

Political Pendulum Swings and the “Labor Renaissance”

By Laura A. Pierson-Scheinberg & Richard F. Vitarelli

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Meet the Authors



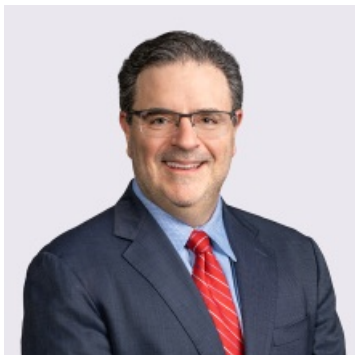
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Transcript

INTRO

Welcome to We get work® and the Year Ahead 2025 podcast series. This year, our special report and corresponding podcast series are created to help you move forward steadily, seamlessly, and successfully in a workplace law environment in persistent flux. Jackson Lewis invites you and others at your organization to experience the report's legislative, regulatory, and litigation insights in full at our website, JacksonLewis.com or listen to the podcast series on whichever platform you turn to for compelling content.

CONTENT

Richard F. Vitarelli

Principal, Hartford

Good afternoon, everybody, and welcome to the Year Ahead podcast. I'm Rick Vitarelli. I co-lead the National Labor Practice with Laura Pierson-Scheinberg, as well as the National M&A Practice, and I'm based out of Hartford, Connecticut. Today, Laura Pierson-Scheinberg and I are going to address the year ahead for employers, particularly with respect to the NLRA, organizing activities and union activity that we're expecting to see in the new year with a new presidential administration.

Laura Pierson-Scheinberg

Principal, Baltimore, and San Francisco

Hi, I'm Laura Pearson-Scheinberg, out of the Baltimore and San Francisco offices, and I co-lead our labor practice and our retail industry group. I'm looking forward to talking to you today.

Vitarelli

Laura, we talked about treating this as an Ask Me Anything episode, so we're going to ask each other questions today about what's happening and what people are expecting to see or what we're expecting to see next year.

The first thing that a lot of folks are asking about these days is what's going to happen with the NLRB in terms of the majority. We've had a democratic majority in place solidly for the past several years. With the election, there were questions about the Democrats holding on to a majority on the board through 2026. Have there been any developments lately, as of December 12th, regarding the composition of the board in next year and in the following years?

Pearson-Scheinberg

A lot has happened, and McFerran, the current chairman, is out as of just breaking news. The likelihood of anyone getting confirmed from the Democratic side, given the Senate composition, is very low. That will leave incoming President Trump with three spots to fill on the Republican side to focus on.

Marvin Kaplan will take the chair seat likely on day one. Two of those Republican confirmations will happen as soon as the Republican party turns to those nominations. As soon as President Trump makes those nominations, they get filled and confirmed. It's just not clear as to where the NLRB will be on that agenda. So, it could be anywhere from immediately multiple days in, or it could take some time to turn to the NLRB.

What would be the most impactful is really the immediate change that you see with general counsel. Now, while the five members sitting on the board are the ones who make the decisions, it's really the general counsel who decides what those priorities for enforcement are.

One of the first things they'll do is rescind the ideas through the rulemaking that they had and move forward with which arguments they want to make. Remember, there's a serious backlog at the NLRB. There are thousands of cases sitting, and a lot of that has to do with the settlement rules they encompass. We envision that those rules will be repealed. A lot of us have practiced for a number of years more than I'd like to admit. It really does swing back and forth with the board.

Which areas do you think the board will focus on first as far as cases go?

Vitarelli

Some of the big ones that they're going to go after, again, a lot of what you're talking about implicates the ability of the board to process the existing cases. One of the big places where the board has been tied up is this requirement that any settlements be 100% of the available damage and the possibility of compensatory damages, making it difficult to settle cases.

There are also initiatives, formal as they appear to be, where the board is not going to accept settlements unless they include enhanced remedies that were not previously available to litigants. I think the first thing that's going to be addressed is the backlog. The very real need to address that backlog is to start to make it easier to settle these cases. I think that's going to happen. There will be a directive from the new GC to get the board to process and dismiss a bunch of cases so they can move on to the docket.

