The Labor Law Insider:

Expected Changes From the Biden Administration

Episode 2 – Expected Changes at the NLRB (Part II)

June 14, 2021

Speaker	Statement
Thomas Godar	Hello, this is Tom Godar. I am very excited to introduce our series of podcasts. We've titled it the Labor Law Insider. I will be joined by my colleagues and thought leaders from around the country to talk about the issues that will affect you, our clients and our friends, over the next three or four years. We think under the Biden administration and just because labor law is always wild, that we're in for quite a ride. Buckle up, settle in and enjoy the next series of podcasts with us. Welcome to our second podcast in our series. We are excited to bring to you the Labor Law Insider. Talking about "The Biden Administration – Expected Changes at the NLRB." We're joined once again by Kat Pearlstone and Rufino Gaytán, who are labor law insiders from Husch Blackwell, and we're excited to go into a little bit more detail. Last podcast, we really followed sort of the imprint that new administrations have on labor law policy and interpretation. We've seen that for the past 20 years, that as Republican administrations replace Democratic administrations and vice versa, they have the chance to appoint not only a general counsel. And we've already seen the Biden administration step aggressively into that by saying, "You're fired!" to the former General Counsel Peter Robb. But we also know that the president ultimately appoints the majority of the board members that reflect, in this case, his labor policy. Biden has nominated attorney Quinn Wilcox for this empty seat. Ms. Wilcox is the associate general counsel for an SEIU local, obviously identifying her union bias. She would fill that seat if her nomination is accepted by the Senate, and that seat has been vacant since 2018.

Speaker	Statement
	I think, Kat, you informed us that, while that waits probably until August when Board Member Emanuel steps down and President Biden is appointed another to the now-empty seat, we have already begun to see some of the imprint that the authority of the president and his administration has on labor law policy. Not unprecedented, although I think, Rufino, you suggested that the aggressiveness with which President Biden was moving was quite unprecedented – that firing a general counsel without having clear authority to do so is something that we don't normally see. Even President Trump didn't move that aggressively. So we have the stage set for a president who, in the first week or two of his administration, had 27 labor leaders into the White House for a meeting to move forward, at least on the administrative side. Whether or not it moves to the legislation, which I believe the PRO Act has been passed by the House and it's already embedded into the infrastructure bill… So it's gonna take some time to find out whether legislatively we'll see that, but certainly we're gonna see some changes from the administration. So, last time we talked, we were also talking about what some of the specific changes might be. And I think we were talking, at least for a short time, about email systems: Who owns? Who controls? What's the impact, potentially, of a change in administration? Kat, why don't you give us some more detail that we didn't cover last time?
Katherine Pearlstone	Sure! You know, for the majority of the board's history, really the history of federal labor law, the precedent regarding an employer's ability to manage their email system has been really intuitive. You know, it's something they own, it's something they created, it's their property, so they have the ability – an employer has the ability – to set guidelines or limitations on what an employee can or cannot do. You know, there's of course always been a feeling to that, which is that, you know, an employer can't set limitations in a discriminatory manner. So, for example, you can't ban just union communications, or just communications about terms and conditions of employment. But so long as an employer's limitations on an employee's use of work communications was not discriminatory – for example, banning all non-business email communications – that was upheld. That was totally valid, good to go. The Obama-era board in 2014 turned that on its head. In a case called *Purple Communications*, they completely reversed course, and instead of finding that it was pretty well-presumed that an email communication is employer property, found an opposite presumption. It held that employees have a presumptive right to use a work-related system for Section 7 protected communications and anything related to the terms

