

Trump's Second Term Poses Range Of Outcomes For NLRB

By **Braden Campbell**

Law360 (November 6, 2024, 5:31 AM EST) -- Donald Trump's projected return to the White House is poised to have a major effect on the National Labor Relations Board, with the potential for a dramatic reversal of the last four years of pro-union policy.



As a function of the major political parties' polarized views on labor policy, the National Labor Relations Board is prone to swings when control changes hands. (Photo by Andrew Harrer/Bloomberg, via Getty Images)

The arrival of a Republican president typically means that the board will ease up on prosecuting employers for alleged labor violations and shift certain policies to favor employers over workers and unions. But if growing skepticism of the National Labor Relations Act's validity seeps into administration policy, the already overburdened agency could instead be left to wither.

"The real open question, to me, is do they [neglect the agency] or follow the traditional, 'OK, we're going to install a Republican, in my view, more of an anti-worker majority?'" said Celine McNicholas, the director of policy and government affairs at the progressive Economic Policy Institute. "That's probably the most likely outcome, but ... those nominees will [be hostile toward labor] along the lines of Trump I."

As a matter of practice, the five-member NLRB is led by a chief prosecutor and majority whose politics and party align with the president's, with Democrats generally favoring labor and Republicans backing employers. As a function of the parties' polarized views on labor policy, the agency is prone to swings

when control changes hands, and these swings invite stiff resistance from the faction out of power. These trends have only intensified under President Joe Biden, the self-proclaimed "most pro-union president" ever.

In an unprecedented move, Biden **fired NLRB general counsel** Peter Robb on Inauguration Day 2021, bucking the historical practice of letting general counsel serve out terms that bleed into new administrations. This allowed the president to more quickly seat general counsel Jennifer Abruzzo, who has aggressively prosecuted employers based on expansive theories of workers' rights under the National Labor Relations Act.

The board's Democratic majority has answered Abruzzo's prodding to shift policy in labor's favor, **broadening the scope** of what's protected under the law and **endorsing stiffer remedies** for labor violations, among other moves.

Michael Lotito, an attorney with management-side Littler Mendelson PC and the co-chair of the firm's Workplace Policy Institute, said Trump was likely to follow his predecessor's precedent and oust Abruzzo on Day 1. This would allow the administration to quickly install a more business-friendly chief prosecutor who will operate with a narrower view of the law and seek lighter remedies than Abruzzo has.

"The new general counsel who will be selected will be vetted in such a way that he or she will be committed to reversing many of the initiatives by Abruzzo," including her novel challenges to **employers' noncompete agreements** and **their use of anti-union meetings** during organizing campaigns, Lotito said.

Trump's return to the White House also likely spells the end for many of the union-friendly policies the Biden board has set out in precedential opinions over the last few years, said Dan Altchek, a partner at Saul Ewing LLP who advises employers on labor relations.

Several policy shifts stand out as obvious early targets, Altchek said. These include the board's Stericycle and McLaren Macomb decisions, which called for greater scrutiny of **employer handbook rules** and **separation agreement language**, respectively. Republicans could also target the board's Thryv decision, which called for stiffer remedies in more cases, or its Cemex decision, which altered the representation election process and made it easier for unions to win orders forcing employers to bargain.

"I think that there will be a very significant effort to undo changes that we've seen ... over the last three-plus years," Altchek said.

But because changes to board policy must wait until Republicans hold a majority of seats, the new administration's impact in that area will be less immediate. With Republicans holding a majority in the Senate, Trump will be able to fill vacancies on the NLRB with his picks. How quickly he can do so depends in part on the lame-duck Congress, however.

Currently, the board consists of Democrats Lauren McFerran, David Prouty and Gwynne Wilcox and Republican Marvin Kaplan, with one vacancy. With McFerran's term set to expire next month, Biden has nominated her for another five-year stint, pairing her with management-side lawyer Joshua Ditelberg of Seyfarth Shaw LLP to fill the Republican vacancy.

The Democrat-led Senate **still has a couple of months** to vote on these nominations before the new Congress is seated. But NLRB nominations could take a backseat to judicial nominations over this period, especially given the challenge of wrangling members of the narrow Senate majority to vote in the lame-duck period, Lotito said.

This means Trump could take office with two seats to fill or with a fully staffed board, in which case he would not have the opportunity to appoint a third Republican until Prouty's term expires in August 2026.

But there's also a third, more explosive and politically fraught path to a Republican majority should the president enter office with Democrats still in control: firing them.

Since last year, numerous employers have sought to disrupt NLRB prosecutions by seeking to enjoin them on the basis that **the board is unconstitutional** in various ways. One of these theories argues that language in the labor relations law permitting the president to remove members only for "neglect of duty or malfeasance in office" violates the president's constitutional power to direct the executive branch.

Lotito said he expects the new administration to consider all options for placing a business-friendly majority at the NLRB, including testing this theory by firing the Democratic members. But such a move would be risky, inviting litigation over the firings and possibly alienating moderate Republicans whose votes would be needed to confirm replacements.

The agency could continue to perform certain functions without a quorum on the board, including processing union representation petitions, investigating unfair labor practices and litigating cases before administrative law judges. But the board could not finally resolve cases until it's restocked.

"We could have quite a mess on our hands," Lotito said.

Altchek said it's unlikely that Trump takes this extreme approach to revamping the labor board, noting that the president has enjoyed some support from labor unions.

"I think that a frontal assault on the NLRB might be too much for a Trump administration," Altchek said. "But I think there'll be no great effort to juice the funding of the NLRB, and I think they will fill those seats, when they become vacant, as quickly as possible with management-side appointees, Republican appointees."

McNicholas said the prospect of legal challenges will be a deterrent to firings, and that the president would likely lose those fights under current precedent, though case law is hardly settled given the current makeup of the U.S. Supreme Court.

"I think it is safest not to underestimate the lengths a reelected President Trump would go to undermine the sole agency tasked with enforcing U.S. workers' rights to a union and collective bargaining," McNicholas said.

To the extent the administration follows the traditional playbook, the question for workers moving forward is what approach will its appointees take, she added.

McNicholas, who is also the former director of congressional and public affairs for the NLRB, said she sees two classes of Republican board members. In one class are management allies who respect the labor relations law but take a narrower view of its protections and prohibitions than more union-friendly Democrats. In the other class are members who are hostile to labor rights and seek to gut them. If Trump's second administration is like his first, his picks will likely come from the latter camp, McNicholas said.

The new administration could alternatively be content to let the agency wither by not filling openings, McNicholas said. Without a complement of members, the new administration would not be able to reverse the Biden administration's labor-friendly policies. But if the board can't resolve cases, those policies aren't much hindrance for employers.

"That only hurts workers, because obviously workers have no private right of action under the NLRA, so they're held hostage to the functionality of the board," McNicholas said.

Trump's second stint in the White House comes amid heightened attention toward unions and workplace organizing and a surge in business at the NLRB.

Seth Goldstein, a partner at union-side Julien Mirer Goldstein & Singla PLLC, said organizing unions would be more difficult under Trump than it's been under Biden because of the likely reversals of precedents such as Cemex and Columbia University, which **recognized the right** of certain student teachers and researchers to unionize. But another Trump administration won't stop the wave, he said.

"Workers are going to continue to organize," Goldstein said. "I don't think that they're going to allow someone like Trump to stop that."

--Editing by Abbie Sarfo, Nick Petruncio and Karin Roberts.