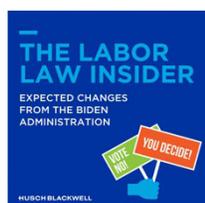


The Labor Law Insider: Expected Changes From the Biden Administration



Special Edition – New York Amazon Employees Vote for Union: What Do We Learn?

April 5, 2022

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Tom Godar	<p>Hello and welcome to Husch Blackwell’s <i>Labor Law Insider</i> podcast. I’m your host Tom Godar and together with my Husch Blackwell colleagues and thought leaders from around the country, we will discuss and explore the ever-changing issues in the world of labor law.</p> <p>President Biden promised to be the most pro-union president ever, and he’s fulfilling that promise. The next four years promises to be a wild ride, so buckle up and join us on the <i>Labor Law Insider</i> podcast.</p> <p>It is great to have you join us for what I’m calling a special edition of the <i>Labor Law Insider</i>. Just last week the National Labor Relations Board counted votes both at the Bessemer, Alabama Amazon election as well as an election at the Amazon facility in New York City in Staten Island. In one case there was a victory for the union in the Staten Island election and in another, while there are still votes to be counted, the union failed to receive enough votes to be a majority of those voting. And remember this was the second election undertaken in the Bessemer, Alabama facility for Amazon.</p> <p>These are a big deal. We’ve talked about the labor union friendly presidency of President Biden. His appointment of general counsel Abruzzo who clearly has an interest in resetting the labor law to a more union friendly dial, as well as now majority of the National Labor Relations Board held by those appointed by President Biden and democratic presidents.</p> <p>So we’re seeing some change in the labor law application. And even New York City, the Amazon vote went for the union with 2,654 yes votes, 2,131 no votes, out of 8,300 eligible voters. So slightly less than a</p>



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third of the eligible voters carried the day for a union election. This might have been surprising as much as this is the first time a union has organized a facility of Amazon, even though they have been working towards in Bessemer for many years to organize that facility. There are significant differences as well between those two elections and there are also some changes that, if you will, assisted the union's election activities in the New York City election because of the change in administration.

Joining us today to help us sort through these issues and give his analysis is my colleague Rufino Gaytán from our Husch Blackwell Houston office. Rufino has been advising employers on labor and employment issues for many years, and often wades into the thorny area of protections provided by employees and unions by the National Labor Relations Board. Welcome Rufino, it's great to have you joining us again to discuss this special topic of a big union win at the Amazon facilities in Staten Island.

Rufino Gaytán

Yeah thanks. First of all, thanks for having me back on the podcast here, Tom, I appreciate it. But you know there are some pretty key differences between the environment, or the union organizing effort environment in Bessemer versus the Staten Island one. And the biggest contrast I think is that (1) the organizing effort in Staten Island was driven by a former employee, joined later by another former employee of that same facility and that what is now called the Amazon Labor Union, is an unaffiliated union, that has no support from the AFL-CIO or any other big existing union. So it was really a homegrown grassroots effort, whereas the Bessemer effort was, you know it's backed by the Retail Workers Union, which is a very well-established union with, you know, I guess for a lack of a better phrase, deeper pockets. So the really sort of historic aspect of this vote is that (1) it's the first one to, you know actually unionize a group of employees, or at least it appears to be headed that way at Amazon, and then the other of course is that it's not an affiliated, it's not affiliated with any other existing unions. And so they probably had to do this on the cheap compared to the effort that was a failing effort in Bessemer.

And then the other of course is that the Staten Island group really began to take root when there were some comments made about a particular former employee that really galvanized that individual to take action and I think used a lot of what was said about him as fodder for getting employees to support a union effort.

Tom Godar

Yeah I think that the individual you're talking about Rufino is Chris Smalls, who was fired very early on for activity which Amazon said



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Rufino Gaytán	<p>violated its Covid protocol. So this is also related, quite honestly as far as I can tell, to quite specific circumstances in Staten Island.</p>
Rufino Gaytán	<p>That's correct. And I think that it's also one of the differences, key differences between the Staten Island effort and in Bessemer. Now, you know unions always attempt to connect with the employees, that's how they get support from employees. They try to customize their message and sometimes they do a better job than others at doing so, but I think that what really sets the Staten Island effort apart is that it really was – because it was driven by former employees, it really was customized to the issues those individuals as well as their co-workers were seeing at that particular facility. There wasn't discussion really about how things could be, it was really about this is how things are, and you had people with first-hand knowledge of the work environment there leading the charge and driving the message, which I think really made a difference in Staten Island.</p>
Tom Godar	<p>Well one of the things that we've talked about is the possibility that under the Biden Administration, a much more pro-union or employee board and general counsel will drive decisions that will make organizing more fruitful for unions. For instance if I recall in the Staten Island Amazon campaign, one of the board decisions back in maybe around Christmas was that union organizers of the employees were organizing, not outsiders, could stay at the facility after their shift closed in order to continue their organizing activities. In other words, they could still be in the facility when they were off the clock. That was a bit of a surprising decision by the board, but can we expect those kinds of decisions to have an impact upon the success rate of union organizing?</p>
Rufino Gaytán	<p>Absolutely, and I think the answer is yes because you've got a, you've got a board now that is comprised of three members who are likely to take more employee or union friendly positions. But really leading the charge you have the general counsel Jennifer Abruzzo, who is really directing all the regional offices to take more aggressive stances on some of these issues. And so I think the risk that an employer facing an organizing drive is going to face is you've got to be very careful about how you discipline employees during those organizing drives, during the actual election period. Anything leading up to the filing of an election petition even, because this board under the current administration, certainly under Ms. Abruzzo's direction, is more likely to say yes, you terminated this employee because of his or her protected concerted activities, not because of the other reasons you're giving. And those reasons might be the employee engaging in misconduct in the workplace, harassing other co-workers, in particular co-workers who may not be</p>



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sympathetic to the union organizing efforts, those sorts of things. And we saw a couple of those issues play out in Staten Island as well.

