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## Reinstated NLRB Rules and Union Organization: Lessons Learned From Amazon

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WEDNESDAY, MAY 26, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

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# REINSTATED NLRB RULES AND UNION ORGANIZATION: LESSONS LEARNED FROM AMAZON

WEBINAR – WEDNESDAY, MAY 26, 2021

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# Agenda

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- **Recent NLRB activity under the Biden administration**
- **Changes to Anticipate from the NLRB under the Biden Administration**
- **The PRO Act & the Biden-Harris Labor Agenda**
- **Amazon warehouse union vote**
- **Preparing for Turbulence: Best practices for union and non-union employers**



# The Shifting Legal Landscape of Labor Law Policy

Brian R. Garrison

# A Refresher on the NLRB's Policy-Making Apparatus

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- **The Board – five members appointed by the President:**
  - Five-year terms, with Senate consent; term of one Member expires each year
  - Acts primarily as a quasi-judicial body in deciding cases based on records created in administrative proceedings
  - Also has the authority to engage in rulemaking
- **The General Counsel – appointed by the President:**
  - Four-year term, with Senate consent; independent of the Board
  - Supervises the Regional Offices in the investigation, settlement and litigation of ULP charges
  - Oversees the administration of representation elections

# The National Labor Relations Board



- **William Emmanuel (R)**
  - Term expires August 27, 2021
- **John Ring (R)**
  - Term expires December 16, 2022
- **Lauren McFerran (D), Chairman**
  - Term expires December 16, 2024
- **Marvin Kaplan (R)**
  - Term expires August 27, 2025
- **One position remains vacant**



Image from the NLRB website:  
<https://www.nlr.gov/about-nlr/who-we-are/the-board>

# Biden Administration Shakes Up NLRB

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- **January 21 – Firing of NLRB General Counsel Peter Robb and Deputy General Counsel Alice Stock**
  - Unprecedented in 70-plus years; legality questioned
  - Several challenges filed in pending cases
- **January 25 – Appointment of Peter Sung Ohr as Acting GC**
  - February 2 – Rolls back guidance from GC Robb
  - February 3 – Withdraws complaints attacking neutrality agreements
  - Acting GC Ohr comments that he doesn't plan to be a "potted plant"
- **February 17 – Appointment of Jennifer Abruzzo to be the next NLRB GC**
- **March 12 – Withdrawal of proposed rule concerning employee status of student teachers and research assistants**

# Rescission of Trump-Era GC Guidance Memos

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## Restoring previous approaches to case processing issues:

- Deferral of ULP charges
- Changes to investigative practices (testimony of former supervisors/agents)
- Respondent's failure to cooperate with ULP investigations

## Restoring previous approaches to organizing issues:

- Assessment of employer assistance in union organizing
- Response to motions to intervene in ULP cases

## Withdrawing guidance on handbook rules post-*Boeing*

## Withdrawing various memos on Union-focused issues



# Changes to Anticipate from the NLRB: Rulemaking

Brian R. Garrison

# The NLRB's Rulemaking Authority & History

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- **Section 6 of the NLRA grants the NLRB authority to promulgate regulations “as may be necessary to carry out the provisions of the Act.”**
  - Rules promulgated by the NLRB carry the force and effect of law and substantially impact labor policy.
- **During its first 75 years, the NLRB promulgated just one substantive rule.**
- **In June 2011, the NLRB proposed a rule to amend the Board’s representation case procedures (which became effective in 2014).**
- **The Trump-appointed NLRB announced a rulemaking agenda reflecting “the Board majority’s strong interest in continued rulemaking” and made effective three final rules.**
- **The NLRB under Chairman McFerran has yet to announce a rulemaking agenda.**

# Potential Advantages of Rulemaking

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- **Advantages of Rulemaking:**

- Allows the NLRB to consider and issue guidance outside the constraints of the facts in a particular case
- Allows a process for obtaining input from interested third parties before a final rule is promulgated
- Allow a process for the NLRB to consider expert opinions and empirical data
- Allows the NLRB to issue broader, more generally applicable rules of law, covering a multitude of fact patterns
- Provides greater clarity and certainty in the standards employers/unions must follow
- Minimizes (in theory) the “flip-flop” of agency case adjudication

# Topics Most Likely Subject to NLRB Rulemaking

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- **Representation Election Rules**
- **Election Protection Rules (blocking charging/voluntary recognition/exclusive bargaining rights, etc.)**
- **Voter Lists**
- **Military Ballots**
- **Standards for Determining Joint-Employer Status**
- **Union/Employee Access and Employer Property Rights**

# Topics Most Likely Subject to NLRB Rulemaking

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## **Representation Election Rules (AMENDED RULE)**

On December 18, 2019 the NLRB issued proposed amendments to the “Quickie Election” representation case procedures of the Obama NLRB.

