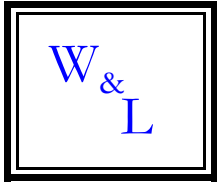


EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues



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SENATE VOTE ALLOWS TRUMP TO MAKE CRITICAL CHANGES AT LABOR BOARD

In a major blow to organized labor, the Senate voted on November 10, 2024, against the confirmation of NLRB Chair Lauren McFerran to another term, thus keeping McFerran from continuing the Democratic majority at the National Labor Relations Board (NLRB or Board) until at least 2026. The decisive votes were cast by two outgoing ex-Democrats, Sens. Joe Manchin and Kyrsten Sinema, who both appeared for the Senate vote late in the process to reject confirmation. Sinema was one of only three Democrats who declined to sponsor the Pro Act, and Manchin had voted against President Biden's renomination of another Democrat to the Board last year. Both Manchin and Sinema had departed the Democratic Party to become independent, and both are leaving office in January.

The five-member NLRB currently has one open seat, which means President-Elect Trump will get to make two appointments next year, allowing the future NLRB to have a 3-2 Republican-appointed majority.

Which Biden-Era Pro-Union Rulings Will Be Overruled First?

Flipping the Board majority from Democratic to Republican control together with a newly-appointed General Counsel will likely cause the new NLRB to move quickly to overturn the most controversial rulings under the prior administration. Chairman McFerran had called the NLRB ruling in *Cemex Construction Materials* to be the most significant ruling from her two terms with the Board, a case which caused the Board to invoke a "card-check" process ordering union recognition where the employer had committed an unfair labor practice, disregarding a secret ballot election. Another ruling highly likely to be overturned is that of prohibiting "mandatory captive audience" meetings in which employees are given the company's views on union representation, emanating from the *Amazon* ruling in November. The effect of this ruling was to prohibit employers' most commonly used tactic of persuading employees not to unionize, a recognized right of employers for over 75 years. Also in November, the Board issued a controversial ruling in a case against Starbucks, casting doubt on the legality of employer statements to employees on the impact that unionization would have on the relationship between the individual employees and their employer. The statement in question was that: "If you want to maintain a direct relationship with leadership, you'll check-off no."

This writer heard a presentation by the sole current Board Republican member, Member Kaplan, in December, listing the many Board precedents set during the Biden Administration, in which he dissented. The implication was that he was awaiting an opportunity to have his dissents become the majority at the new Board. Member Kaplan

lamented during his presentation that it was practically impossible for an employer to draft a legally-compliant employee handbook based on the Biden Board's rulings.

With a new Acting General Counsel at the NLRB, pro-union enforcement policies can be changed very quickly, even absent rulings from the full Board. The new General Counsel has the power to push for changes to labor law precedents, and to decide which cases to pursue in NLRB complaints against employers.

BUT WHAT ABOUT THE SELECTION OF A TEAMSTER-BACKED SECRETARY OF LABOR?

President-Elect Trump announced in November that he plans to nominate Republican Rep. Lori Chavez-DeRemer of Oregon as Secretary of Labor. Although she lost her recent election, she serves on the House Committee on Education and the Workforce, which conducts oversight of the Department of Labor (DOL). Her voting history on major labor issues is as pro-union as it gets for a Republican, and she was one of only three House Republicans to support the Pro Act. She will be easily confirmed as the new Labor Secretary since she will have significant Democrat support as well as that from Republicans.

At the DOL, she will be in a position to address the ongoing pro-worker DOL agenda such as finalizing wage rules regarding federal contract worker minimum wage, independent contractor classification, the salary threshold for overtime exemptions, and prevailing wages under government contract rules. Some of these rules are contentious, both on legal and practical grounds.

The selection should not be totally surprising in light of the fact that President-Elect Trump placed special emphasis on working class voters and union voters. While union workers have often been considered a part of the Democrat coalition, in the recent election, half of union households voted for President-Elect Trump, and Teamsters President Sean O'Brien spoke at the Republican Convention. Some suggest there may be increased tension within the Republican party between the populist and business-friendly wings of the party. Further, other moderate Republican senators serve on the Health, Education, Labor & Pensions Committee, such as Senators Murkowski of Alaska and Collins of Maine.

Opposition to business-friendly policies may also come from state legislatures and state attorney generals to challenge Trump Administration actions by attempting to persuade federal district judges to halt or delay executive orders or agency regulations. States are also increasing their own workplace laws.

It is believed that the new administration's DOL will move from strict enforcement and legal actions to focus more on providing compliance assistance to help employers understand the rules.

WHAT A DIFFERENCE AN ELECTION MAKES!

