

What to expect in 2021?

By Seth Borden, Esq., Brennan Bolt, Esq., and Richard Hankins, Esq., *Perkins Coie**

FEBRUARY 3, 2021

WHAT IMPACT WILL PRESIDENT BIDEN'S ADMINISTRATION HAVE?

President Biden has long been allied with the labor movement, and during his tenure as vice president, the administration pursued policies favorable to organized labor. The same is fully expected following his January 2021 inauguration.

Within hours of taking the oath of office, President Biden terminated the sitting General Counsel of the NLRB with 10 months remaining in his term. Labor unions and advocates celebrated the unprecedented move, as well as the termination a day later of the top deputy. While he will have an immediate opportunity to fill one current NLRB vacancy, the Board will maintain a Republican majority at least until August of 2021, when Member Emanuel's term will expire.

President Biden has also named Boston Mayor Marty Walsh — a former union member and prominent former labor leader — to serve as Secretary of Labor. Various issues in the Senate — composition, the fate of the filibuster, etc. — may complicate making predictions about legislative business.

Within hours of taking the oath of office, President Biden terminated the sitting General Counsel of the NLRB with 10 months remaining in his term.

Regardless, however, expect the Executive Branch to proceed by administrative and other regulatory means as well to pursue its agenda.

WILL CONGRESS ESTABLISH ANY MOMENTUM BEHIND THE AMBITIOUS PROTECTING THE RIGHT TO ORGANIZE (PRO) ACT, OR ANY OF ITS COMPONENT PARTS?

In 2018 congressional Democrats introduced a sweeping bill designed to overhaul federal labor law to be more favorable to employees and labor unions than current law. The comprehensive package would:

- (1) authorize civil monetary penalties against employers;
- (2) impose liability on corporate directors and officers;

- (3) require pursuit of preliminary injunctions in a wide range of ULP cases;
- (4) make Board orders self-enforcing;
- (5) authorize a private right of action;
- (6) prohibit employers from requiring workers to attend workplace meetings where union representation is to be discussed;
- (7) remove the legal prohibition on secondary boycotts and intermittent strikes;
- (8) require mandatory interest arbitration to settle first contracts after just 150 days of negotiations;
- (9) prohibit permanent replacement workers during economic strikes;
- (10) forbid mandatory arbitration agreements;
- (11) outlaw state "Right to Work" statutes;
- (12) make misclassification of workers a labor law violation;
- (13) extend remedies to undocumented workers;
- (14) restore and codify the Browning-Ferris joint-employer standard; and
- (15) restore the invalidated Obama-era Persuader Rule, among other items.

President Biden has expressed support for the bill. While we believe that passing such an expansive piece of legislation is unlikely in a roughly evenly divided Congress, the bill nevertheless sets the parameters within which a significant debate over labor law reform will occur.

HOW AGGRESSIVE WILL THE CURRENT BOARD BE WHILE IT RETAINS ITS MAJORITY?

As mentioned above, despite the change in the White House, barring any resignations or additional attempted terminations, the Board will remain majority Republican until late in the coming year. There remain a number of pending matters on which the current

Board majority almost certainly has a different perspective than will an incoming majority appointed by President Biden.

At press time for this publication, the Board had not yet issued decisions on several of the issues outlined above, including the legality of Scabby the Rat, the scope of the contract-bar doctrine, the status of student teaching assistants under the NLRA, and a number of additional election-related protocols.

It will be interesting to watch whether the Board announces final determinations on these issues as the clock winds down on its current composition, and the extent to which the Acting General Counsel named by the President acts to impede or alter those efforts.

WILL THE UNITED STATES-MEXICO-CANADA AGREEMENT (USMCA) RESULT IN INCREASING ADOPTION OF U.S. LABOR STANDARDS SOUTH OF THE MEXICAN BORDER?

The trade agreement replacing NAFTA went into effect on July 1, 2020. As a precondition of its entry into the agreement, Mexico instituted a number of constitutional and statutory reforms designed to provide more transparency and competition among labor organizations seeking to represent Mexican workers.

In mid-December, a U.S. panel of experts issued a report critical of the pace of Mexican implementation of those required reforms. Moreover, in order to promote a trend toward increased uniformity of labor standards, Annex 31-A to the USMCA provides for a “Rapid Response Labor Mechanism,” by which U.S. stakeholders may advance challenges to pressure greater enforcement of labor standards by Mexico.

The extent to which U.S. labor organizations utilize this mechanism to leverage their interests in connection with multi-national corporations and cross-border operations is potentially transformative.

This article was published on Westlaw Today on February 3, 2021.

* © 2021 Seth Borden, Esq., Brennan Bolt, Esq., and Richard Hankins, Esq., Perkins Coie

ABOUT THE AUTHORS



Seth Borden (L) is a partner in **Perkins Coie’s** Labor and Employment Law Practice. He develops sophisticated enterprise-wide labor relations strategies for global companies and advises clients on their most complex labor challenges. He is based in the firm’s Washington and New York offices and can be reached at SBorden@perkinscoie.com. **Brennan Bolt** (C) is also a partner in Perkins Coie’s Labor and Employment Law Practice. He advises and represents small businesses and Fortune 100 companies in developing labor relations strategies and navigating complex labor and employment issues. He is based in the firm’s Dallas office and can be reached at BBolt@perkinscoie.com. **Richard Hankins** (R) is a partner in Perkins Coie’s Labor and Employment Law Practice as well. He has 30 years of experience advising sophisticated purchasers of traditional labor services in high-profile national matters. He also is based in the firm’s Dallas office and can be reached at RHankins@perkinscoie.com. A version of this article was originally published in January in the firm’s Labor Law Today: 2020 Year in Review report. Republished with permission.

Thomson Reuters develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world’s most trusted news organization.