All but five of the amendments became effective May 31, 2020, including the following:

- Definition of “business day”
- Extending the representation hearing timeline from eight to 14 days from the notice of hearing
- Extending the posting of the notice of election from two to five days
- Requiring a petitioner to submit a response to the employer’s petition statement
- Permitting post-hearing briefs pre- and post-election
- Granting RD discretion on timing of notice of election
- Allowing for impoundment of ballots when a request for review is pending

# Topics Subject to NLRB Rulemaking?

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## **Representation Election Rules (AMENDED RULE) (cont.)**

In April 2020, a federal district court struck down five parts of the Trump-NLRB election amendments, which covered:

- Whether bargaining unit eligibility needs to be litigated/resolved before election
- Whether elections must be scheduled for the “earliest date practicable” (vs. waiting a minimum of 20 business days following direction of election)
- Extending the time for an employer to provide a voter list from two to five business days after the direction of election
- Whether election observers must be members of the current voting unit when possible
- Whether the RD has authority to certify an election when a request for review is pending

## ***What to expect from Biden Board?***

- A McFerran Board is unlikely to pursue pending appeals of the five amendments struck down by the DC federal court
- A McFerran Board (with majority) may likely consider rulemaking to reverse Trump-NLRB amendments

# Topics Subject to NLRB Rulemaking?

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## Election Protections (NEW RULE)

On July 21, 2020, the Board implemented a three-part Election Protection Rule (EPR), addressing contract bars to election petitions in certain situations, including:

- **Blocking Charges:** Board adopted a “vote-and-impound” procedure where a petition will proceed to election regardless of a filed ULP, with ballots impounded until ULP is resolved
- **Voluntary Recognition Bar:** Board returned to the *Dana Corp* standard applying a contract bar in situations of voluntary recognition only when employees are provided specific notice of rights and fail to file a decertification/recognition petition within 45-days
- **Construction Industry Contract Bar:** Board established a rule requiring extrinsic evidence of majority support in order to apply a contract bar to construction project agreements

## **What to expect from Biden Board?**

- A McFerran Board (with majority) likely may consider rulemaking to return Obama Board contract bar rules in situations involving blocking charges, voluntary recognition and construction industry contracts

# Topics Subject to NLRB Rulemaking?

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## Joint Employment Status (NEW RULE)

On February 26, 2020, the NLRB issued a final rule addressing when two employers will be found to be “joint employers” who share an obligation to bargain, are jointly liable for unfair labor practices, and are vulnerable to strikes, picketing, and other economic protest from unions.

The NLRB’s Joint Employer Rule became effective April 27, 2020 and adopted a new joint employer standard.

### ***What to expect from Biden Board?***

- A McFerran Board (with majority) will likely consider rulemaking to return to *Browning-Ferris* “**direct and immediate control**” over essential terms and conditions standard finding:
  - No substantial direct and immediate control necessary
  - Indirect, limited and routine, or contractually reserved but not exercised control of another business’s workers sufficient to find joint employment

# Topics Subject to NLRB Rulemaking?

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## **Voter Lists and Military Ballots (PROPOSED RULE)**

On July 28, 2020, the NLRB published a notice of two proposed amendments to current election rules addressing:

- **Voter Lists:** The proposed rule would eliminate requirement that employers provide email, home address and cell phone number for eligible voters as part of the representation election process
- **Military Leave Ballots:** The proposed rule would establish a process for soliciting absentee ballots from employees on military leave

### **Current status:**

The NLRB's comment period expired October 27, 2020 without a final rule having issued.

### ***What to expect from Biden Board?***

- A McFerran NLRB is unlikely to move forward with changes to voting list requirements
- It is uncertain what position a McFerran NLRB will take on military leave absentee ballots

# Topics Subject to NLRB Rulemaking?

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## **Union/Employee Access and Employer Property Rights (EXPECTED RULE)**

Trump-appointed NLRB requested briefing and was expected to issue rules on important issues involving access to employer property, including:

- Codifying its reversal of Purple Communications and allowing employers to restrict employee use of business email
- Addressing union rights of access in regard to union organizing
- Clarifying employee solicitation and distribution rights (and restrictions)

## ***What to expect from Biden Board?***

- Either through adjudication or rulemaking, a McFerran Board (with majority) will likely return to Obama-NLRB standards in providing employees broad solicitation/distribution and email rights
- Either through adjudication or rulemaking, a McFerran Board (with majority) will likely broaden union rights to access an employer property and/or employees

