

## Blog Post

# Back to Pro-Labor: What Employers Can Expect From a Biden Presidency: Part II, Labor Relations Edition

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While the final results are not yet certified, it appears that we have a new president. Employers across the country, both union and non-union, are wondering what they can expect from a Joe Biden presidency when it comes to organized labor. The Biden campaign was not shy about its strong support for labor unions, and many of Biden's campaign promises involved restoring the Obama administration's pro-union policies that have largely been dismantled by the Trump administration.

Changes to labor laws can be made in multiple ways: by statute; by rulings issued of the National Labor Relations Board (NLRB); and occasionally and more recently, by rulemaking. When a new party takes control of the White House and Congress, we often see legislation changing the National Labor Relations Act (NLRA). Statutory changes are more difficult to reverse than NLRB decisions. The presumptive President-elect Biden's legislative agenda centers around, and in some ways goes beyond, "The Protecting the Right to Organize Act," (PRO Act), which passed the House of Representatives in February 2020. The PRO Act is designed to make it easier for employees to form and join a union, and to limit employers' ability to ward off unionization. Biden's plan includes the following key concepts applicable to various stages of unionization efforts:

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## Before Union Election

**Card Check:** Biden was a co-sponsor of the original 2008 Employee Free Choice Act (EFCA) which allowed workers to choose to form a union if a majority signed union authorization cards, instead of through voting in an NLRB conducted secret ballot election. He has indicated that he strongly supports card check and will seek to revive EFCA in some form. Employee peer pressure to sign a union card is much more effective than a union election campaign encouraging a “Yes” vote for the union in a NLRB secret ballot election. Therefore, we expect card check to significantly increase union organizing success. Another aspect of the PRO Act requires an employer to recognize and bargain with a union based on this “card-check” authorization, in the event the union loses an election and the NLRB determines that an employer improperly interfered with the election. No such requirement currently exists.

**Expand the NLRA’s Coverage:** The PRO Act would expand the protections of the NLRA to more workers by adopting strict criteria to classify a worker as an independent contractor. Under the PRO Act, more workers in the gig economy could potentially be classified as employees entitled to NLRA coverage.

**Broader Definition of Joint Employers:** Additionally, Biden has pledged to codify the broad definition of joint employment applied in the *Browning-Ferris* decision, which would expand the definition of a joint employer to include companies that do not have direct control over employees, but indirect control or even the mere potential to control those employees.

**Reversal of Determination of Micro-Unit:** Through the NLRB’s decisions in *Boeing* (2019) and *PCC Structurals, Inc.* (2017), the NLRB effectively rejected *Specialty Healthcare*’s decision which allowed unions to cherry pick a smaller subset of workforce (i.e., micro-unit). However, under the

Biden administration, the NLRB (i.e., pro-labor Board) is expected to reestablish the return of micro-unit.

## During Union Election

**Quickie/Ambush Election Rules:** Under President Obama, the NLRB implemented revised union election rules that shortened the time between the filing of a union election petition and the election itself to an average of 21-days, down from a previous average that hovered around 38 days. These tight election deadlines often left employers scrambling to respond when an election petition was filed, and they were not already prepared. The Trump NLRB was partially successful in rolling back the shorter timelines, though some of their changes were struck down by a federal court. Rather than changing these rules once again through NLRB rulemaking, Biden's plan includes codifying the shortened election timelines into law. Significantly, under the shorter election timeframes, the union win rate increased substantially to approximately 72%.

**Ban on Captive Audience Meetings:** During most union election campaigns, employers hold mandatory meetings with employees, often referred to as "captive audience speeches," on paid time to discuss campaign issues. The PRO Act would ban such meetings, greatly hindering an employer's ability to communicate with its employees about important information related to the union election.

## Post Union Election

**Initial Collective Bargaining Agreements:** Many newly organized unions fail to reach an initial contract with their employer. In first contract negotiations, the PRO Act compels the employer and union to engage in mediation by the Federal Mediation and Conciliation Service (FMCS) if the parties cannot reach agreement within 90 days of beginning negotiations. If mediation fails, FMCS refers the parties to "interest arbitration," often referred to as "baseball arbitration" or "final offer

arbitration.” A three-person arbitration panel would then decide the wages, benefits, other terms and conditions of employment to be contained in the collective bargaining agreement, even if the employer objected to any of those terms.

**Strike Rights:** The PRO Act would make frequent and short duration “intermittent strikes” lawful and prevent an employer from hiring permanent strike replacements during economic strikes. It would also permit workers and unions to engage in secondary boycott activity. A secondary boycott is the boycott of an employer with which the union does not have a labor dispute that is intended to induce that employer to cease doing business with another employer with which the union does have a labor dispute. Such secondary boycott activity has long been found to be illegal under the NLRA.

## Others

**Ban Right to Work Laws:** More than half of all states have what is known as a “right to work” law, which prohibits an agreement between an employer and a union that requires employees to pay dues or some portion of dues to a union as a condition of employment, generally referred to as a union security agreement. The PRO Act would supersede these laws and allow employers and unions to enter into union security agreements in all 50 states.

**Penalties:** The PRO Act creates monetary penalties (including personal liability for corporate officers and directors) as a remedy if an employer is found to have violated the NLRA. These penalties include consequential damages (double the amount of actual damages), punitive damages, and fines that range from \$10,000 to \$100,000 per violation. The NLRB currently does not have the authority to levy such penalties. The PRO Act also authorizes individuals and unions to sue employers in federal court for NLRA violations and allows a successful plaintiff to be awarded attorney’s fees. This type of litigation could be a huge financial windfall to lawyers and

would exponentially increase the number of lawsuits filed under the NLRA. Biden also supports the debarment of federal contractors who violate the NLRA and/or other employment laws.

**Persuader Regulations:** The Obama Department of Labor proposed a regulation that would have required employers to report the hiring of a lawyer or consultant (a “persuader”) to help with union organizing. The lawyer or consultant would also be required to report all fees received from all clients (not just the client hiring them for the union work). These persuader regulations are intended to discourage lawyers and consultants from helping employers fight unions. Biden’s plan would reinstate and codify this persuader rule into law.

### New Board Members and General Counsel

Biden will likely designate Member Lauren McFerran, the only Democrat (pro-labor) member of the current NLRB, to be the NLRB Chairman, and will nominate a pro-labor candidate to fill the fifth NLRB seat that is currently vacant. Nominations to the NLRB require Senate confirmation, so Biden may act quickly if Democrats are able to gain control of the Senate. **Note that despite Biden’s win, the NLRB will remain in Republican (pro-management) control until August 27, 2021, when Board Member Bill Emanuel’s term expires.** If Emanuel’s replacement is confirmed by the Senate, the Democrats will then have a 3-2 pro-labor majority, and can seek to overturn many of the recent employer friendly rulings issued by the Trump Board such as (1) decisions allowing employers to mandate workplace civility and protect confidential business information, (2) decisions allowing unions to cherry pick bargaining units based on union support (“micro units”), and (3) decisions limiting the jurisdiction of the NLRB over certain employees. Finally, Biden is expected to replace the current pro-employer NLRB General Counsel Peter Robb on November 17, 2021, when Robb’s term expires. The General Counsel establishes the priorities for the NLRB’s Regional Directors and ultimately which

cases the NLRB reviews in addition to initiating rule making changes.

## Conclusion

These are just some of the initiatives we anticipate may come into play over the next several years. We will continue to update as things evolve and we know more definitively. It is important for employers to be thinking now about how they will operate effectively under this Biden plan. If you have questions about how these proposed changes may impact your workplace, contact your Akerman attorney.

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