



Labor Relations Changes Expected Under the New Administration

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3:2 LABOR RELATIONS CHANGES EXPECTED UNDER THE NEW ADMINISTRATION

By: Eleanor Werenko

Think labor relations don't apply to your company? Not so fast. Portions of the National Labor Relations Act apply to your company even if your company does not employ union employees. Or at least that has been the case. Under the incoming Trump administration, experts may not agree on much, but they agree that we can expect changes to labor relations law and policy. The question becomes what kind of changes and how swift?

This article looks at some of the sources of labor relations law and policy, what changes we might expect to see from these sources, and further what new sources of change and influence may arise in response to the anticipated sweeping labor relations law and policy changes.

All of these changes will be played out on a stage where union members throughout the country, but especially those in the rust belt who came out strongly in support of Mr. Trump, watch carefully to see how Mr. Trump balances his antitrade, pro-business pledges with union interest, meanwhile amidst Republican Party attempts to dismantle pro-employee legislation. This author predicts that in order to stay on top of changes, New Mexico employers will have to think tweets, think social media, think local, think different; this is New Mexico after all.

I. LABOR RELATIONS LAW AND POLICY

A. National

On a national level, labor relations law and policy is shaped and impacted by executive decisions made by the Executive Branch, by legislation enacted by Congress (the Legislative Branch), by the Judicial Branch, and administratively by the National Relations Labor Board. Below I will discuss each briefly and describe some of the changes your company might expect to see from each.

Executive Orders

Under the new administration, experts expect that Mr. Trump will most likely undo Mr. Obama's executive orders on labor. The executive orders that experts think Mr. Trump is likely to undo include:

- An order requiring federal contractors to disclose labor law violations, provide paid sick leave, and pay a \$10.10 minimum wage, and;
- The order under the FLSA which would have required overtime pay for an additional four million workers (a federal judge in Texas recently suspended that regulation).

Congress

The Republican-controlled Congress is expected to:

- Repeal the 85-year old law requiring that contractors pay union-level wages on federal projects, and;
- Dismantle "right-to-work" legislation, barring the requirement that allows unions to require all union eligible workers to pay union dues or fees.

Judicial Branch

In a recent labor case before the United States Supreme Court, ten California teachers brought a suit against the State of California. In the suit they alleged that a California law requiring public employees to monetarily support (via dues) unions they do not choose is unconstitutional because it violates their First Amendment rights to free speech. After the death of the conservative Justice Scalia, the Court deadlocked in a 4:4 decision over the case. With a new conservative appointment to the Court, it is expected that the outcome in a similar case would be decided against unions.

National Labor Relations Board

The National Labor Relations Board has five members who are appointed by the President to five-year terms with Senate consent. Each year the term of one member expires. Currently, the NLRB is composed of three members, leaving two vacancies which will be filled by the incoming administration. The current Board's one lone Republican member will be joined by two Republicans, leaving a 3:2 Republican majority controlling the Board. With that shift, we can expect to see some of the more employee-friendly decisions made by the Board overturned. Changes employers might expect to see from the Board include:

- Overturn Board decisions which allowed for a speeding up of unionization elections;
- Overturn Board decision which gave graduate research and teaching assistants at private universities the right to unionize; and
- Overturn Board decisions relating to the protection of concerted activity.

This last area, protection of concerted activity, is discussed in more detail below because it is one area where all employers, even those who do not have employees who are subject to

collective bargaining agreements, have exposure under the National Labor Relations Act (“NLRA”).

With the broad-stroke changes which are expected from the new administration on a national level, employers might also expect to see more activity and changes at the state and local level.

B. New Mexico

Changes at the national level will necessarily impact labor relations in New Mexico. The impacts to New Mexico employers, broadly speaking, however, are likely to be minimal, because union membership across New Mexico is relatively low. Of the 782,000 people employed in the state of New Mexico in 2015, only 6.2 percent (or 49,000 people) were members of unions.¹ This compared to 11.1 percent of the national population, where in 2015, 7.2 million public sector and 7.6 million private sector employees were members of unions.² The relative percentages of union membership have seen a dramatic decline since the 1950’s when 35 percent of all workers were union members. While union membership has stayed fairly consistent in the public sector, private sector union jobs have continued to decline. While statistics are not readily available, according to the Quarterly Census of Employment and Wages, public employment comprised about 23 percent of all employment in New Mexico as of 2012, equaling about 182,190 workers statewide, including among others, teachers and police officers.³ Nationally, of public sector workers, 35.2 percent are union members.⁴ Extrapolating

¹ Bureau of Labor Statistics, U.S. Department of Labor News Release January 28, 2016 accessed at <http://www.bls.gov/news.release/pdf/union2.pdf> on December 1, 2016.

² *Id.*

³ Public Employment in New Mexico – A Look at Current Employment and Recessionary Impacts accessed at https://www.dws.state.nm.us/Portals/0/DM/LMI/Public_Employment_in_NM.pdf on December 1, 2016.

this national trend, of New Mexico's at least 182,190 public sector employees (as of 2012), 64,130 employees could be expected to be union members. As this number dwarfs the 49,000 actual union members, it is likely that a large majority of union members in New Mexico are public sector employees. Again, based on national statistics, it can be anticipated that those numbers are likely to remain consistent and public sector union membership remains stable.

II. LOCAL CHANGES – NEW SOURCES OF CHANGES AND INFLUENCE

As unions continue to decline, and more and more workers are not represented by a union for the purposes of collective bargaining, employers can expect to see employees come together in ways not seen before, and to focus their efforts on more winnable local battles. Across the nation, the “Fight for \$15” campaign has engaged in worker strikes and protests aimed to bring attention to the movements’ demands for a \$15/per hour minimum wage. This election, statewide referendums passed raising the minimum wage to \$12 in Arizona, Colorado and Maine and to \$13.50 in Washington. In New York, Uber drivers are using a nonunion drivers’ guild in an effort to lift wages and working conditions.

A. Protection for Concerted Activity

Unless or until changes are made to the NLRA, under which employees have the right to engage in group activity for the purposes of “mutual aid and protection,” employers need to be careful to not overstep employees’ rights to protection for concerted activity. For instance, language in policy manuals which might be viewed as discouraging employees from discussing wages or from discouraging other acts of mutual aid and protection have been found to violate the Act. Another area where employers have run afoul of the Act relates to employee strikes and

⁴ Bureau of Labor Statistics, U.S. Department of Labor News Release January 28, 2016 accessed at <http://www.bls.gov/news.release/pdf/union2.pdf> on December 1, 2016.

walk-outs. The types of worker strikes and protests engaged in by the “Fight for \$15”, for instance, are protected activity under the NLRA, even where the workers are nonunion workers.

Where two or more employees acting in concert walk off the job to protest work conditions or enforce demands relating to the terms of their employment, the walk-out, or strike, generally is protected concerted activity under the Act. If your employees are engaged in a work protest or strike, it is unlawful to discipline or discharge the employees for walking off the job.

B. Options for Employers

Businesses are not without recourse under the NLRA. The NLRA recognizes an employer’s right to continue business operations. An employer is allowed to hire temporary or permanent workers to replace striking workers, or to assign the duties to a manager. Additionally, an employer does not have to allow violence or other picket line misconduct, including intermittent or “quickie strikes”. Finally, an employer can also enlist local law enforcement to enforce the law when crimes have been committed or seek an injunction from a state court to prohibit violence.

There are many nuances to an employer’s rights under the NLRA all of which cannot be discussed here, and we don’t know what the future may hold, so if your business is facing what it believes may be protected concerted activity or other labor and employment related issues, we recommend you seek legal advice.