Speaker	Statement
	and conditions of their employment. It's a watershed case. It was really one of the first attempts to redefine the fundamental nature of employer property rights and where the line between property rights and Section 7 protected concerted activity begin to blur. You know, *Purple Communications* did say there was a very limited instance in which an employer could control its email communications, but it was a "special circumstance," which it never bothered to define or give any guidance on.
Thomas Godar	Wow. So, just as a larger, you know, big picture, we're expecting that the labor law might be interpreted much more consistently with President Obama's administration and its years than, obviously, President Trump's. So we're looking back at some of that history to give us guides as to what might happen tomorrow. Is that fair to say?
Katherine Pearlstone	Absolutely. The Trump board turned course and overturned *Purple Communications* in a case called *Caesars Entertainment*. But we should absolutely expect the Biden board to flip that back and either reinstate *Purple Communications*, if not expand it.
Thomas Godar	Rufino, this is only important to unionized employers, right?
Rufino Gaytán III	Well, unfortunately, no, Tom. As… I think we've mentioned in our prior podcast was, Section 7 of the National Labor Relations Act applies to all workplaces, union or non-union. If an employee is engaged in protected concerted activity, as defined under the Act, he or she has the protections of the NLRA. And so, it is very common, actually, for non-union employers to have to face unfair labor practice charges. So, unfortunately, it is something that applies across the board.
Thomas Godar	So, just to understand this, employees have long been able to take their employers to task on their own Facebook page or outside in social media. But now it's possible that that kind of challenge to the employer's wages or hours or working conditions inside their own email might be protected activity?
Rufino Gaytán III	That's correct. And generally, you know, as Kat was saying, the current standard is a little more flexible than that – where an employer can prohibit, you know, non-business use across the board. As long as it's not discriminatory toward unions or protected activity, then it's generally going to be an acceptable limitation. But it is a scary proposition to have your own tools, your own resources, used against you in a campaign for organizing a unit of employees or for, really, any other type of concerted activities.

Speaker	Statement
Thomas Godar	Wow. Hey, Kat: practical advice on the end of April 2021, as we're anticipating this kind of change?
Katherine Pearlstone	I think, for now, one is to check which employees actually need email access. You know, a lot of employers will issue email addresses for jobs where maybe it's not necessary to have it, especially if you're looking in more of manufacturing and production. So, one of the first things, kind of big picture, is can we cut down on the number of email addresses that we have? Another thing is to look at what kind of policy you currently have in place and see what the language is. I wouldn't recommend making any modifications until the law itself changes. I mean, you can keep the protection you have under *Caesars Entertainment*, but have language ready to go, so that if this changes, you have a plan in place.
Thomas Godar	Great, great practical thoughts. We talked a little bit when we were flying at 40,000 feet in our earlier discussion, that facially neutral workplace rules may also be under assault. I'm not quite sure I even understand what a facially neutral workplace rule is. Aren't workplace rules all pro-employer? Otherwise, why would you have them? But, in any case, Rufino, why don't you tell us a little bit about what we could anticipate under the new NLRB?
Rufino Gaytán III	So, under this new board, we anticipate a change in how the board looks at "facially neutral workplace policies." And so, by that, of course we mean a policy that does not outright say, "We prohibit you from talking to your coworkers about your wages and hours or other working conditions," right? It's something as generalized as, you know, "Behave appropriately at work," or, you know, sort of workplace civility rules: "Don't engage in disruptive behavior" – that sort of thing.
Thomas Godar	Aren't those already pro-employee? I mean, because isn't the disruptive behavior one employee toward another, as a rule?
Rufino Gaytán III	Well, it depends, too, because we might even see a change in what sort of workplace misconduct is permissible under this board. But, you know, it's one of those situations where if you have an incident at work where an employee is being disruptive, employers may need to really think twice about what sort of discipline is going to be permitted. But as it relates to facially neutral rules, under the Obama board, under a case called *Lutheran Heritage*, the board came up with what it referred to as the "reasonably construed analysis." And under that analysis, the board deemed unlawful any workplace rule, facially neutral, if it could be "reasonably construed" by an employee to prohibit the exercise of

