

Labor relations could see changes under Biden

As the November presidential election approaches, labor stakeholders say one thing is clear: Labor relations across the nation could see big changes if Democratic presidential nominee Joe Biden wins the vote.

Biden has promised over the course of his presidential bid to strengthen protections for unions and organizing workers, voicing support for legislation to amend the National Labor Relations Act and severe penalties for employers who illegally oppose unions -- changes that hold appeal for labor at a time when union membership in the U.S. has fallen to historic lows.

But one of the most anticipated and consequential labor changes a Biden administration could bring is the makeup of the five-member National Labor Relations Board. Tasked with interpreting and enforcing the act, the five-member board, whose seats are currently held by three Republicans and a single Democrat appointed by President Donald Trump, has rendered decisions and published rules that management-side attorneys say strike a fair balance between the rights of workers and their employers, but that plaintiff-side attorneys characterize as rolling back protections for organizing workers.

In the event the board reaches a Democrat majority, stakeholders expect its members to roll back the most hotly-debated decisions made by the current board -- including those narrowing the definition of a joint employer, deciding the misclassification of employees doesn't count as a violation of the act and restricting access rights for union organizers.

But the path of change for a Biden-appointed board may not be so straightforward. It has become standard in recent decades for the NLRB to have a partisan makeup. If a Republican president is in office, it is expected

decisions that are more management-friendly will prevail. When the nation has a Democratic president, decisions are expected to veer in favor of workers and labor.

Even in this context, though, stakeholders representing both management and workers say the Trump-appointed board's employer-friendly approach stands out. And it is precisely this approach, they say, that would stop a Democratic administration from easily undoing the current board's work.

Presidential elections did not always determine which way the NLRB would swing, because the board's partisanship was not always a given. In the first years after the act was passed in 1935, as part of the Second New Deal, members of the board were nearly always selected from purported nonpartisan backgrounds like government service and academia. But in 1953, the tide started to turn.

"The Eisenhower administration was the first time that the president nominated a management-side labor lawyer to the NLRB," explained Catherine Fisk, a Berkeley Law professor who specializes in labor and employment. In the decades that followed, partisan appointments became increasingly common, she said.

"If you speak to management-side lawyers, they will tell you that it was the Obama board that first became extreme in its efforts to protect worker rights. And if you speak to labor advocates, they will tell you that the board under George W. Bush became extreme, and that the Trump board is extreme," Fisk said. "What is extreme and what is the correct interpretation of the statute is a matter of perspective, and it's become a highly partisan issue."

"There used to be more of a professionalism and a little more of an attempt at neutrality, and not politicization, or having agendas by board members," said Ira L. Gottlieb, a partner at Bush Gottlieb who represents public and private labor organizations.

Gottlieb identified two moves by President Ronald Reagan that he believes set a precedent for more explicit partisanship: when Reagan, breaking from the Republican tradition of appointing management-side lawyers to the board, appointed John R. Van de Water, a management consultant who specialized in defeating union campaigns; and when he fired more than 11,000 air traffic controllers who were illegally striking in 1981 -- a move widely considered to embolden anti-union stances across the nation.

"With that attack, I think, also came a more politicized NLRB," Gottlieb said of the firings.

Management-side attorneys say Democrat-majority boards have also been explicitly motivated by politics.

"I would say that the Republican boards seem to be focused on case law and the structure and interpretation of case law and the [labor relations act], whereas the Democratic boards seem to be not only concerned with the case law, but also about awareness of the protection that the act affords," said Ron Holland, who represents employers as a partner at McDermott Will & Emery LLP. Explaining the statute does not only protect already-unionized workers, and that Democrat-majority boards have proactively reached out to nonunion employees in recent decades to inform them of their rights, Holland said, "The democratic board, by virtue of their policies -- they want to be expansive."

Fisk agreed that historically the NLRB has played a more salient role in the lives of non-unionized workers whenever it had a Democrat majority. This is because Democratic members were more likely to extend the protections of the act to collective action and concerted activity by non-unionized workers -- even if these workers "were not, in the near term, going to achieve majority unionism and successful collective bargaining," Fisk said. "This is one of those partisan issues: Does the NLRA protect workers engaging in collective action outside of the traditional majority union framework?"

Under the Trump administration, the NLRB has largely fallen in line with this

partisan tradition, rendering decisions and rules that employers like, and unions and workers don't. As with the board under President Barack Obama, many of these decisions and rules continue to be hotly debated, and are widely expected to be overturned or rescinded if Biden wins the presidential election. Particularly at risk, said Holland and McDermott partner Chris Foster, are decisions restricting how and where employees and union organizers can organize; a rule that narrows the definition of a joint employer; and procedures that effectively slow down the union election process.

But Fisk said even in the context of the NLRB's partisan history, the current board's approach stands out.

"It's more extreme," she said. "Rapidly overruling prior cases ... not just precedents from the Obama board, but precedents going back, in some cases, decades; taking aggressive positions that worker protest is unprotected." She pointed to *Preferred Building Services Inc.*, a case involving a group of janitors who picketed in front of a building where they worked to publicize alleged low wages, working conditions and sexually inappropriate comments by their employer.

In 2018, "the board's position was that they were engaged in an unlawful secondary boycott," Fisk said. "That's an extreme position and that kind of position is unprecedented."

The case is being appealed in the 9th U.S. Circuit Court of Appeals, which heard oral arguments Wednesday.

A Democrat-majority board, which would be in place by August 2021 at the earliest if Biden were elected president, would not be able to easily overturn many of the changes made by the Trump board, however. This is partly due to the unprecedented number of attempts the board has made to undertake rule making -- a practice that the NLRB has historically rarely engaged in, Fisk said.

"A rule is harder to rescind because the Administrative Procedure Act requires

agencies to go through a process before adopting a new rule or rescinding a rule," she said. "Critics of the Trump board believe that the ... rule making is not about using expertise to make labor policy, but is rather about trying to insulate its new rules from being overturned by a later NLRB."

Foster agreed there would be obstacles for a Biden-appointed board.

Employers would likely try to appeal decisions rendered by an employee-friendly board in the circuit courts, and there's a high chance they could prevail since Trump has appointed more than 50 judges to circuit court benches, he said.

"If the courts of appeal or the U.S. Supreme Court changes how much deference they give to administrative agencies or the NLRB," that could change how much a Democrat-majority board could accomplish, Foster said.

But Democrats are already pushing back. On Tuesday, Democrats on the House Committee on Education and Labor issued a subpoena to compel the NLRB to hand over records about conflicts of interest among board members. A pending bill, the Protecting the Right to Organize Act, which passed the House in February, would amend the act to provide greater protections to organizing workers.

The legislation has not been taken up by the Senate, but Biden has voiced his support.

"The PRO Act is broad sweeping legislation that overhauls the NLRA to the extent that we haven't seen since the 1940s," Holland said. "We're sitting here talking about the makeup of the board and what could happen if the board shifts if Joe Biden becomes president ... That's barely a blip if the PRO Act is passed."

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