Tom Godar

Well and that’s what we had talked about on our last podcast, and with this special podcast we’ll talk about some more in the *Labor Law Insider* with some of our colleagues about speech rights under Section VII of the National Labor Relations Act. Certainly that Section VII right is going to continue to loom large for both non-union plants like Amazon was, as well as unionized plants.

The other thing that seems very fascinating and for clients and friends who are interested, they can go out and see *New York Times* reporting on this, there’s an interesting video put together by a very pro-union organization called The Intercept. But on that, they show some of the videos that themselves were put on TikTok and other video platforms that the employees had taken of presentations made by management, of activities in the workplace, interactions between pro-union and management types. Indeed, one of the videos that seemed to, or perhaps loomed large was the arrest of Mr. Smalls only a couple of weeks before the count of the vote. Well I think that votes are still being cast, showing him being marched off the premises for trespassing, and that vote then becomes viral, at least in the community that is making decisions. How does social media and its use have a potential impact in organizing in 2022 and beyond, Rufino?

Rufino Gaytán

Well social media has really given employees the ability to amplify their message. And one of the things that employers have always been good at is having the ability to reach employees, right. Whether it’s through captive audience meetings or just daily interactions between management representatives and employees or supervisors and their employees. Social media has really given employees a way to push back or sort of level the playing field, because it used to be much more difficult to have an audience of even 10 or a dozen or a couple dozen people because that drew attention. And with social media and having the ability to push out a message that might be seen by dozens or hundreds or thousands even of people or co-workers, really allows employees to send out a message to try to unify their co-workers around a specific issue.

In the case of Mr. Smalls, I believe there were some negative comments that some managers within the Amazon organization made about him, some of those comments are leaked and become public and that was really the driving force for him to get involved and to try to lead this effort. And he used those comments made about him, which obviously were not kind comments about him, to really galvanize his co-workers and say this is what they think about, not just me but all of us, and this is



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part of the reason why we need to band together so that we can get better respect, better working conditions and have a voice at the table that Amazon as the employer can't ignore.

Tom Godar

Well I want to, as we part and leave some of these discussions for our clients and friends to sort through, also bring up that there was a second vote in Bessemer, Alabama. Votes were counted I believe again last week and in that case there were 993 votes for no, that is no union. About 120 less, 875 yes for the union and another 400 that were contested. So it's not certain whether or not the yes or the no vote will be certified. But the beat goes on, indeed the beat goes on. There's another Staten Island facility of Amazon which is facing a vote this month. So the reality is that unions are going to keep their eyes on the larger targets, including Amazon, including Starbucks and others where there's been some success.

What sort of parting thoughts do we have for employers as they're watching a renewed energy in union organizing?

Rufino Gaytán

Well you know I think one of the striking facts about the second vote in Bessemer is that the number of employees participating in the vote significantly dropped off. You know I think it's just a little over 35-ish, somewhere in that range, percent of eligible employees voted, whereas during the first election there was significantly higher turnout. That could be, you know, it could be that employees are just fatigued and don't really care anymore what happens and they're going to let the folks who are really passionate about it, make the decision for the rest of the group. here could be other factors at issue, right. Employees might fear that if I do vote I might get in trouble, there might be sort of a retaliation fear there. Which I think for the most part is unfounded in terms of your employer knowing how you're going to vote unless you're publicly putting out support or disagreement with the union effort.

But the other message I think is employers really need to focus on the feedback they're getting from their employees. And both good and bad, but especially the bad feedback, right. So if you're getting a consistent drum of complaints from employees, it's going to behoove you as the employer, as a manager or supervisor, to listen to that employee's concern. Not just listen to it, but then also address it. And one of the biggest issues that Mr. Smalls talked about during his organizing efforts was, you know we kept bringing up concerns to Amazon and to managers and everybody else, and all we got in return was "we'll get back to you." Well the getting back to you part is very important, and it doesn't always mean that the employer has to change any of its practices or procedures to appease an employee, but it does mean that you have to



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open that dialogue and having that open conversation and dialogue with your employees, is going to go a long way towards giving them a voice and making them feel like they're actually being heard, even if you don't always give them what they're asking for.

Tom Godar

I think we're going to let it go at that, Rufino, as we brought our friends a new update on what's taking place in union organizing. Thank you very much for joining us and thank you for listening. Do pay attention, in just a few days, we will also have the promised second round where we're talking about protected speech and how obnoxious it can be and still be protected. But in the meantime, keep your eyes on the labor law changes that we're all experiencing. Thanks again from Tom Godar. Take care.

