

## **Biden NLRB Seen As Likely To Continue Rulemaking Trend**

By **Braden Campbell**

*Law360 (August 13, 2021, 8:01 PM EDT)* -- Early signals suggest the National Labor Relations Board will continue its recent trend of rulemaking under President Joe Biden, though it's unclear how the board's soon-to-be Democratic majority will wield this historically little-used policy tool.

Under former President Donald Trump, the board's Republican majority issued a controversial rule narrowing the circumstances in which two employers share bargaining and legal liability under federal labor law and revised aspects of the union election process for the second time in six years. These policies are likely candidates for rescission or revision in the new administration, experts say, but what new initiatives the Biden board undertakes are anyone's guess.

"The board in its history has been really sparing in its use of rulemaking and it's really ramped up recently under both the Obama and Trump boards, and that trend may continue," Levy Ratner PC partner Allyson Belovin said.

NLRB Chair Lauren McFerran, a Democrat who was first confirmed to the board in 2014, said in a statement to Law360 that rulemaking is "an option we should consider, but only in carefully chosen, appropriate circumstances."

### **The Rulemaking Surge**

Section 6 of the National Labor Relations Act empowers the NLRB to "make, amend and rescind ... such rules and regulations as may be necessary to carry out the provisions of the act." The board has not historically used this power often, preferring instead to set policy through rulings on specific situations and facts. But the agency has lately warmed up to rulemaking.

Despite having the power to make rules since its inception in 1935, the board did not flex its regulatory muscles until 1989. That year, the agency abandoned case-by-case decisions deciding who belongs in health care bargaining units in favor of a rule describing eight sets of workers who could form units, including registered nurses, physicians and business office clerical employees. In the '90s, the board moved to set rules for informing workers of their rights to decline a share of dues covering unions' lobbying expenses and addressing the appropriateness of single-location bargaining units, but neither effort bore fruit.

The NLRB would not try again until 2010, when it pursued a rule requiring employers to post notices of workers' organizing rights. The agency finished the rule a year later, but employer groups mounted a

successful court challenge. The Obama board sought in 2011 to speed up the union election process via rulemaking, succeeding in 2014 after a D.C. federal judge struck an initial effort for procedural reasons.

The Trump board was a rulemaking machine relative to its predecessors. It issued an information request on whether to revisit the 2014 election rule in late 2017, shortly after Republicans retook control. By the end of the Trump administration in January, the agency had scaled back the 2014 election rule, narrowed joint employer liability and altered other election-related policies via rulemaking. Certain pending plans have been shelved following the change of administrations.

These recent efforts have primed the board for further rulemaking activity under Biden, said former NLRB Chair Philip Miscimarra, a Republican who served from 2013 to 2017.

"Rulemaking involves different muscles or possibly a different part of the administrative brain of the board" than adjudication, the Morgan Lewis & Bockius LLP partner said. "They now have more practice, especially after the last several years, with rulemaking than they've had at any other time in history."

### **Rule or Ruling?**

Rulemaking and adjudication each have their strengths and weaknesses as policymaking tools, labor experts say.

Samuel Estreicher, the director of the New York University School of Law Center for Labor and Employment Law, has been an outspoken proponent of rulemaking for decades, for two main reasons.

First, rulemaking may reduce the "policy oscillation" the NLRB has become notorious for, Estreicher said. This phrase refers to the board's tendency to shift its stance on certain controversial issues depending on who's in power, business-friendly Republicans or worker-friendly Democrats. And because federal law requires that agencies have good reasons for issuing most regulations, rules may be more static than rulings, he said.

Additionally, the requirement that federal agencies solicit public comment before issuing substantive rules means the board often has more information to work with in rulemaking than it would in the context of a specific case, according to Estreicher. The Trump board's 2019 ruling reversing an Obama-era decision that expanded workers' access to employer email systems for organizing purposes illustrates both principles, he said.

"What is the problem with employees using their employer's email?" Estreicher said. "Is there likely to be a high degree of interference with employer email? Is there a privacy problem? Those are the kinds of questions they should put out, not whether you're a Democrat or Republican."

Miscimarra recently drew on his NLRB experience for a paper analyzing the advantages of each process. The board has vastly more experience in deciding cases than it does in issuing rules, and adjudication turns on real-world issues and concrete factual records that ground the process, he observed.

However, the former board chair said, rulemaking has its benefits: For one, it allows the agency to set policy on a given issue without having to wait for a case that presents it. The board can grapple with a policy's impact on a range of factual scenarios rather than the narrow circumstances of a single case, he added, and the notice-and-comment process typically yields a wider range of views for the board to consider.

"It's quite possible that prospectively, the board will look more favorably on rulemaking in some instances because rulemaking does have some advantages," Miscimarra said.

McFerran expressed similar ambivalence, noting that the opportunity rulemaking provides for "broad public input" is a positive aspect, while calling the process "time-consuming and resource-intensive for the agency."

### **The Biden Board's Agenda**

McFerran did not indicate which areas the NLRB may look to regulate once David Prouty joins later this month, which will give the Democratic party its first majority since 2017, but experts suggested a few likely candidates.

West Virginia University College of Law professor Anne Marie Lofaso said the new majority — and new general counsel Jennifer Abruzzo — will likely take a close look at the Trump board's 2020 joint employer rule. That rule made it easier for linked employers such as franchisees and franchisors to avoid joint liability for labor law violations against, or obligations to bargain with, shared employees.

The rule holds that an employer must have "direct and immediate control" over another's workers to be considered a joint employer, nullifying an Obama-era decision known as Browning-Ferris that allowed indirect control as a factor. That rule may be broad enough to allow the board to find joint liability among certain employers, Lofaso said. But to the extent the Biden board finds the rule constricting, it may look to issue a rule of its own, she said.

"They're going to look at it very closely and they're going to decide, can we live with this or do we need to tweak it?" she said.

That the board has revisited union election rules in successive administrations suggests a third trip may be in the offing, Miscimarra said. Belovin, the union attorney, said she would welcome a change.

"Certainly the election rules have slowed down the election process, which serves no purpose other than to give employers more time to quash a union organizing drive," she said.

Predicting the Biden board's plans past reviewing its predecessor's initiatives is tougher. Belovin said rulemaking may be best used for addressing broad issues, for example the board's test for deciding whether a given worker is an employee protected by the NLRA, or an independent contractor who is not.

Lofaso cosigned this suggestion, predicting as well that the Biden board may consider rules setting out workers' rights to access employers' property, such as computers and bulletin boards.

The board's spring regulatory road map lists two proposals that did not appear on previous agendas: Rules setting out a process for using video conference technology in agency proceedings and expanding the disclosures litigation parties must make to avoid conflicts of interest among board members. The board will issue an updated agenda this fall along with other federal agencies.

But even if the new majority continues the Trump board's rulemaking tear, it won't be to the exclusion of adjudication, McFerran said.

"We will still spend most of our time deciding cases," she said.

--Editing by Breda Lund.

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