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A Biden Board At The NLRB: What To Expect And When

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This past Labor Day, President-elect Joe Biden told a group of union supporters that he would be “the strongest labor president you have ever had.” Just how true those words will be hinges on what party controls the Senate after the dust settles on this election season.

As part of his labor goals, Biden has championed the PRO Act, a substantive and drastically pro-union rewrite of the 85-year-old National Labor Relations Act that was passed by the House in early 2020. The PRO Act would codify the ambush election rule and micro-unit policy, neuter employers’ ability to mount counter-campaigns to union organizing attempts, and weaken right-to-work laws that protect employee free choice. The ambitious legislation would also permit the NLRB to issue heavy monetary penalties on employers for violating the NLRA and would more strictly require bargaining after an initial certification of a new union.

The legislation would be destructive to companies, but it seems unlikely to become law in today’s political landscape. Indeed, a less ambitious pro-labor bill, the Employee Free Choice Act, failed to pass a Democrat-controlled Congress in 2009.

But even if the PRO Act does not come to fruition, one thing is clear: there will be changes. Employers have benefitted greatly from the pro-employer NLRB over the past four years. We have seen a flurry of positive changes

including wins on issues like [joint employers](#), [micro-units](#), abolishing the [ambush election rule](#), and making it easier for employers to make [unilateral changes](#) in the workplace.

When and how change might occur under President-elect Biden will largely depend on when he is able to gain control of the NLRB.

The NLRB is currently composed of three Republican members and one Democrat, with one vacant seat. Assuming President-elect Biden is able to fill the vacant seat, his first opportunity to flip control of the Board in his favor will come in August 2021, when Trump appointee Bill Emanuel's seat expires. NLRB General Counsel Peter Robb's term expires in November 2021. Even then, control depends on the Senate confirming both the new general counsel and Board member positions.

In short, we could expect there to be pro-union changes at the NLRB beginning in the fall or winter of 2021. This timeline is similar to the beginning of the Trump administration, when we saw the biggest flurry of [pro-employer rulings](#) come in December 2017 after Republicans gained control of the NLRB. Once Biden gains control, we might see a strategy similar to that employed by the Trump and Obama Boards. A mix of precedent-overturning NLRB decisions and rulemaking could be in store for employers.