



The National Labor Relations Board: Background, Current Board Members, and Issues to Watch in 2019

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The decisions and actions of the National Labor Relations Board (“NLRB”) often have a significant impact on employers. While most employers are generally familiar with the NLRB, details regarding the backgrounds of the individual NLRB Board members and their respective political alignments are far less widely known or understood. This article will provide an overview of these details and will address the ways in which the Board’s current make-up may impact decisions on key labor law issues in the coming year.

Background of the NLRB, its Board, and the General Counsel

The NLRB is a federal body authorized by Congress to administer and resolve labor issues arising under the National Labor Relations Act of 1935 (“NLRA”). The “Board” of the NLRB consists of five members who are each appointed by the President and confirmed by the Senate for a five-year term. Generally, after a labor charge has been filed with the NLRB and administratively adjudicated, the Board members may review the decision in a quasi-appellate capacity and uphold, reverse, or revise the decision based on the Board’s interpretation of the NLRA. The Board’s positions on the law and policy of the NLRA, as expressed through its opinions, often create significant legal precedents that can impact the rights of employers, employees, and unions in a wide range of future cases.

In addition to the five appointed NLRB Board members, the upper-tier of the NLRB also includes the position of the NLRB General Counsel. The General Counsel is also appointed by the President and is confirmed by the Senate, but the General Counsel serves only a four-year term. Unlike the Board members, the General Counsel does not serve in a quasi-appellate capacity for the NLRB. Instead of issuing opinions that decide legal disputes under the NLRA, the General Counsel’s role is akin to a District Attorney for the NLRB. The General Counsel is responsible for investigating charges on behalf of the NLRB, initiating its enforcement actions, and overseeing the NLRB’s enforcement priorities and operational structure. In addition, the General Counsel often issues Advice Memos to NLRB Regional Directors addressing legal and policy questions regarding matters under current review. While these Advice Memos are only advisory in nature and do not create legal precedent, they do have the effect of strongly influencing how the NLRB will handle matters with respect to pending cases.

Given the fact that the NLRB Board members and its General Counsel are all Presidential appointees, many NLRB decisions and policies are viewed under a “Republican vs. Democrat” political lens. The “custom” for many years with respect to NLRB appointees called for the President to appoint Board members in a manner that maintains a three-to-two political split, with the majority of Board members aligned with the President’s political party. In addition, the fact that the Board members’ five-year terms are staggered is intended to foster continuity in the Board’s positions and further isolate the Board members from political pressures. Yet, despite these traditions and measures, political disputes, regarding the confirmation of prospective Board members in particular, have affected the political balance and make-up of the Board. This is evidenced by the number of sitting Board members shrinking down to only two during the Obama administration due to a series of Senate confirmation disputes.

Backgrounds of the Current NLRB Board Members and its General Counsel

There are currently four sitting NLRB Board members and it is likely to remain this way until the next election. Of the four NLRB Board members, three, including the current Chairman of the Board, are Republicans appointed by President Trump. The remaining Board member is a Democrat appointed by President Obama whose term will end in December 2019. The current General Counsel is also a Republican and a President Trump appointee.

JOHN F. RING (R), CHAIRMAN OF THE BOARD

Chairman Ring was appointed to the Board in April of 2018 and will serve through December of 2022. Chairman Ring was formerly a career labor and employment attorney with the law firm of Morgan, Lewis & Brockius. Notably, Chairman Ring’s professional career was not entirely employer-focused, as he handled several matters on behalf of affiliates of the Teamsters union. While Chairman Ring has not yet signaled the extent of upcoming policy changes for the NLRB, many commentators agree that he is likely to usher in significant changes regarding several labor law issues during his term, as discussed below.

WILLIAM J. EMANUEL (R), BOARD MEMBER

Mr. Emanuel was appointed by President Trump in September of 2017 and will serve until August of 2021. Mr. Emanuel was a career labor and employment attorney with the law firms of Morgan, Lewis & Brockius, Jones Day, and Littler Mendelson. Mr. Emanuel’s career in private practice was almost entirely focused on representing employers in labor disputes. During his Senate confirmation, Mr. Emanuel was criticized for his extensive work on behalf of employers during his legal career. However, Republicans deflected this criticism by arguing that an employer-focused Board member was necessary in order to bring “balance” to a Board which Republicans claimed had become overtly pro-union.

MARVIN KAPLAN (R), BOARD MEMBER

Mr. Kaplan was appointed by President Trump in August of 2017 and will serve as a Board member until August of 2020. As an attorney, most of Mr. Kaplan’s work has been in public service roles. Mr. Kaplan worked within the Department of Labor, the House of Representatives, and for OSHA, as its Chief Counsel. It is generally believed that Mr. Kaplan holds politically conservative views. However, both Mr. Kaplan’s youth and his career in public service represent something of a wildcard which make his political and policy views more difficult to predict.