# PRO Act

Sarah Yerger

# President Biden's NLRB

- President Biden
  - Pledged to be “the strongest labor president you have ever had” during campaign
  - More regulation of employers – unionized and non-union
  - Uptick in organizing campaigns



**Barley Snyder**

**THE  
PRO  
ACT=**

**WORKER POWER**



**Barley Snyder**

# Protecting the Right to Organize (PRO) Act

- Most significant change to the labor law since 1935
- Tremendous impact on private sector employers
- More than 50 changes to the labor law which are all pro-union
- Included in \$2.5 trillion infrastructure plan introduced in late March
- Supported by pro-union organizations, opposed by Chambers of Commerce

# U.S. Chamber of Commerce PRO Act Position

- **The PRO Act “is a litany of almost every failed idea from the past 30 years of labor policy. The PRO Act would undermine worker rights, drag employers into unrelated labor disputes, disrupt the economy, and force individual Americans to pay union dues regardless of their wishes.”**
  - U.S. Chamber of Commerce
- **“Contrary to media coverage of the bill and union talking points – the proposal actually weakens workers’ rights in addition to creating further challenges for employers.”**
  - PA Chamber of Business and Industry

# PRO Act Political Tug of War

- Passed by the House of Representatives on March 9, 2020
- Currently three Democratic Senators stand in the way of the PRO Act coming to the Senate floor for a vote



# PRO Act Changes – IC's as employees

- IC's are currently exempt from NLRA, but PRO Act would change that
- ABC employment test - no IC status unless:
  - A: Worker is free from the control and direction of the hiring entity in connection with the work's performance, both under the contract for the performance of the work and in fact.
  - B: Worker performs work that is outside the usual course of the hiring entity's business.
  - C: Worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.
- This means fewer “contractors” and more employees who are covered by labor laws and able to organize



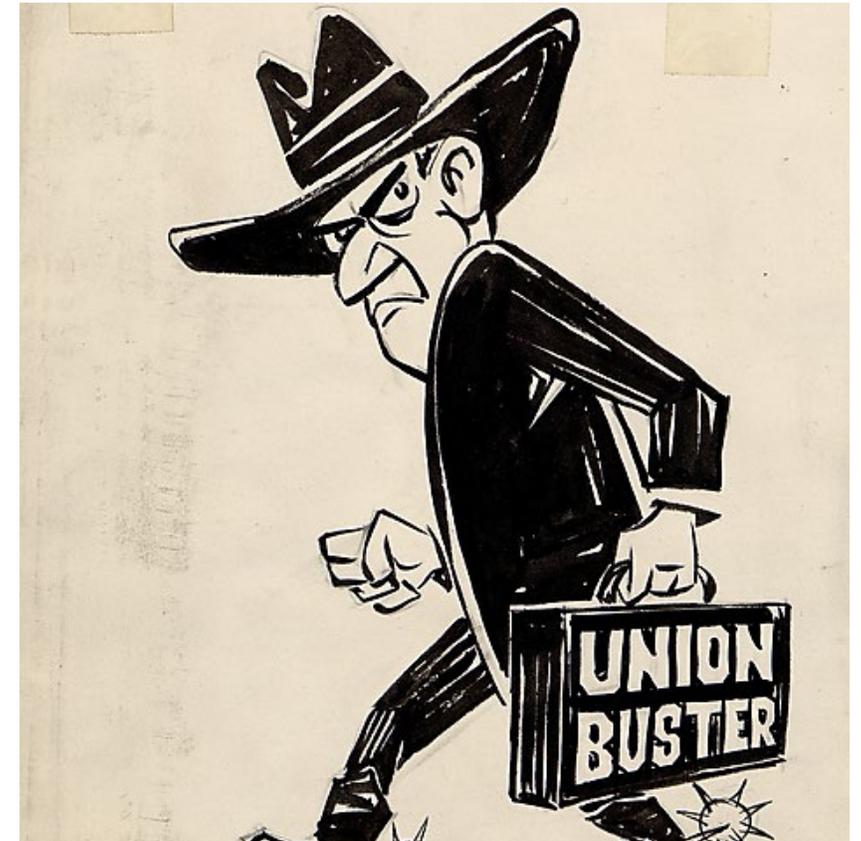
# PRO Act Change – Who is a supervisor?