Speaker	Statement
	Section 7 rights. Very tough standard for an employer to defeat because an employee will always testify that, "I thought that if I talked to my coworkers about my wages and how I think our treatment is not fair at this workplace, that I was going to be terminated in retaliation." If the employee sets that up, it's very difficult for the employer to challenge that. Under the Trump administration, under the *Boeing* case, the board created a balancing test that looks at the neutral workplace rule and its negative impact on the employee's ability to exercise Section 7 rights, and then that rule's connection to the employer's right to maintain discipline, productivity, general civility in the workplace, essentially. Under the… Even sort of the kicker for the employers under the *Boeing* case is that the general counsel, or the board, essentially, bares the burden of establishing that a reasonable employee would interpret that rule to impinge on his or her Section 7 rights. And so, it's just, you know, right now under *Boeing*, employers have at least a fighting chance, whereas under the *Lutheran Heritage* case, it really was almost a presumption of invalidity as long as you had the right testimony from an employee.
Thomas Godar	So, Kat, we have a policy that says, "We expect all employees to treat their peers, subordinates and supervisors with respect, and negative comments regarding your peers, subordinates, and supervisors will be looked at as a violation of our policy." Potentially a problem, or is that okay?
Katherine Pearlstone	Potentially a problem, I think, is the small way to say it. You know, I would expect this board… And there was a case released – it's *Medic Ambulance Services*; it was just released in January of this year – where the current board upheld a social media policy that prohibited, like, inappropriate postings. But the current NLRB chairman – and lone Democrat appointed member – wrote an incredibly strong dissent saying that that should have been per se unlawful. And so, it's kind of a roadmap of what to expect. I would, you know, if I was an employer, I would be looking… They're gonna look for buzzwords: "inappropriate," prohibiting "inappropriate" comments, prohibiting "negative" comments, requiring a "positive" workforce, requiring a "welcoming" workforce. Those are the kind of… That's the kind of buzz language that the board and regional directors are really gonna hone in on. And so the best way to try to get around it is to be as specific with what you're prohibiting as you can, to the extent you want to still prohibit certain types of behavior.
Thomas Godar	So, I'm not falling into the same trap this time. I know that this is affecting non-union employers; this is not just for those who have a

Speaker	Statement
	unionized workforce. Interesting stuff. Let me talk one more topic at least, and that is investigation and confidentiality. Too much of our time as counsel has been spent helping employers work through investigations where one employee claims another stole from him or her, or was engaged in harassing behavior, or was engaged in behavior that was disloyal because they were working on the side, taking the employer's secrets and so forth. That calls for really quite specialized investigations. Normally I would ask, if I were participating in that or advising a client, "Tell your folks, you gotta, you know, keep this investigation, even your answers, even the background which we shared with you, confidential so we can have a neutral investigation and not, sort of, have it poisoned by communication." Is that at risk, potentially, under the new Biden administration interpretation of the National Labor Relations Act? What do you think, Rufino?
Rufino Gaytán III	Yeah, I think that it is certainly something that this board would take an opportunity to, you know, change course on. So, from a purely board precedence standpoint, right now, the rule is that a confidentiality rule that prohibits employees from discussing a workplace investigation while the investigation is pending is presumptively lawful. If it lacks any sort of time limitation, that's going to require additional scrutiny, but it's not, you know, unlawful right out of the gate. That is… That rule came about in a case called *Apogee Retail* under the Trump board. The prior rule, which was promulgated under the Obama-era board, was a case called *Banner Estrella Medical Center*. And under that rule, employers were required to determine on a case-by-case basis whether a confidentiality obligation was legitimate or not and substantially justified so that it outweighed whatever infringement it actually may have caused on the Section 7 side of the equation. There were some exceptions, for example, if the employer believed that somebody's safety was in danger; if they believed that evidence would be destroyed if employees talked about the investigation. There were very limited exceptions to when the rule could be applied, and even then you had to make that case-by-case analysis. Whereas under the current rule, it's just, you can require it during the pendency of the investigation, and it permits the employer to conduct an investigation without fear of, you know, evidence being destroyed, or people coordinating their stories – that sort of thing – which is always a very practical challenge when human resources and employers are conducting these types of investigations.
Thomas Godar	So, again, we're going to have to be thoughtful as counselors to you as our clients and friends, about how you're gonna conduct, particularly in the most delicate situations, your investigations. And some of the practical things, I suppose, is trying to have an investigation wrap up

