

IRI Intelligence Briefing

U.S. Labor Law: Change is here... But is it here to stay?

Next month will mark one year since President Trump took office, Republicans took control of all three branches of government, and employers across the country breathed a collective sigh of relief. At last, it seemed the pro-union fog that had settled over America would be lifted and employers would be able to focus on growing their business (and jobs), once again.

So why is it, as we approach the one year anniversary of such a massive shift in the regulatory and legislative environment, that most employers feel as though they're living through the 10th year of the Obama Administration?

A Look Back

First, it's important to keep timing in perspective. While it's true the Obama Administration's National Labor Relations Board (NLRB) managed to overturn a staggering **4,559 years** of established labor laws, it still took them **eight years** to do it. In fact, a look back at the first year of Obama's presidency shows he was unable to deliver on any of his campaign promises to labor unions.

“Obama’s Key Promises” Scorecard, The Washington Post, January 20, 2010

<p>LABOR</p> <p>Ensure freedom to unionize and fight for passage of the Employee Free Choice Act.</p>	 <p>To do To help win crucial backing from organized labor during the campaign, Obama made several promises, none of which have been fulfilled so far. Read more »</p>
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So, while we have yet to see many changes to the laws themselves, there has been major turnover among the people responsible for setting that process in motion.

While the changes span all branches of government and jurisdictions, what’s happening at the NLRB right now is something all employers should be paying attention to, in particular.

Things to Know:

The confirmation of Bill Emanuel shifted the Board to a 3-2 **Republican majority for the first time in 10 years.**

However, **last Saturday**, Philip Miscimarra stepped down as Chair, leaving a tie Board. The White House is expected to nominate a replacement within the **next three weeks**, but the Board will likely remain a 2-2 political split through the **Spring of 2018** given the slow Senate confirmation process.

What Does This Mean?

Traditionally, a departing Board member has the opportunity to have his/her colleagues address a number of decisions before he/she steps down. So, while we’ve seen a flurry of activity in the past week that seems to indicate a new day has arrived, the momentum is limited. After this weekend, the Board will most likely hold off on revisiting major, Obama-era decisions until a political (likely Republican) majority is restored, and will continue to make decisions on routine cases **that do not raise policy considerations.**

**SHIFT CHANGE:
NEW PLAYERS
INTRODUCED IN 2017**

January 20, 2017	Donald J. Trump is sworn in as the 45 th President of the United States Republicans keep control of the Senate with 52 seats Republicans keep control of the House with 241 seats
March 22, 2017	Alexander Acosta is confirmed as Secretary of Labor
April 7, 2017	Neil Gorsuch is confirmed to the U.S. Supreme Court
August 2, 2017	Marvin Kaplan is confirmed to the NLRB
September 25, 2017	William Emanuel is confirmed to the NLRB
November 8, 2017	Peter Robb is confirmed as General Counsel of the NLRB
December 11, 2017	<u>NLRB overturns its first Obama-era precedent</u>
December 14, 2017	<u>NLRB seeks input from the public to evaluate the 2014 Ambush Election Rule</u>
December 14, 2017	<u>NLRB does away with the Browning-Ferris Joint Employer Test</u>
December 14, 2017	<u>NLRB overturns Employee Handbook Standard</u>
December 16, 2017	Philip Miscimarra stepped down as Chairman of the NLRB

But Wait, There's More...

While the agency is overseen by a five-person Board, there is another member of the NLRB that holds considerable sway and has a unique role from the other Board members. The NLRB's General Counsel manages the agency's day-to-day activities and **can initiate enforcement activities independent of the Board.** Acting as the prosecutorial arm of the NLRB, the General Counsel also sets priorities for the types of unfair labor practice cases in which to issue complaints.

On December 1, newly confirmed GC, Peter Robb, [sent a memo](#) instructing all NLRB regional offices to seek input from the NLRB's Division of Advice before issuing complaints involving certain issues. **The Goal:** To prevent “career” regional directors (meaning, not political appointees of the current Administration) from defaulting to Obama-era precedent.

In his list of which issues would warrant such escalation, Robb wrote:

Significant legal issues include cases over the last eight years that overruled precedent and involved one or more dissents, cases involving issues that the Board has not decided, and any other cases that the Region believes will be of importance to the General Counsel.

So, what are some of the major cases that are likely to be affected by this?

Specialty Healthcare – The 2011 ruling significantly increased the standard for employers' challenges to narrow or “micro” bargaining units.

Banner Health System – The 2012 ruling stated that blanket confidentiality requirements while employers are conducting workplace investigations violate the NLRA.

Purple Communications – The 2014 ruling stated employee use of an employer's email system for union-related activities is generally protected.

In his memo, Robb stated he would no longer pursue an extension of this to other devices.

A Look Ahead

If you're wondering which of these rulings we can expect to see overturned, it's probably safe to say: Most of them. But changing the law takes time. In order for the NLRB to rule, they first have to wait for a live case to come up and then progress through multiple levels. In the meantime, employers should keep an eye on the GC, who has the ability to get creative and move a little faster in his unique position.

Employers should also pay attention to movement in other areas, certain to have a significant impact on employers and employees for years to come.

Federal Courts

Nearly one year into his term, President Trump has nominated 59 federal judges – **many of whom are still in the very early stages of their careers, which has the effect of shaping major cases for decades to come.** 14 have been successfully confirmed so far.

The President is poised to fill 17 vacant positions in the U.S. Court of Appeals, with seven nominees already pending. These seats are critical to deciding cases appealed from the NLRB. While these judges are not in the rule-making business, more conservative judges on the bench will give employers a good backstop to support rulings made by the NLRB.

Supreme Court

With the confirmation of Neil Gorsuch, we can also expect to see some pro-employer rulings on pending Supreme Court cases, including:

Janus v. American Federation of State, County, and Municipal Employees, Council 31 – SCOTUS is expected to outlaw “fair share” fees from public-employee union non-members, dealing a major financial blow to public-sector unions. Last week, [the Solicitor General publically sided with Mark Janus](#), in a brief submitted to the high court.

National Labor Relations Board v. Murphy Oil USA, Inc. – Circuit Courts are split on the issue of whether class action waivers in arbitration agreements violate the NLRA. The case centers on whether employers can mandate employee participate in arbitration for collective action matters and class action matters.

Department of Labor

Secretary Acosta has already positioned his Department to roll-back several Obama Administration regulations, [telling the House Education & Workforce Committee](#) certain efforts that affected overtime rules, retirement investment advice, corporate legal liability, and disclosure requirements by lawyers who practice labor law were “overreaches that hurt the economy.” However, he is awaiting confirmation for a large majority of his staff who, once in place, will still need to review issues on the table and determine priorities, before moving toward implementation.

Key positions left to fill are: Solicitor of the Department of Labor, head of the Wage and Hour Division and Chief Deputy, all of which are critical to moving the Department’s agenda forward. One of the most important decisions awaiting a full DoL staff is the compensation cut off level between exempt and non-exempt workers.

Equal Employment Opportunity Commission

Two nominees are awaiting Senate confirmation. Once confirmed, we can expect major changes, including voiding the EEO1 initiative that would have required considerably expanded reporting on employee compensation statistics, and a re-examination of employer wellness rules.

It’s been quite a year. And while it may feel as though not much has changed, the stage is now set for a major shift in the legal and regulatory environment. Now, the big question is: How much will it matter, if employees begin to unionize on their own, without going through traditional unions?

Stay tuned for more details and analysis on the changing labor environment, coming soon.



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