Pierson-Scheinberg

There's going to be a budget issue. There aren't going to be a lot more budgets in fluxed into the NLRB, and a lot of these agencies given, at least, what Trump ran on as far as smaller government, et cetera. These agencies are going to have to do more with less and continue to do that. The agency has already been strapped with lots of vacancies not being refilled once people leave. In and around the board, they think that there's going to be even more of a mass exodus, more people leaving. There's going to be this fight of, yes, it'll be easier to resolve cases, but because the heightened remedies are going to go away, 80% of the informal settlements will come back. The non-board settlements will have less oversight and it'll be really whether the charging party is happy. It's going to be really interesting to see if things move because there's going to be far less money in the agency for them to really deal with it. It'll be interesting times for sure.

Vitarelli

Some of the other things that may be day one targets are going to be trying to go back to the Boeing Standard on Work Rule Scrutiny. Right now, the board has a hair-trigger test to determine whether or not policies would violate the act. It harkens back to what was in place during the Obama administration. That's going to be something that will get rolled back, adding more to the board's docket. Confidentiality and non-disparagement provisions that have been found to be invalid by the current board. We are probably going to go back to the independent contractor test.

Some of the things that touch on the employment relationship that are not necessarily for the union like management relations and parts of the board's enforcement. A lot of those things are probably going to be taken off the board's current posture as soon as possible---things like the quick election final rule. If you want to gum up the board's processes, make these elections take place on an expedited timetable. There's going to be some relaxation in the time periods in which the board can process those types of cases, so the elections may not be as quick as they are under the quick election rule. There might be more opportunities for litigants to actually litigate disputes over appropriate units, so it's more like it was before this rule went into effect, but that's going to involve some change to rulemaking authority. I don't see that happening day one. That's going to be when the new majority is solidly in place, and it's going to take some time to undo it. A lot of those high-profile changes are going to be attacked pretty quickly by the new board.

The labor-management relations aspects of the current majority's agenda and the GC's agenda---they are going to start going after those things, too. In some of the key areas that we look at on the traditional unionized sector side. There are definitely some changes to the organizing rules. Before we move past that too quickly, what is going to happen with organizing besides maybe a change back to the older election procedures? What do you see substantively happening with elections?

Pierson-Scheinberg

First of all, organizing is going to stay and, if anything, continue to grow. There is a different sentiment among younger workers than towards unions that is far more positive, regardless of where they sit in the country, regardless of whether it's a red or blue state or any of those issues. So, the level of organizing will continue to climb.

What the latest election taught us is how very polarized our nation is. The people who didn't have their candidate get through are left pretty frustrated. We will see that activism and social justice issues will continue to rise. Because it went the other way, you're going to see people acting out more. You're going to see more strikes. You're going to see more activism and organizing. So, sticking to the organizing thing, as far as that goes, we're going to continue to see both primarily in these non-traditional sectors. I'm continuing to see a lot of petitions in tech. I'm continuing to see a lot of petitions in the restaurant and retail industry. Far, far more at a higher pace than in the past five years; for example, it's just been a steady climb, and it's still continuing to grow. I'm seeing them on a daily basis come in.

Are you seeing any other industries where you think that in the coming year they'll be organizing?

Vitarelli

All industries are going to be susceptible. The ones that typically have a workforce that's younger, more progressive, you're going to see as being fertile ground for organizing. You're going to see a lot more top-down organizing. One thing about the Trump administration is the way in which they ran their campaign, in which a lot of ways endorsed the working person in the U.S. and advocated for the working person. That is going to keep the president more supportive, if not, maybe supportive to some extent, but definitely not oppositional to strike behaviors and activity in the country. I don't think we're going to see the Trump administration or the Republicans standing on the picket line. But they may not intervene in large national strikes that we've seen like the port strikes that we saw on both coasts and a number of the others, like the rail strike that President Biden stepped in on.

You may see the Republican administration allow some of those strikes to go on for some period of time, subject, of course, to the potential impact on the economy. That's going to be the red line in terms of how much they are

going to support strikes and not intervene. We don't know what's going to happen because the constituency of the political parties has changed somewhat as a result of this election. That's the reason why the result was what it was. So, we'll see what happens.

Pierson-Scheinberg

Also with the election, the changes that we'll see within the agency, going back to that for a moment. In the twenty-one days that we saw those rulemaking authorities, they can soften some of those at the regional level. So, it used to be forty-two on average; then it was as soon as practicable, which ended up being around twenty-one. You're going to see that timeline climb, number one, because they're not going to have the pressure on cutting the timelines to be so heavy, and number two, because of the staffing issues. Once a petition is filed, you're going to see more time to run a campaign. Whether it's twenty-one days or forty-two days, the preventative part of it is focused on positive employee relations; all of those pieces have to be before that petition is filed: the focus on doing what's right for the employee and focusing on the employee, not the union. That's really what we try to focus our clients to do focus on the employee.

