

CONSTRUCTION LABOR ISSUES ON THE RISE IN THE DMV: WHAT LIES AHEAD >>>

BY MAURY BASKIN, ESQ.

The 2020 national elections created a rare federal “trifecta” of control by a single political party over the White House and both houses of Congress. The President and the congressional leaders campaigned in part on a strong pro-labor agenda. Early actions of the new administration appear to confirm the intent to make significant changes to labor regulations, as spelled out on the President’s website: <https://joebiden.com/empowerworkers>. If implemented, the proposed changes could have a significant negative impact on the merit shop construction industry.

This article will highlight the areas of law where change is anticipated, and what steps construction industry employers should consider in response.

PROMOTING GROWTH OF ORGANIZED LABOR

As one of his first actions on Inauguration Day, President Biden fired the general counsel of the National Labor Relations Board (NLRB), who was viewed as too “pro-business.” The firing occurred with 10 months still left in the general counsel’s statutory term, an unprecedented action by any president, seemingly sending a signal of the administration’s approach to labor issues. The administration also appointed a new acting general counsel who immediately sought to dismiss his predecessor’s complaint challenging the legality of “rat” balloons and “shame” banners in the construction industry before the NLRB. President Biden also named as his new

secretary of labor the mayor of Boston, Marty Walsh, who previously served as a top official in the building trades union.

More broadly, the new administration announced its goal of dramatically increasing union organizing throughout the private sector. The number of NLRB union elections fell to record low levels during the Trump administration, but that trend appears to be turning toward an upward trajectory in the early months of 2021. In order to promote union organizing moving forward, the new congressional leadership in February introduced the Protecting the Right to Organize bill (the “PRO Act”), with the unqualified endorsement of President Biden.

The PRO Act is the most sweeping rewrite of labor law proposed in the last 75 years, containing more than 50 reversals of longstanding labor laws and court rulings, all designed to promote union organizing and increase the power of unions to dictate terms to businesses. The Act would impose many changes to the union election process, all designed to strengthen union organizing rights at the expense of employers seeking to protect their businesses. The PRO Act would also greatly increase the ability of unions to intimidate employers, and neutral customers, through elimination of protections against certain strikes and boycotts that have long been found to be illegal.

The Pro Act would also greatly increase the penalties imposed on employers for any violations of the labor laws, while at the same time limiting the ability of employers to obtain advice on how to obey those laws while properly communicating with employees. The Act would also reshape most workplaces, including the construction industry, by broadening the definition of “joint employers” and narrowing the definition of “independent contractors.”

As of this writing, it is uncertain whether the votes in the closely divided Congress are sufficient to pass all or even part of the PRO Act, but the threat to merit shop construction is real. Even if the bill does not pass, indications are that the administration intends to implement as many of its Act’s provisions as possible through executive action or via changes at the NLRB and U.S. Department of Labor. Associated Builders and Contractors and other business groups expect to challenge such actions where they exceed statutory authority.

OTHER LABOR INITIATIVES OF THE BIDEN ADMINISTRATION

The administration has already taken steps to change the standards for joint employment and independent contractor status, both of which are critical to the successful operations of many construction businesses. The administration has also rescinded or “frozen” previous Trump initiatives that were perceived as reducing the regulatory burdens imposed on employers. At the same time, the administration has ordered that OSHA issue a COVID-19 emergency temporary standard, mandating compliance with new safety requirements.

While the NLRB does not immediately change its policies with the inauguration of a new president (apart from the general counsel, as noted above), the staggered terms of the NLRB members are such that the administration should gain control of the board later this year. At that time, it is anticipated that

the NLRB will change a number of governing rules related to employee handbooks and other workplace policies, reverting back to the more labor-friendly rules that caused so many lawsuits during the Obama administration. Construction employers will be well advised to monitor the expected changes at the NLRB as they occur and to adjust accordingly.

STATE AND LOCAL LAWS AFFECTING CONSTRUCTION WORKPLACES

Construction contractors also need to be aware of recent changes in state and local laws throughout the DMV, and the impact of those laws on labor relations. Employers in all three local jurisdictions have been targeted by plaintiff lawyers and union organizers (sometimes working together) based on accusations of wage theft (underpayments) and wage fraud (misclassifications). Higher-tier contractors have also been sued for alleged improper payments by lower-tier contractors or staffing agencies.

COVID-19 issues pose continuing challenges for many local merit shop contractors. Failure to adhere to state and local emergency orders opens the door to claims of unsafe workplaces. The paid leave provisions of the federal stimulus bill need to be understood in the context of overlapping paid leave laws of state and local governments. Finally, vaccination of essential construction workers remains a challenge as the supply continues to lag behind demand, and vaccinations alone will not displace the need to follow all safety protocols.

WHAT SHOULD MERIT SHOP CONTRACTORS DO NOW?

With so many changes taking place in federal, state and local laws affecting the workplace, management training and regular updates are more important than ever. Senior management should be aware of the likely points of exposure to organized labor and other types of costly workplace litigation, and should have rapid response plans in place. Self audits are recommended to be sure your company is in compliance with all applicable workplace laws. Consult with experienced labor counsel and your association chapter staff. ■



Maury Baskin is a shareholder with Littler Mendelson, P.C. in Washington, DC, and general counsel to Associated Builders and Contractors. He chairs the construction industry practice group in the Littler Mendelson law firm based in Washington, DC.

He has long represented Associated Builders and Contractors and its members in all aspects of labor and employment law throughout the DMV. For more information, email mbaskin@littler.com.