

The American Steel Construction Inc. Decision: What All Private Employers — Especially Those Without Unionized Workforces — Need to Know About Big Changes in Labor Law

The law firm of Tucker Arensberg contributes this quarterly column focused on the legal issues that may impact our readers. Tucker Arensberg is a full-service law firm headquartered in Pittsburgh, Pa., USA. Servicing the legal needs of the iron and steel industry, Tucker Arensberg has also provided legal counsel to the Association for Iron & Steel Technology.



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On the campaign trail in September 2020, then-Presidential candidate Joe Biden promised to be the “strongest labor president you’ve ever had.”¹ Upon taking office in January 2021, he reshaped the National Labor Relations Board (NLRB), the independent federal government agency that protects the rights of private sector employees to join together, with or without a union, to seek to improve their wages and working conditions. On his first day in office, President Biden asked for the resignation of the NLRB’s then-General Counsel, Peter Robb, who had been appointed by former President Trump in 2017. President Biden subsequently named a new Acting General Counsel, Peter Sung Ohr, and a new NLRB Chairperson, Lauren McFerren.

By August 2021, the five-member board had a Democratic majority for the first time since 2017 and the NLRB’s new general counsel, Jennifer Abruzzo — who had previously worked for the NLRB for 22 years and most recently served as a senior attorney for the Communications Workers of America — announced a clear agenda to reverse more than 40 legal precedents that she characterized as doctrinal shifts that harmed the interests of workers.²

Much of the NLRB’s new focus affects and regulates the conduct of non-union employers.^{3–5} Accordingly, all private employers — both currently unionized employers and those whose employees are currently not represented by a union — need to pay close attention to this rapidly changing legal landscape.

The American Steel Construction Inc. decision (issued in mid-December 2022) exemplifies these changes. Although it dealt with a relatively narrow issue, like how much discretion a union has to define the group of employees that it is seeking to

represent (bargaining unit), the ramifications are much broader. There are several key takeaways for private employers, especially those in the iron and steel industry.

First, the decision itself. The American Steel Construction decision raised the legal standard that employers must meet to successfully challenge the definition of a group of employees seeking to unionize.⁶ In doing so, the NLRB overturned two prior decisions issued in 2017 and 2019 by the NLRB,⁷ and returned to a standard (called the “community of interests” test) that had been set forth in a 2011 Obama-era NLRB decision.⁸ The American Steel Construction decision makes it easier for unions to define smaller bargaining units and break into a previously unrepresented employer or expand its role in already unionized workforces. It also raises the prospect of an employer having multiple smaller bargaining units (often referred to as micro-units).⁹ Second, the American Steel Construction decision demonstrates how rapidly the NLRB can significantly change the legal standards in a way that affects private employers. Third, the American Steel Construction decision illustrates the NLRB’s methodical pursuit of its previously stated priorities and goals, which include overturning some long-standing decisions to make it easier for unions to organize a previously non-union employer’s employees. Two examples follow.

First, the NLRB’s General Counsel has stated the intention to turn back the clock more than 50 years and reinstate the so-called Joy Silk doctrine, which would require employers to recognize a union and the representative of a group of employees without an NLRB-conducted secret ballot election as long as a union presents signed cards from a majority

of the proposed bargaining unit’s employees.¹⁰ Second, the NLRB is considering changes that would restrict employers from enacting and enforcing policies that, while on their face are neutral to union activity, can be seen as interfering with rights employees have under the National Labor Relations Act “to self-organization; to form, join, or assist labor organizations; to bargain collectively through representatives of their own choosing; and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...” If this effort is successful, employers will need to closely review — and likely change — in-effect policies and rules relating to a wide range of subjects, such as insubordination, confidentiality, employees’ social media activity, use of company logos, etc.

All private-sector employers — whether or not they currently have union-represented employees — are advised to recognize the changes that are well underway in federal labor law.

References

1. Solender, A., “Biden Vows To Be ‘Strongest Labor President You’ve Ever Had’ at Union Event,” *Forbes*, 7 September 2020, accessed 6 February 2023, <https://www.forbes.com/sites/andrewsolender/2020/09/07/biden-vows-to-be-strongest-labor-president-youve-ever-had-at-union-event/?sh=1b2487ed5d5d>.
2. Covert, B., “Meet the Activist Championing the Rights of Workers From the Inside,” *The Nation*, February 2023, accessed 6 February 2023, <https://www.thenation.com/article/society/jennifer-abruzzo-national-labor-relations-board>.
3. Daily Labor Report®, Bloomberg Law. (n.d.). accessed 6 February 2023, <https://news.bloomberglaw.com/daily-labor-report/nlrp-top-lawyer-eyes-worker-status-in-charting-legal-plans>.
4. Wiessner, D., “Labor Law Landscape Likely to Shift in 2022 Under Biden-Era NLRB,” *Reuters*, 30 December 2021, accessed 6 February 2023, <https://www.reuters.com/legal/transactional/labor-law-landscape-likely-shift-2022-under-biden-era-nlrp-2021-12-30>.
5. PCC Structural Inc., 365 NLRB No. 160 (2017) and The Boeing Company, 368 NLRB No. 67 (2019).
6. American Steel Construction, National Labor Relations Board, accessed 6 February 2023, <https://www.nlrp.gov/case/07-RC-269162>.
7. PCC Structural Inc., 365 NLRB No. 160 (2017) and The Boeing Company, 368 NLRB No. 67 (2019).
8. Specialty Healthcare & Rehabilitation Center of Mobile, 357 NLRB 934 (2011).
9. Fox, J.S.; Theodore, M.; and Kelly, T.L., “Here We Go Again: NLRB Foreshadows a Potential Return to Micro-Units. Labor Relations Update,” (9 December 2021), accessed 6 February 2023, from <https://www.laborrelationsupdate.com/uncategorized/here-we-go-again-nlrp-foreshadows-a-potential-return-to-micro-units>.
10. Kullgren, I., “How the NLRB Could Ease Union Elections: Joy Silk, Explained,” *Bloomberg Law*, 15 April 2022, accessed 6 February 2023, <https://news.bloomberglaw.com/daily-labor-report/how-the-nlrp-could-ease-union-elections-joy-silk-explained>. ◆