- Limit definition of supervisor
- Many first line supervisors would not be considered management and instead would be part of the bargaining unit
- More employees covered by possible union representation



# Pro Act Change – Return of the Persuader Rule

- PRO Act measure will bring the return of the restrictive “persuader” or “union buster” rules.
- President Biden’s plan would reinstate and codify Obama’s persuader rule into law.
- The Obama administration proposed a regulation that would have required employers to report the identity and compensation of a lawyer or consultant (called a “persuader”) hired to help combat union organizing.



# PRO Act Change – Return of Micro-Units

- What are “micro-units”?
  - A small subset of employees at a worksite which a union may represent separately from other employees
- *Specialty Healthcare & Rehab Center*
- *PCC Structural, Inc.*
- Numbers



# PRO Act Change – Easier to Organize

- Requires employers to turn over employees' personal contact information to union organizers in advance of an election
- Authorizes secondary strikes and boycotts, which allow unions to target any company through picketing and protests, even those unrelated to a labor dispute
- Prohibits permanent replacement of strikers
- Prohibits employers from requiring employees to attend meetings regarding the employer's views on unionization
- Eliminates re-run elections in the event of finding by NLRB
- Unions choose type and location of NLRB elections (now it is by agreement)

# PRO Act Change – Workers Use Employer Email to Organize

- PRO Act mandates on email
- ***Purple Communications / Caesars Entertainment***



**YOU'VE GOT MAIL**

# PRO Act Change – End Right-to-Work Laws

## What are right-to-work laws?

- These laws provide that workers don't need to join a union or pay union dues to be hired or to work for a Company. People have "the right to work" without being part of a union
- PRO Act would effectively end these state right-to-work laws through federal labor law

## What are fair share agreements?

- All employees in a bargaining unit would be required to pay union dues as a condition of employment
- Pennsylvania does not have right-to-work law but 27 states do.



# PRO Act Change – Arbitration

- First contract – mediation and binding arbitration
- Epic Systems – prohibit mandatory arbitration agreements



"Hell, I was hoping we could avoid binding arbitration."

# More PRO Act Changes

- Codify quickie or ambush election rules which shorten the amount of time between filing for a petition for election and the actual election
- Institute card checks which allow unions to challenge election results and get certified automatically in certain circumstances



# PRO Act – Expansion of Remedies for ULP's

- Creates a private right of action
- Introduces new civil penalties for labor law violations, including personal liability for directors and officers, back pay, front pay, liquidated damages, attorneys fees and punitive damages
- Allows for injunctions
- For cases involving retaliatory discharge



# Amazon Lessons

Sarah Yerger



# Amazon Election Outcome

- Retail, Wholesale & Department Store Union obtained enough signatures to petition for recognition
- Vote was overwhelmingly against union at 738 to 1798.
- Union has charged that Amazon illegally interfered by threatening layoffs and firing a pro-union employee. Amazon denies the allegations.
- Hearing before the NLRB is likely





# Other Changes to Anticipate from the NLRB

Brian R. Garrison

# Work Rules Under A Biden Board

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- **HR Policies and Work Rules**

- Since the *Boeing* (2017) decision, the Board has evaluated facially neutral policies or work rules on a case-by-case basis and taken into consideration any business justification for the rule
- Most post-*Boeing* cases have resulted in finding contested rules are valid
  - Work rules that requires confidentiality during workplace investigations are presumptively valid
  - Social media policies requiring employees to be “respectful and professional” are valid if not discriminatorily enforced
  - Rule restricting use of union insignia based on legitimate business justification is valid
  - Rules prohibiting employees from using company email for union activities are valid

- ***What to expect from Biden Board?***

- Will *Boeing* decision stay?
  - *Tesla* decision (March 2021) may provide some light



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## Other Issues to Keep An Eye On

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- **Recent Issues the NLRB has Invited Parties and Amici to Brief:**
  - Standard to apply when employer questions an employee in an investigation where *Johnnie's Poultry* rules have historically applied?
  - Standard to apply when employer has a non-discriminatory uniform policy?

### **Other Issues:**

- Protected Concerted Activity
- Permitting Further Expansion of Micro-Units
- Withdrawal of Recognition Standard
- Unilateral Changes and CBA coverage
- The future of “Scabby the Rat”
- 10(j) Relief



# Prepare for Turbulence!

- The confluence of these events means that business are likely to see:
  - More pro-labor regulations and decisions from the NLRB
  - More aggressive activity from unions in day-to-day contract administration and at the bargaining table
  - An uptick in union organizing



# Prepare for Turbulence!

To prepare for these anticipated changes:

- Keep your ear to the ground-know the issues with your employees
- Prepare for more scrutiny of handbook policies and work rules
- Positive Employee



**Barley Snyder**

# THANK YOU



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