CLIENT ALERTS & INSIGHTS

Biden’s Nomination of Abruzzo as General Counsel Signals Pro-Union Moves Ahead

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President Joe Biden has nominated Jennifer Abruzzo, a lawyer for the Communication Workers of America union, to be general counsel of the National Labor Relations Board (the “Board”) after forcing out Peter Robb as the head of office responsible for investigating and prosecuting U.S. labor law violations.

Biden’s decision to fire Robb, a Trump Administration appointee who still had 11 months left in his tenure, and appoint Abruzzo, who previously served as deputy general counsel under the Obama Administration, is the president’s latest move to implement his aggressive, pro-union platform. Indeed, the firing of Robb was unprecedented. Presidents of both parties have always allowed the general counsel appointed by the previous administration to serve out their term. The circumstances of Robb’s dismissal are expected to lead to a contentious confirmation process for Abruzzo.

Biden also has a chance this year to nominate a new Democratic member to the five-member Board, which decides labor-related cases by majority vote. The Board currently has four members-three Republicans and one Democrat-with one seat open, ensuring a Republican majority until 2022.

Nevertheless, should Abruzzo be confirmed, it is likely that she will pursue pro-union investigations and use novel legal theories to try to overturn several Board decisions, including Caesar’s Entertainment, which held that an employer may prohibit employees from using its information technology systems, such as e-mail, to solicit support for a union. Caesar’s Entertainment overruled the Obama Board’s decision in Purple Communications, Inc., which had held that employees had the right to use an employer’s e-mail during non-work time for concerted protected activity, such as union organizing.

The Biden platform also explicitly seeks to reinstate Specialty Healthcare, which was overruled in 2017. In Specialty Healthcare, the Obama NLRB endorsed the concept of "micro-units" when evaluating potential negotiating units to make it easier for unions to organize parts of a workforce. Additionally, a Biden Board could also target The Boeing Company decision, which overturned a decision that held neutral rules were unlawful if an employee could reasonably construe them to interfere with protected rights. And, a Biden Board would likely try to reinstate the Browning-Ferris Industries decision that expanded the joint employer standard by holding that an employer's status as a joint employer is dependent on the employer's right to control employees, either directly or indirectly. The Board released its final rule regarding joint-employer status in 2020 that restored the pre-Browning-Ferris joint-employer standard that an entity must possess “substantial direct and immediate control” over another’s employees to be considered a joint employer.

Finally, Biden is trying to pass the Protecting the Right to Organize (PRO) Act, which was introduced in Congress on February 4 by Democrats. The PRO Act includes more than 50 significant changes to current labor law. Among those are proposals to overturn state “right to work” laws, codify the “ABC” test to determine whether a worker is an independent contractor or an employee, change the standard for joint employment, prohibit employers from using mandatory arbitration agreements, and make it easier for unions to organize.

While it is expected that incoming presidents will implement new labor policies, the Biden Administration is taking aggressive route to overturn most of the Trump Administration’s policies within a short period of time. We will continue to monitor developments as they are announced and, as always, Benesch is available to answer any questions regarding the likely changes.

For more information, please contact a member of Benesch’s Labor & Employment Practice Group.

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