



Construction Industry Best Practices During
A Pro-Union Administration
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Gregory A. Hearing
Shareholder
GrayRobinson, P.A.
813-273-5000

gregory.hearing@gray-robinson.com

Agenda

- General Overview of Incoming DOL Leadership
- Macro and Micro Impacts of Unions
- Do's and Don'ts When Dealing with Unions
- Recent Pro-Employer NLRB Decisions a Biden Board May Overturn
- Legislative Changes Employers May Expect the Biden Administration to Pursue and How to Deal with Same
- Conclusion

President-Elect Biden Intends to Stock the DOL with Life-Long Union Supporters



Biden's Secretary of the Department of Labor ("DOL")

- Biden recently introduced Boston Mayor Marty Walsh as Biden's pick for Labor Secretary



Biden's Labor Secretary

- Walsh is a longtime affiliate of Laborers Local 223 in Boston
 - Between 2002 and 2015 Walsh has held numerous positions within Local 223, including President and Financial Secretary, the latter position providing Walsh with over \$200,000 in annual compensation

Biden's Labor Secretary

- Biden's selection of Walsh to lead the DOL comes as no surprise given Biden's overt interest in packing the DOL with union leaders and supporters with extreme pro-employee ideologies

Why should construction industry
employers care?

Unions Harm the Overall Economy

- In essence, Unions are nothing more than labor cartels
 - Unions restrict the workforce in order to increase wages
 - As a result, the labor workforce suffers as a whole
 - While some employees **may** experience slightly increased wages, unions cause many employees to lose their jobs
 - In fact, unions cause job loses across the economy

Unions Harm the Overall Economy

- The pandemic has already placed the U.S. economy in jeopardy
- A slew of pro-union rulemaking, NLRB decisions, and legislation will only stunt economic recovery and growth
 - Research shows that pro-union policies increased the economic impacts of the Great Depression
- Economists have found that over time unions have the same impact on corporate investments as a 33% tax increase

<https://www.heritage.org/jobs-and-labor/report/what-unions-do-how-labor-unions-affect-jobs-and-the-economy#:~:text=Less%20investment%20makes%20unionized%20companies,jobs%20available%20in%20the%20economy.>

Unions Harm the Overall Economy

- Unions also cause the following macro level economic impacts:
 - Higher unemployment rates due to a decrease in available jobs
 - Exporting of jobs to other countries
 - Price increases for consumers
 - Unequal competition between unionized and non-unionized employers

Unions Harm Individual Companies

- Unions decrease a company's ability to compete with non-unionized companies
 - Greater overhead and workforce expenses
 - Lower profit margins
 - Reduced investment by outside investors
 - Increased prices for goods and services

Unions Harm Individual Companies and Employees

- Unions disrupt the workplace environment
 - Create manufactured tension between employees and the employer
 - Unions create an “us versus them” mentality among employees
 - CBAs can make it difficult to terminate a poor performer and/or an employee with behavioral issues
 - May require a grievance process to include binding arbitration
 - Employers spend significant resources in the grievance and arbitration process
 - Leave discipline decisions up to the whims of arbitrators

Unions Harm Individual Companies and Employees

- Employers are prohibited from unilaterally increasing employee benefits and/or wages without bargaining with the union
 - May lead to employees receiving less benefits and/or compensation than they would without the union
- The union becomes the sole authority capable of negotiating with the employer
 - Removes an employer's ability to discuss and consider terms and conditions of employment directly with its employees
- Union organization rewards seniority, not performance
 - Union organization discourages skilled workers with low seniority from working for employers with a unionized workforce
 - May create discontent with such workers who remain employed in a unionized workforce

National Labor Relations Act ("NLRA")

NLRA

- Section 7 protects employees' right to engage in concerted activity regarding the terms and conditions of employment
- Section 8 prohibits employers from interfering with employees' Section 7 rights and prohibits employers from discriminating against employees who exercise such rights

Employer Do's and Don'ts When Dealing With Unionization

Employer Don'ts When Dealing with Unionization

- Don't make statements that violate the restrictions known under the acronym T.I.P.S. as follows:
 - Threaten employees with bad things because they support the union
 - Interrogate or question employees about the union or the employees' union activity
 - Promise employees anything good if they will oppose the union
 - Surveil pro-union activity or create the impression that the company is spying on employee union activity

Employer Don'ts When Dealing with Unionization

- Don't do anything by way of statement or other communication to the employees which contains any threat or reprisal or promise of benefit concerning voting for the union, union membership, or other union activity
- Don't spy on union meetings . . . that is, don't "accidentally" park your car across the street from where the meeting is being held
- Don't ask another employee to spy for you
- Don't tell employees that the company will fire or punish them if they engage in union activities
 - Do nothing that might be looked upon as a "threat"

Employer Don'ts When Dealing with Unionization

- Don't promise, either directly or impliedly, any benefits to an employee because he or she rejects the union
- Don't discharge, discipline, or do anything else to an employee that may be viewed as discrimination because of union activity
 - Be extremely careful in laying off or discharging employees during this union organization period
- Don't make any promises in return for a vote against the union such as:
 - More pay
 - Promotion
 - Better treatment
 - More overtime
 - Special privileges