Tell me about what you're seeing because you also co-lead our transactional practice. Where do you see things happening on the transactional side?

Vitarelli

Looking at the last third of the year, there's been a palpable pickup in the amount of transactional activity. There's a lot more money being invested in acquisitions of businesses. We're seeing a lot more of that activity and a lot of it is going into 2025 and beyond. The deal flow seems to be moving pretty quickly. That's one big change.

We're seeing a lot of plant closings and relocations of companies with unionized facilities and non-union. In the union sector, there's a lot more call for support on plant closings and relocations. One X factor in relocations of anything manufactured in the U.S. is going to be the impact of potential tariffs on the manufacturing of products in other countries, so if folks are going to go to Mexico or Canada or to Asia to have products manufactured, we might see some of those plant relocations slow down as we get into 2025 and 2026, if there will be tariff restraints. That's one of the impacts.

There are going to be impacts that are going to take place based upon various initiatives of the Trump administration, not all labor. But they will have a definite impact on transactions and how these companies operate.

Pierson-Scheinberg

Another thing is collective bargaining is going to continue to take a long time because the unions are going to continue to take very hard stances. As you mentioned, there is an increase in strike activity and taking really aggressive stances on what their bargaining asks are.

We're going to see people not getting deals as fast with the attention to not having the focus on expediting bargaining through Abruzzo's agenda. With the new incoming general counsel, they're not going to be pushing people to get deals, to have those various bargaining orders come out. There were decisions that flipped on making a bargaining order automatically with just one violation. That case will be attacked as quickly as the board can get it in front of it to take it to test and move that law back. The bargaining will be much more aggressive, and the union will exert its main power available to it, which is to take the workers out and strike.

Any other thoughts on that as we wrap up our review?

Vitarelli

The strikes are going to continue. I still wonder whether the post-COVID era influenced a lot of those high settlements we saw in the strike because, if you think of it, these contracts were locked in during a period of time when we had a pandemic, and a lot of the economy shut down. Then we saw people catching up as the labor market caused increases in rates and even benefit costs in the desire of the workers and the unions to go after more money as a result of being stuck under collective bargaining contracts that extended through COVID. Because of the social unrest issues and the fact that unions have a much higher favorability, 70 %, the most recent surveys that I saw shows the public is going to support some strikes.

I don't think the Republicans will be as opposed to strikes as they were in the past, or at least actively opposed. There will be some more of what we saw with the auto strike this year and the longshoreman strike, which is detente until January. We may see that pick-up again. I don't think it's going to end either.

What do you see happening in litigation? There's been a lot going on lately that we've seen where the actual powers of the board have been challenged in court successfully by employers throughout the country. Do you see that continuing in this next era?

Pierson-Scheinberg

I do. We were all debating internally as to whether they were going to and what their agenda would be when they first came in. I think it's going to be filling any vacancies on the bench. As those vacancies get filled with Republican nominees, it's likely to continue to see challenges as to the structure. Eventually, someone's going to have to fix it. It'll just essentially bring everything to a screeching halt. You'll continue to see those challenges.

Every day we see decisions that surprise me. There was one out of D.C. recently that continues to enforce that there's an overreach on power on the ALJ benches, et cetera.

So, in closing, any last advice, or thoughts that you want to leave our listeners with, Rick?

Vitarelli

The practical thing is we've seen so many changes with presidential administrations that have come and gone over the past 30 years of my career, at least. Most of our clients and most employers out there understand that there's going to be a pendulum swing. This is not going to be new to anybody who's been in their roles of labor relations or in the legal departments of companies for more than ten years. You've seen this happen two or three times now. The key thing for us right now is to make decisions that consider where the law is and where it might go. Understanding that we have four-year terms in the presidential administration and things always change.

Pierson-Scheinberg

I want to just make everybody understand that this has changed, but it's actually still the labor Renaissance. Unions are very popular right now and the labor movement is very aligned and consistent with the social justice movement. You're going to continue to see lots of labor activity and it'll be really interesting to see how it unfolds with them not being so aligned at the rulemaking and lawmaking decisional level and how that really impacts it. We're all buckled up to see how it goes.

So, thanks everybody for listening. More information to come. Thanks, Rick so much for chatting today. I look forward to seeing how the year unfolds.

Vitarelli

Thanks, Laura.

OUTRO

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