



## *Labor & Employment Law Perspectives*

<https://www.laboremploymentperspectives.com>

# Happy New Year, Employers — Things are Likely to Improve at the NLRB



POSTED BY THOMAS C. PENCE ON 3 JANUARY 2017

POSTED IN LABOR RELATIONS

As every employer knows, the Obama era has not been kind from a labor law perspective. The five-member National Labor Relations Board (NLRB), which has had a Democratic majority during recent years, has issued a host of pro-union decisions over the past eight years. Along with new rules that speed up the union election process, those decisions have made it easier for unions to organize, and often made it harder for employers to enforce disciplinary rules.



It will take some time, but life will almost certainly be easier for employers during the Trump administration. First, there is the possibility that the Republican-controlled Congress will pass legislation that could restrict or even eliminate the Board. In one scenario, the Board would be abolished and decisions by administrative law judges could be appealed directly to federal district court.

Even assuming there are no legislative changes to the Board's structure or mission, the Board under the Trump administration, it will nevertheless go quickly in a different political direction. Shortly after Trump takes office, Republicans will be appointed to fill two vacancies on the Board, and the Board will then be controlled 3 – 2 by Republicans. Some changes will take longer. For example, it will take a while to reverse some of the rule-making that occurred under the Obama Board, and the top lawyer for the Board – a former general counsel for the International Union of Operating Engineers – will continue to serve in that capacity until the end of 2017

(when he will be replaced by a pro-employer Republican). But, by late 2017, and then into 2018 and beyond, expect to see a series of pro-employer decisions from the Board and new rules “undoing” some of the changes that were put in place during the Obama era.

What are some likely first “changes” this management labor lawyer expects to see? There are so many possibilities, but here are a few top contenders:

1. A reversal of numerous Board decisions determining that otherwise simple and straightforward employee handbook provisions are unlawful because they “might” have a chilling effect on employees wanting to exercise their rights under the National Labor Relations Act. For example, the Obama Board decided that a handbook rule prohibiting “harassment” was too broad because it might make employees think they couldn’t argue with co-workers in the organizing context (it was still okay, the Board said, to prohibit “harassment based on a protected category”). There were a series of these sort of “pushing the envelope” decisions over the past few years, and it caused many employers to give up on handbooks altogether out of concern that whatever they say might be viewed as going too far. Expect the new Board to bring back some common sense to this area and prohibit handbook provisions only when they are truly likely, not just hypothetically possible, to impact organizing or concerted activity.

2. An end to the new NLRB doctrine that “mini-units” are presumptively appropriate. In that regard, for many years, the NLRB determined that “wall to wall” bargaining units were presumptively appropriate, and if a union wanted to represent just one small group of employees, it had the burden of showing the small group somehow had a different community of interest than the other employees. The Obama Board reversed that doctrine and determined the burden was on the employer, rather than the union, to show the small group was inappropriate. This change has made it easier for unions to get a foot in the door by organizing just a small department as opposed to all employees. Mini-units also create operating obstacles for employers, as they attempt to deal with a bargaining representative for just one small group of employees. Expect the new Board to return to the old rule — rejecting mini-units, as appropriate.

3. An end to the new NLRB doctrine that union security provisions survive the expiration of the labor agreement. Historically, the Board determined that when a labor contract expires, the employer’s obligation to continue dues deductions expired as well. This was a powerful tool in the unionized employer’s arsenal. Fear that the employer might stop deducting dues when the labor contract expired gave a union incentive to reach a new labor agreement on time. The Obama Board reversed this

longstanding rule, and determined that the employer's duty to withhold union dues continues even after expiration. Expect the new Board to return to the old approach.

These are, of course, just some examples of changes that occurred under the Obama Board that will likely be reversed under the Trump Board. The changes won't be reversed overnight, but there is no doubt the Trump Board will unwind as many of them as possible, as fast as possible.

**TAGS: NATIONAL LABOR RELATIONS BOARD, NLRB, OBAMA, OBAMA ADMINISTRATION, PRESIDENT OBAMA, PRESIDENT TRUMP, TRUMP ADMINISTRATION**

---

© 2017 FOLEY & LARDNER LLP