

Top Five Labor Law Developments for January 2021

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Meet the Authors



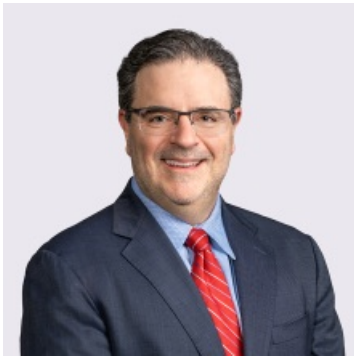
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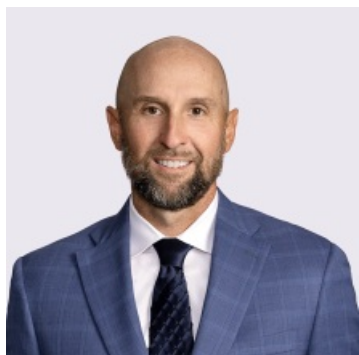
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1. *President Joe Biden summarily removed National Labor Relations Board (NLRB) General Counsel (GC) Peter Robb from office on January 20, 2021, and removed Robb's deputy, Alice Stock the following day. On January 25, 2021, the president named Peter Sung Ohr to be acting General Counsel.* Ohr was the NLRB's Chicago office Regional Director. Because President Biden subsequently nominated Jennifer Abruzzo to serve as GC, Ohr will continue to serve as acting GC presumably until the Senate acts upon the nomination. As the NLRB official tasked with prosecuting cases and overseeing the NLRB's regional offices, the GC has significant authority over NLRB policies and procedures. Former GC Robb's tenure was notable for the extent to which he facilitated the reversal of Obama-era NLRB rules and policies. Biden's recent actions are clearly meant to change direction from that of Trump administration appointees like Robb. Some have speculated that unfair labor practice complaints issued under Ohr could be challenged on the grounds that Robb's removal, and thus Ohr's appointment, were unlawful. The litigation of at least one NLRB complaint (issued under GC Robb) is already the subject of a challenge.
2. *The Biden administration named Democratic NLRB member Lauren McFerran as NLRB chair, replacing Republican member John Ring.* Ring remains a sitting member until December 16, 2022. McFerran is the sole Democratic member on the NLRB and was recently reconfirmed, with a term ending on December 16, 2024. As with the removal and replacement of GC Robb, these developments strongly suggest the new administration intends reversals at the NLRB. However, the composition of the NLRB remains at three Republicans and one Democrat, with one vacant seat. Republican member William Emanuel's term expires on August 27, 2021. Upon nomination and Senate approval of two (presumably) Democrat members, the NLRB majority will flip from Republican to Democrat. Until that time, the Republican majority will retain a large measure of control.
3. *On January 7, President Biden nominated Boston Mayor Marty Walsh to be Secretary of Labor.* If confirmed, Walsh is expected to reverse course on many Trump-era Department of Labor (DOL) initiatives. Walsh has strong ties to the labor movement, as the former head of the Boston Building and Construction Trades Council, a union umbrella group, and having served as president of Laborers' Union Local 223. As Mayor of Boston, Walsh voiced his support for proposals including national paid family leave and a \$15 national minimum wage. As Secretary of Labor, Walsh could direct the agency to promulgate rules and regulations that further those and other goals of worker advocates. Walsh would also oversee the rules on unions' financial reporting and disclosures, which the

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Trump-era DOL sought to enhance to require more transparency in union finances, changes the DOL under Walsh may seek to roll back. Walsh's nomination will move to a full Senate vote, which has not been scheduled yet.

4. *Acting Board GC Ohr rescinded a number of his predecessor's policy memoranda, signaling a departure from Trump-era NLRB policies.* Among his first public acts after being named acting GC, Ohr on February 1 issued Memorandum [GC 21-02](#), "Rescission of Certain General Counsel Memoranda," directing the withdrawal of memoranda issued by Peter Robb, Ohr's predecessor. The next day, Ohr's office issued Memorandum [OM 21-04](#), "Rescission of Certain Operations-Management Memoranda," revoking two further Trump-era memoranda. The rescinded memoranda cover a wide range of topics, from the use of subpoenas by NLRB agents to the types of proof required in cases alleging a union breached its duty of fair representation to its members. Board GC memoranda set policy for NLRB staff, including guidance on which types of cases to prioritize, and direct staff on how to investigate and prosecute those cases. Together, the rescissions demonstrate that Ohr will be more likely than his predecessor to favor positions espoused by worker advocates. Likewise, on January 29, Ohr directed an NLRB regional office to dismiss a case concerning the use of neutrality agreements between unions and employers. Many speculated that the case would serve as a vehicle for former GC Robb to advocate for limits on what employers and unions include in neutrality agreements, which allow certain union activities during organizing campaigns. By directing the dismissal, it appears Ohr does not intend to challenge the scope of union activities conducted pursuant to those agreements.
5. *The Bureau of Labor Statistics (BLS) reported that the number of employees belonging to a union fell by 2.2 percent in 2020.* However, because of an even larger decline in total wage and salary employment in 2020 (a drop of 9.6 million, or 6.7 percent, compared to 2019), the percentage of employees belonging to a union actually increased, to 10.8 percent, a 0.5 percent increase from 2019. As a result of the large decrease in overall employment, the BLS cautioned that comparisons with union membership measures for earlier years "should be interpreted with caution." Among states, Hawaii had the highest union membership rate (23.7 percent, with New York following at 22.0 percent), while South Carolina had the lowest membership rate (2.9 percent, with North Carolina following at 3.1 percent). More employees are union members in the public sector – 7.2 million – than in the private sector, where 7.1 million workers belonged to unions. Meanwhile, reports by Bloomberg and others noted that the average wage raise in union contracts dropped to 3.1 percent in 2020, down from 3.3 percent at the end of 2019.

Please contact a Jackson Lewis attorney if you have any questions about these developments.

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