Employer Don'ts When Dealing with Unionization

- Don't question any employee about the union, including:
 - Other employees' membership in the union
 - Union activity
 - How he or she intends to vote
 - Whether or not he or she has signed a card
 - The employee's opinion of the union
 - Why he or she would want the union
- Don't tell any employee that the employer knows about the union activity of other employees, such as having signed a card, attending a union meeting, being supportive of the union, or that the company is keeping a list of employees who are pro-union

Employer Don'ts When Dealing with Unionization

- Don't request or require that employees wear buttons or other insignia indicating their opposition to the union
- Don't ask or require an employee to come into your office to discuss the union or to attempt to persuade him or her, even without coercion, in connection with union matters
- Don't visit an employee's home for the purposes of attempting to persuade him or her in connection with union matters after petition for an election has been filed
- Don't try to prevent an employee from talking about the union during "free-time" such as breaks (even if on-the-clock), or lunch

Employer Do's When Dealing with Unionization

- Explain to employees that wages and benefits do not increase just because a union wins the election
 - Everything is negotiable and the law does not require the employer to agree to any particular union demand
- Explain to employees that, if the union wins the election, then all of the employees in the bargaining unit are bound by the negotiations with the employer
 - Even if an employee does not join the union, the union is the sole voice to management about wages and terms of employment
- Inform employees that if they are required by the union to strike, they are subject to being permanently replaced, and while on strike, they will draw no pay from the company and no unemployment compensation from the state

Employer Do's When Dealing with Unionization

- Inform employees as to how you think they should vote
- Inform employees that the signing of an authorization card does not mean that they must vote for the union
- Inform employees that the election is decided by a majority of those who vote, not a majority of the total number in the unit
- Inform employees that the election is supervised by the Federal Government and the ballot is completely secret
- Inform employees that it costs money to join a union because of dues, initiation fees, and fines for breaking union rules
- Inform employees of the adverse effects of unions in other areas
- Inform employees of any known racketeering or other undesirable elements which may be active in the union

Employer Do's When Dealing with Unionization

- Inform the employees that the union membership does not stop the company from taking disciplinary action, including discharge, if they do not perform their work properly
- Inform employees that if a union gets in, you cannot deal directly with them but everything affecting wages, working conditions, etc., must go through the union
- If the union makes any outlandish claims or promises, let the employees know that these claims and promises are untrue and answer any arguments and charges the union makes
- Inform employees of the benefits they are now receiving and possibly taking for granted, and point out that these benefits were obtained without any union

Employer Do's When Dealing with Unionization

- Explain the election procedure in detail to employees, and keep them abreast of developments, such as hearings before the National Labor Relations Board and the scheduling of the election
- Discuss any personal negative experiences you have had with unions
- Listen to what employees tell you about the union and what they think about it

National Labor Relations Board ("NLRB")



NLRB

- Agency which enforces the NLRA
 - Supervises elections
 - Investigates and remedies unfair labor practices (“ULP”)
- The union or employer may file an unfair labor practice charge with the NLRB
- The regional NLRB office then investigates the charge and may set the matter for hearing before an Administrative Law Judge (“ALJ”)

NLRB

- NLRB General Counsel appointed by the President and prosecutes alleged ULPs before Administrative Law Judges
- A party may appeal the ALJ's decision to the Board
- The Board is comprised of 5 members appointed by the President
 - Each member serves a 5 year term
 - Traditionally, there is a 3-2 majority in favor of the current administration's political party
 - Currently, the Board is comprised of 3 Republicans and 1 Democrat
 - Biden will likely nominate a Democrat to fill the vacancy in the early days of his presidency

NLRB

- Board members' terms are staggered
 - The seat which term is set to end in 2021 is held by William Emanuel, a Republican
 - His term ends August 27, 2021
 - Republicans will hold the majority until Emanuel's term expires
 - Biden is then expected to nominate a Democrat to replace Emanuel which would give the Democrats a 3-2 majority

Recent NLRB Decisions Which Employers Should Expect a Biden Board to Overturn

Caesars Entertainment

- In a prior Obama era NLRB decision, *Purple Communications*, the Board found that employees had the right to use their employer's email system in order to organize and engage in union activity
- In *Caesars Entertainment*, the Trump Board overturned *Purple Communications*, holding that employers have the right to control the use of their email systems so long as employers do not discriminate in restricting email use

Caesars Entertainment

- In other words, employers may not solely prohibit employees' utilization of employer email systems for union purposes
- Instead, employers must restrict all non-business use of their email systems
 - For instance, in order to comply with the ruling, an employer wishing to prohibit use of its email system for union purposes must also prohibit its employees from using the employer's email system for personal purposes such as an employee promoting the sale of Girl Scout cookies

