in 2024.

By way of digression, just so that you do not think that I misspoke, the tradition at the NLRB is that even when a woman serves as the chairman, she is designated as the chairman, maybe Chairman McFerran will change that hoary old tradition. There is currently a vacancy which belongs to the Democrats. That term would end in August of 2023. Given the way that things are moving so quickly at the board, I think we can expect the Biden administration to designate a new board member in the very near future.

Meredith Dante:

So, Steve, what does this mean then in terms of board precedent?

Steve Suflas:

Well, remember that the board establishes substantive rules of the law of the National Labor Relations Act either by issuing opinions in individual cases containing broad pronouncements of substantive law, or by way of rulemaking. What this means is that a Biden NLRB, which as you said, will absolutely tilt towards supporting union and employee rights, really won't be able to get moving until they can have a three out of the five seat majority of the board, and that's not going to happen anytime before August of 2021. So what we can expect is that the substantive decisions of the board aren't going to change for a while.

On the issue of rulemaking, the Trump board went a long way down that road. The circuit courts of appeal have traditionally criticized the NLRB for not engaging in more rulemaking. The Trump Board did that, but a number of the

rules that had been in process have not been finished in time. So rules regarding independent contractor status, the employee status of graduate student assistants, rulemaking to change the Obama era quickie election rules have either not finished and now have been put on hold, or those rules which did go into effect, we can expect at some point during the Biden administration to be revoked. Now, we also expect that we will see legislative initiatives involving the National Labor Relations Act. Meredith, what do you see coming down the pike in that regard?

Meredith Dante:

So it'll be really interesting to see what Biden is able to accomplish given that the Democrats have control of the House and Senate. He is a strong and vocal supporter of the PRO Act, which stands for the Protecting the Right to Organize Act. So you can imagine what it seeks to do, make organizing easier, and frankly, it goes even far beyond that. I don't think it is an understatement to suggest that this law, if passed, would fundamentally alter the labor landscape as we know it. It would expand coverage to a number of independent contractors, which could drastically change the gig economy. So at the outset of this program, I mentioned that there are non-unionized employers that really need to pay attention to labor issues, and that may seem counterintuitive to them.

Certainly now, though, I think is the time to make sure that you're educating yourselves on what this could mean for your organization, certainly in the tech industries and the gig economy industries, this kind of legislation, if passed, could place an additional amount of pressure on these companies and there's no question that they would be targets for unionization, given a lot of the issues that have been raised about gig workers, independent contractors, and certainly in the wake of the pandemic, I think we saw all of that come to a head in a pretty pronounced way. So, that's certainly something to keep an eye out for.

The PRO Act would also be a return to the so-called ambush or quickie election rules, as Steve mentioned, from 2015, and what those rules did in a nutshell is essentially collapsed the time period between when a petition is filed in an election, which does not in order the benefit of the employer. The company, certainly, or the employer at issue, certainly benefits from additional time to be able to not only potentially oppose the petition from a legal standpoint before the board, but also from a practical standpoint in trying to conduct any kind of campaign or prepare itself for an election. So this would be a return to a very condensed time period between petition filing and election process. It would also require employers to provide more information about their employees and sooner in the process.

There are a number of other significant items that really tilt the playing field in favor of the unions in the Pro Act. That includes things like the introduction of civil penalties for labor law violations, which really could chill an employer's right to act with respect to certain misconduct, the banning of right to work laws. So approximately 27 states have those kinds of laws right now on the books. That could change, which would be a huge shift in the political

philosophies of a number of these states and the employers that operate within them. As well as binding arbitration for first contracts.

So these are concepts that are incredibly significant and really could have a substantial impact on labor issues in the country, really affecting employers across sectors and of all sizes. So stay tuned. I really do think that could be one of the most significant pieces of legislation passed in the labor sector, certainly in recent memory. So Steve, what should, with all of that said and this certainly was a high level summary of some of the more recent changes that we're seeing at the board, what should employers be doing and thinking about now?

Steve Suflas:

Especially for non-union employers, attention needs to be paid to what's going to be coming at the National Labor Relations Board. The Obama era NLRB reversed 4,559 years of prior NLRB precedent. They did that primarily to achieve a goal, and that was in my view of fundamental reinvention of the agency by inserting it into the non-union workplace, taking traditional legal principles that have applied to the heavily regulated unionized workplace and applying it to the 21st century non-union workplace. That resulted in a number of oppressive principles for purposes of a non-union workplace, issues like, employer policies in your handbooks, the protection of what I call bad behavior by employees who are allegedly advocating for workplace issues.

Questions of employee access to an employer's email system, questions of the confidentiality of internal workplace investigations like sexual harassment investigations, and issues of work stoppages and work protests and work to rule activities, which apply equally in a non-union workplace. So I think that the non-union sector of the economy, in addition to unionized employers, are going to have to be paying a lot of attention to what's coming. I think more broadly, it certainly appears that the NLRB is a litmus test for what the Biden administration is going to be doing because they have moved with such alacrity to make fundamental changes within the first two weeks of the administration at the National Labor Relations Board.

So for our audience, I would remind you that on February the 10th between noon and 1:00 Eastern Time, Meredith and I are going to go into much more detail over these issues and also discuss a number of COVID related issues under the National Labor Relations Act. You can sign up on our events page at [BallardSpahr.com/eventsnews](http://BallardSpahr.com/eventsnews), and we'd encourage you to do that. We look forward to speaking with you on February the 10th. Thank you for your attention and be safe and be well. Thank you.

John Wright:

Thanks again to Meredith Dante and Steve Suflas. Make sure to visit our website [www.BallardSpahr.com](http://www.BallardSpahr.com), where you can find the latest news and guidance from our attorneys. Subscribe to the show in Apple Podcasts, Google Play, Spotify, or your favorite podcast platform. If you have any questions or suggestions for the show, please email [podcast@BallardSpahr.com](mailto:podcast@BallardSpahr.com). Stay tuned for a new episode coming soon. Thank you for listening.

This transcript was exported on Feb 10, 2021 - view latest version [here](#).