

No Time to Waste – The NLRB and Signs of What’s to Come Under the New Administration

The first few weeks in the Biden administration have been nothing short of busy. At the National Labor Relations Board (Board), it seems like there has been no time to waste in prioritizing items on the administration’s agenda.

Only hours after being sworn into office on Jan. 20, 2021, President Biden took unprecedented action and fired Trump-appointed General Counsel Peter Robb. Former General Counsel Robb was reportedly offered the opportunity to resign, but refused, and was then fired. Robb’s term was set to expire in November of this year. A day later, Biden terminated second in command, Deputy General Counsel Alice Stock. President Biden appointed Peter Sung Ohr to serve as Acting General Counsel of the Agency. Ohr, most recently served as the Regional Director of Region 13 of the NLRB in Chicago.

Because the General Counsel serves independently from the Board and is responsible for investigating and prosecuting unfair labor practice cases, Robb’s firing has already resulted in legal challenges to pending cases. Respondents have argued that because Robb’s removal was without cause, and therefore, unconstitutional, Ohr’s appointment is also unlawful. As a result, some respondents have argued that Ohr does not have legal authority to prosecute cases. If this argument is successful, several cases currently pending before the Board may be invalidated. We fully anticipate such issues will be litigated and likely head to the U.S. Supreme Court.

But the Biden administration didn’t stop there.

On Jan. 20 President Biden also designated NLRB member Lauren McFerran as the Chair of the Board. Member McFerran was appointed to the Board in 2016 by President Obama.

Then, on Feb. 1, Acting General Counsel Ohr rescinded ten General Counsel Memoranda promulgated by former General Counsel Robb, stating that he “determined that a number of outstanding General Counsel Memoranda are either inconsistent with [the purpose and policies of the National Labor Relations Act] and/or Board law, or are no longer necessary.” The rescinded memoranda spanned several topics from guidance on handbook policies to employer assistance in union organization. A complete list of the rescinded memos can be found [here](#).

Notably, Acting General Counsel Ohr indicated that we should be on the lookout for: “[f]uture memoranda setting forth additional new policies [that] will issue in the near future.” This almost certainly confirms that we will see substantial changes in existing guidance in the coming weeks.

Additionally, the five-member Board is anticipated to shift to a Democratic majority as early as August of this year. The Board currently consists of three Republican appointees, one Democratic appointee and one vacant seat. It is expected that President Biden will appoint a Democratic member to the vacant seat, and another Democratic member in August, with the expiration of Republican member William Emanuel’s term.

The Biden administration has expressed a strong pro-labor agenda, including strengthening workers' rights and encouraging and incentivizing collective bargaining. With the appointment of a new General Counsel and a shift to a majority Democratic Board, we expect to see labor policy shift relatively quickly in the short term, and almost certainly over the next four years.

If you have any questions about the information presented in this memo, please contact [Stephanie H. Fedorka](#), [Erin S. Torcello](#), or any [attorney](#) in Bond's [Labor and Employment practice](#).



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