The Boeing Company

- Boeing's policies included a "no camera rule" which restricted an employee's ability to take pictures of Boeing's facilities without Boeing approval
 - Also, employees working on sensitive government and military projects were not allowed to possess a camera within such project area, including their camera-enabled cellphones
 - Boeing maintained its "no camera rule" in order to comply with the national security requirements of its government projects, protect its facilities from terrorist attacks, and protect its proprietary information
- The ALJ determined that Boeing's "no camera rule" violated the NLRA

The Boeing Company

- The Trump Board overturned prior precedent which evaluated whether an employer's policies violated the NLRA by prohibiting or chilling protected concerted activity regarding the terms and conditions of employment
 - The prior test determined whether a policy could be "reasonably construed" by an employee to prohibit protected concerted activity
 - The test was liberally construed in employees' favor
- In *The Boeing Company*, the Trump Board held that it would consider "(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule"

The Boeing Company

- The Trump Board divided employer rules into three categories:
 - Category 1 – Includes rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.
 - Category 2 – Includes rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications
 - Category 3 – Includes rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule

The Boeing Company

- For instance, a policy requiring confidentiality for the duration of an employer's investigation may be perceived by some as restricting an employee's right to engage in protected concerted activity
- However, under *The Boeing Company*, investigative confidentiality rules limited to the duration of an investigation fall into Category 1 and do not constitute an NLRA violation

General Motors

- The Trump NLRB overturned prior precedent which allowed employees to engage in offensive and/or abusive behavior so long as the employee was doing so in the course of protected concerted activity
 - Example of such behavior permitted by prior NLRB precedent
 - An employee's social media post which read: "Bob is such a NASTY MOTHER F***ER don't know how to talk to people!!!!!! F*** his mother and his entire f***ing family!!!! What a LOSER!!! Vote YES for the UNION" (*Pier Sixty, 2015*)

General Motors

- The new *General Motors* standard provides that an employer may discipline an employee for **abusive or offensive** conduct while engaging in **protected activity** as long as the employer can establish that it disciplines employees who engage in **similar** offensive or abusive conduct while they are not engaged in protected activities

Biden Administration's Potential Legislative Agenda

Recent Independent Contractor Rule

- New DOL Final Rule for classifying independent contractors under the FLSA
- Considers actual practice of the individual and alleged employer, not what is contractually or theoretically possible
- Employer friendly
- Effective March 8, 2021
- Biden Administration will likely work to reverse the Final Rule

The Protecting the Right to Organize Act ("PRO Act")

- Nullifies right-to-work laws
- Enacts an employee-friendly "joint employer" standard
- Prohibits mandatory arbitration in employment agreements
- Provides employees with the right to bring forth individual lawsuits against employers to enforce the NLRA
- The PRO Act provides for the following damages:
 - Back pay (without consideration of interim earnings)
 - Liquidated damages (twice the amount of back pay)
 - Front pay
 - Consequential damages
 - Punitive damages

The Protecting the Right to Organize Act ("PRO Act")

- The PRO Act also provides for prevailing party reasonable attorney's fees
- Allows the NLRB to impose \$50,000 fines against employers for NLRA violations
 - Doubles the fine for repeat violations
- Imposes personal liability on corporate directors and officers involved in or who have knowledge of NLRA violations

The Protecting the Right to Organize Act ("PRO Act")

- Sets a heightened standard for defining individuals as independent contractors, making it more difficult for employers to classify individuals as same
- Prohibits employers from permanently replacing striking workers
- Prohibits employer meetings designed to allow employers to convey their opinions regarding unionization to employees
- Provides for ambush elections
- Allows non-secret elections

The Protecting the Right to Organize Act ("PRO Act")

- The AFL-CIO has announced its renewed and invigorated effort to lobby in support of the PRO Act
- ABC members may visit ABC's national website to sign a petition against enactment of the PRO Act
 - <https://www.abc.org/Politics-Policy/ABC-Action-App/Action-Center>

Biden's Other Labor and Employment Law Objectives

- Increase federal minimum wage to at least \$15.00 per hour
- Prevent DOL's recent Independent Contractor Final Rule from becoming effective
- Mandatory paid leave requirement
- Debar employers who illegally oppose unions
- Mandate PLAs and expand PLA requirements
- Require employers to sign union neutrality agreements prior to accepting federal funds

Biden's Other Labor and Employment Law Objectives

- Strictly enforce the prevailing wage requirements of the Davis-Bacon Act
- Mandatory benefits for workers in the gig economy
- Eliminate non-compete and no-poach agreements
- Increase OSHA enforcement efforts
- Expand protections for undocumented workers who report labor violations

Conclusion

- The Trump Administration has favored employers
 - Favorable NLRB rulings
 - Favorable DOL rules
- Employers may utilize the foregoing Do's and Don'ts to avoid unionization
 - Employers must proceed cautiously when opposing unionization as the list of Do's may become Don'ts as the Biden Administration progresses
- Employers should immediately seek the advice of counsel upon learning of any unionization efforts in order to avoid committing a ULP and to better understand the actions which an employer may legally take to defend against the union
- Proactive employee relations and recognizing and reporting union risks, especially card signing, may give employers a fighting chance

Questions?

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