The shift in positions since the election is amazing. Before the election, there was bi-partisan support for a bill to increase the number of federal judges, but since the election many Democrats have announced opposition to the measure and President Biden has threatened to veto it. During the Biden Administration, Democrats considered trying to eliminate the Senate filibuster, which requires 60 votes for most legislation to proceed, and now President-Elect Trump wants to ditch the filibuster rule to promote his legislative initiatives. Most believe the filibuster will

remain. Whereas Republican attorney generals brought many cases attacking federal agency rules and Presidential executive orders, now it is Democrat attorney generals holding meetings to plan just such attacks and, like Republican attorney generals, such attacks will be brought to the most favorable federal judicial districts. During the Biden years, many cases were brought by Republicans in Texas district courts, whereas now the Democrat attorney generals may choose the U.S. District Court for the District of Massachusetts.

BUT WHAT ABOUT PRESIDENT-ELECT TRUMP'S IMMIGRATION POLICIES?

In his first term, President Trump changed policies at the U.S.-Mexico border, reduced the number of refugees admitted to the U.S., and added additional requirements to the legal immigration system. He also changed enforcement priorities, seeking to increase Immigration and Customs Enforcement (ICE) enforcement and deportations and to end the Deferred Action for Childhood Arrivals (DACA or Dreamers) Program. He also sought to end the Temporary Protective Status (TPS) for certain countries.

But when we look at the actual results of the first Trump Administration, in his first term he only deported about 325,000 persons. While President Biden only deported about 140,000, former President Obama deported some 1.2 million across his two terms. But no effort was made by Presidents Obama or Biden to round up people living in the U.S. en masse.

Trump's immigration advisors and Trump himself have said they plan to primarily target immigrants with criminal histories and those that have already been ordered deported by a court. There are other possible targets.

Some 860,000 immigrants live in the U.S. through TPS status, which is for people whose countries are deemed too dangerous. Trump has vowed not to renew those protections for some or all of the 16 or 17 countries, including Venezuela and Haiti. The first set of TPS protections is due to expire in March of 2025, that covers 230,000 migrants from El Salvador. Another group that Trump has suggested he would deport are those granted Humanitarian Parole, and there may be up to one million persons currently in one of the Parole Programs.

It will be hard to have the largest "mass deportation" that has been repeatedly mentioned in the press. Mass deportation requires assistance from state and local law enforcement agencies that may or may not be available. Currently, some 21 states participate in the Section 287(g) Program, which allows state and local law enforcement officials to detain immigrants who will be picked up by ICE. It would be difficult to have massive deportations, as currently the U.S. can only hold about 40,000 in immigration detention on any given day, and coordinating a large effort among various state and federal agencies and local law enforcement would be difficult if not impossible. There have been suggestions that the President could declare a national emergency and use local law enforcement, the military, the FBI and other federal agencies, but there are legal and practical limitations to such efforts.

What is possible is more localized enforcement efforts. The new "Immigration Czar," Tom Homan, formerly ICE Director in the first Trump Administration, suggested that he might have ICE agents go around knocking on apartment and house doors in various areas, particularly to apprehend those who had serious criminal records or previously had been ordered to leave the U.S. Mr. Homan conducted such efforts in localized areas during the first

Trump Administration, an example being the Los Angeles area. Mr. Homan has said repeatedly that ICE would not ignore someone they encounter who does not have the government's permission to be in the U.S., and at least in those cases would likely arrest immigrants whose only offense was being in the country illegally.

Thus, although illegal immigration is at the top of the list of priorities of the new administration, the type of mass deportation suggested in the press would likely actually lead instead to more of a "showy effort."

What we do know is that the new administration will likely reinstitute workplace "raids," and increase the type of audits of I-9s known as "silent raids." In October 2021, the Biden Administration announced it would no longer do worksite raids. The last reported raid was in July of 2020, but they are likely to be reinstated in the new administration. In such raids, ICE might surround a business premises to prevent anyone from leaving, and pursuant to a warrant, arrest and detain unauthorized workers at the site. These raids are highly disruptive to a business and create adverse publicity.

Regarding audits or "silent raids," ICE provides a notice of inspection or subpoena for a company's I-9 Forms to be provided within 72 hours. After the government reviews the forms, some errors in the forms may be corrected by the employer within a 10-day deadline for non-substantive mistakes, while substantive errors usually result in penalties. Most significantly, an employer may be required to terminate numbers of employees who are determined to be unauthorized. An employer can be fined up to \$27,894 per unauthorized worker if an employer is deemed to have knowledge of unauthorized status, and in some cases even criminal actions can be brought. The paperwork violations range from \$281 to \$2,789 for each paperwork violation.

Employers have learned that the best way to avoid enforcement actions as well as a disruption to the business is by attempting to maintain a legal workforce. At the same time, employers must remember that immigration law protects legally authorized workers from discrimination.

This firm is available to assist employers in developing compliance programs with proactive steps to avoid disruptions to the business and enforcement actions. Some of these programs will be discussed in upcoming newsletters.

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