Speaker	Statement
	quite quickly. But that itself has problems, doesn't it? If you have more than one investigator they can't compare notes and all that sort of thing. So, right now, we have a rule that allows what I'd call traditional investigative authority. We're looking at a likely change to allow employees to compare notes because that's concerted, potentially protected activities, if you will. Speaking of conduct in the workforce, there's also the likelihood that what we would've thought of as abusive workplace conduct might have more protection than historically it's had, or return to a standard, perhaps, that the Obama board offered. Kat, why don't you talk to us about that?
Katherine Pearlstone	Sure. So, you know, in this context, Section 7 almost runs contradictory to some of the other federal employment laws you're gonna see, like Title VII, or the Americans With Disabilities Act, or the ADEA, in that, in the context of protected concerted activity, and especially in the context of, like, an organizing campaign or a strike, there is a much higher tolerance for what is…the big category is abusive conduct. Now, what falls under that conduct is pretty broad. You know, it can include cursing, it can include berating coworkers. And how an employer is able to determine when they can actually issue discipline for this kind of behavior, which is, you know, everyone would agree in a normal circumstance, completely inappropriate for a workplace, has always been really murky. You know, the board hasn't really had a bright-line analysis for how to address this behavior. It has to rise to a really high level to lose its protected status. And when I say high level, there have been instances where even racial slurs have not gotten there. It's incredibly high. So, one of the things that the Trump-era board tried to do was fix that because it was skewing too far toward abusive conduct, where the employer was losing the ability to maintain a safe and positive work environment. And that was in a case called *General Motors*, which is… For the first time, the board adopted a single, uniform standard for determining when an employer can issue discipline to an employee that is engaging in abusive or offensive conduct, even if that conduct is in connection with some kind of protected concerted activity. And it goes back to a case called *Rightline*, where it does a burden-shifting analysis and it looks at if the employer, whatever adverse employment action the employer wants to take, if it's because of the underlying protected concerted activity, or because of the abusive conduct on its own. And so, it gave a roadmap to employers to be able to actually try to rein this behavior in. You know, this is a touchy topic, and it's one that unions and pro-union sites feel very strongly that, in these kind of heightened emotional

Speaker	Statement
	scenarios, employees should be given pretty high leeway. So we would expect the incoming board to implement a much more employee-friendly standard, with a really high tolerance for abusive conduct, if it's related to protected concerted activity.
Thomas Godar	Rufino, does this potentially set up a conflict between the way employers have to interpret someone's rights to be free from harassment based upon a protected characteristic, and someone else's rights to be screaming the F-bomb because they think that something is unfair in their wages or hours or working conditions?
Rufino Gaytán III	It definitely does. And, generally, these cases that have moved their way through the board and into courts have been because an employer… You know, for example, if an employee is engaged in a picket, and during that picketing shouts out a racial slur at somebody who is crossing that picket line and going into work, that employer is generally gonna want to terminate the employee who's shouting the racial slur, because they –
Thomas Godar	And protect that other employee, yeah.
Rufino Gaytán III	Absolutely. Because, you know, there's liability, potentially, under Title VII, potentially state discrimination laws. And so you do create this conflict between which evil does the employer allow, right? So do you permit this employee to harass another coworker to avoid an unfair labor practice charge, or do you terminate that harassing employee and face that unfair labor practice charge to avoid potential liability on the discrimination side? I think, practically, what employers are gonna be faced with is choosing the lesser of the two evils. And if you look at it from just a dollar standpoint, the financial risk and liability associated with Title VII violations is generally going to be much higher than it is under an unfair labor practice charge, you know, side of things. And so, unfortunately, I think employers are gonna have to look at what is my potential exposure, and make decisions based on that financial risk alone.
Thomas Godar	Of course if the PRO Act gets passed, it will change that financial risk equation hugely. We'll save that discussion for another day. But listen, this has really been helpful, I so much appreciate it. So our two labor law experts… Kat Pearlstone, who's in our Husch Blackwell Kansas City office… That's been terrific. Thank you so much for joining us. Rufino joins us from our Houston office of Husch Blackwell, and it's really been excellent to hear your insights. I will join you in predicting that each of the things you've talked about, in one way or another, will find their way to our new national labor policy within the next eight to 12 months. And in that way, our friends and our clients are going to need

Speaker	Statement
	some opportunity to look at how they have interpreted their own policies as well as sometimes changing them. By the way, there's a whole other swash of stuff coming down the line that's going to affect our unionized employers, or those who are facing union organizing campaigns. Again, there's gonna be a number of decisions or advice memoranda that are gonna be changed or challenged by this new board and the new GC. We're gonna save some of that discussion for our continuing podcasts on the Labor Law Insider. But for now, I think we've given our clients and friends enough to think of. Rufino and Kat, thanks so much for sharing your expertise, your thoughts today.
Rufino Gaytán III	Thank you for having us again.
Katherine Pearlstone	Yeah, it was fun.
Thomas Godar	It was great. Really enjoyed it. Thanks again, and thanks, everybody, for joining us on our Labor Law Insider podcast.