LAUREN MCFERRAN (D), BOARD MEMBER

Ms. McFerran remains as the last Board member appointed by a Democratic President and is the only Democratic member of the Board. She was appointed by President Obama and will continue to serve on the Board through December of 2019. Ms. McFerran formerly held a U.S. Circuit Court of Appeals clerkship prior to a relatively short career in private legal practice. Since 2005, Ms. McFerran served in a variety of labor law roles for various Democratic Senators and Senate Committees. Despite being the longest-serving current Board member, Ms. McFerran will likely have little ability to pursue or effectuate any sort of policy goals in her remaining year as a Board member given that she is outnumbered three-to-one in terms of the current Board members' political affiliations.

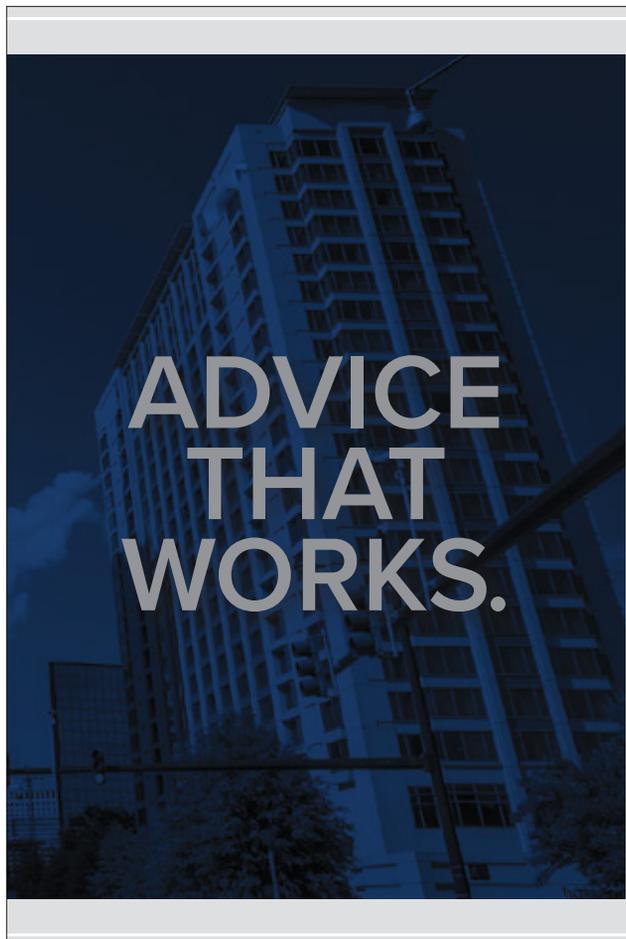
PETER B. ROBB (R), NLRB GENERAL COUNSEL

Mr. Robb was appointed by President Trump in November of 2017 for a four-year term as the NLRB's General Counsel. Mr. Robb formerly had a long career in private practice handling labor law matters for employers with firms such as Downs Rachlin & Marin and Proskauer Rose. Mr. Robb has also served as Chief Counsel for a previous Board member, Robert Hunter. As outlined above, while the Board members have significant power in terms of creating national labor policy and legal precedents, the NLRB's General Counsel has broad powers over the operational aspects of the NLRB, including the direction and oversight of the NLRB's 33 regional offices and the hundreds of NLRB agents and employees. Mr. Robb has already released several of his Advice Memos, which have generally been employer friendly. Mr. Robb also issued an internal memorandum indicating his desire that the NLRB revisit several of its prior rulings.

Issues to Watch in 2019

The recent appointment of Chairman Ring to the Board is widely-expected to lead to the Board taking more employer friendly positions regarding current labor issues. Included among the issues that the Board may address in 2019 is the NLRB's current "joint employer" standard, which many commentators expect will be relaxed in order to make it more difficult for two employers to be considered a "joint employer" under the NLRA. Second, the Board is likely to revisit and curtail the NLRB's previous rulings that suggested that emails sent on an employer's email system can be considered "protected concerted activity" under the NLRA. In addition, the Board appears to be interested in revisiting the recent NLRB decisions regarding union recognition in the construction-industry and in developing a more employer-friendly policy on this topic. Other topics, such as employers' social media and non-disclosure policies, union recognition, and union elections are also expected to be addressed in a more employer and management friendly fashion relative to prior Board decisions. However, it should be noted that many long-term NLRB employees and agents have recently staged a series of well-publicized protests against the Republican party's consolidation of power over the NLRB and against the new leadership's more employer friendly policies and viewpoints. However, given that both the General Counsel and the majority of Board members are politically aligned, the Republican Party will likely maintain effective influence over the decision-making, enforcement, and administrative roles of the NLRB throughout 2019.

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