

Midterm Elections Come With High Stakes For NLRB

By **Tim Ryan**

Law360 (October 26, 2022, 8:26 PM EDT) -- The 2022 midterm elections could have major ramifications for the National Labor Relations Board, with scrutiny over its operations, funding for the agency and nominations hinging on who controls Congress after votes are counted.



If Republicans take the House of Representatives, experts expect the NLRB to have a more combative relationship with Congress than it has during the first half of Biden's term. (Andrew Harrer/Bloomberg via Getty Images)

During the first two years of President Joe Biden's term, the NLRB has lined up a series of pro-labor shifts in labor law, with Democratic appointees on the board and in the general counsel's office moving to reconsider several major precedents. Republicans and employers have criticized the board as pushing the boundaries of the National Labor Relations Act and being overly favorable to unions.

If Republicans take the House of Representatives as many forecasters predict, experts expect the board to have a more combative relationship with Congress than it has during the first half of Biden's term. That begins with the top Republican on the House Education and Labor Committee, Rep. Virginia Foxx of North Carolina, who has promised that Republicans will ramp up oversight if they take the gavel on the committee.

"Going forward, my colleagues and I will continue to monitor the NLRB to keep the agency, and its union-touting leadership, accountable," Foxx said in a statement to Law360. "To the NLRB, or any federal agency which thinks it can push harmful policies onto the American people, I have a simple message: You've got a big storm coming."

Increased Oversight from Congress

If Republicans do win the House majority in November, experts expect them to launch a series of investigations into various aspects of the board's operations under the Democratic majority.

Foxx, who would need a waiver of Republican term limit rules to keep a top leadership position on the Education and Labor Committee in the next Congress, has sent dozens of requests to the NLRB and other workforce agencies during her time in the minority. If Republicans are in control of the House Education and Labor Committee, those requests are likely to become the basis of investigations with the backing of the full committee, said Michael Lotito, co-chair of the Workplace Policy Institute at the management-side firm Littler Mendelson PC.

"If the Republicans gain control, the first thing that you could expect is that any inquiries that have been made from the Republican side in the minority will be remade in the majority in an extraordinarily robust way," Lotito said.

Lotito said the probes would be more aggressive than they were after previous changes in power following the midterms, reflecting the intensity of Republican concerns about the direction in which the board has started to push the law.

Roger King, senior labor and employment counsel at the business-side HR Policy Association, said he expects that House Republicans would explore the rise of mail-in ballots in union representation elections. He also expects Republicans to scrutinize general counsel Jennifer Abruzzo's pursuit of novel legal theories, such as finding so-called captive audience meetings unlawful or the adoption of consequential damages.

King also said that the committee will likely train its focus on the past work NLRB members Gwynne Wilcox and David Prouty did as attorneys for unions, including the Service Employees International Union.

Celine McNicholas, director of policy and government affairs at the progressive Economic Policy Institute, said that while much oversight of federal agencies consists of genuine requests for information from lawmakers, some requests can become excessive and place a strain on the agency's ability to perform its normal work. She said she expects "obstructionist Republican oversight" of the NLRB on issues such as its proposed rule to remake its joint employer standard and major organizing campaigns at Amazon and Starbucks, putting pressure on already strained staff.

"Instead of being able to do the traditional business of the board, processing cases, there will be staff that are pulled to being responsive to the oversight requests," McNicholas said. "The true intrusive nature depends on how far afield the oversight requests are."

Higher Board Budget Hinges on Majority

The NLRB has **received the same funding** from Congress every year since 2014, and a bid to boost the agency's budget early in the Biden administration did not gain momentum despite calls from union advocates and **even a large group** of Democratic lawmakers.

McNicholas said that if Democrats are able to retain the House majority and control the Senate, there could be momentum around providing the NLRB with additional money, as there is a "growing recognition" that the board has been underfunded.

David Madland, senior adviser to the American Worker Project at the left-leaning Center for American Progress, also predicted that Democrats would take the chance to boost the board's funding if they hold power in Washington after the midterms. He said that a "strange set of bills and circumstances" took up time during the first two years and that if Democrats retain control, the board will be closer to the top of their priority list.

"I think with a little bit more time and a majority for the second Congress, I think we would very much see pursuit of increased funding for the NLRB," Madland said. "President Biden clearly supports it; the challenge is the floor time and getting the bills to pass the ridiculous congressional process."

But the future of increased board funding is bleak if Republicans take the majority in either chamber, McNicholas and Madland agreed.

While unions and labor advocates have complained that the **board is underfunded**, those on the side of employers have argued the concerns are overstated.

King suggested that if Republicans take the House, they could look to add language to appropriations bills limiting what the board is able to do with the money. Appropriations bills since 2011 have included language, known as a rider, that prohibits the board from using the funds to set up an electronic voting process for union representation elections.

King said House Republicans could add similar language to funding bills targeting the board's ability to adopt certain legal positions, such as banning captive audience meetings or requiring employers to compensate workers for economic losses beyond back pay.

"I think one of the main issues is how much money the Congress is going to appropriate for some of these — what I would call radical or extremely aggressive — positions that might be taken by the board," King said.

But the success of whatever legislative goals Democrats and Republicans may have if they take the House will hinge on the Senate, experts said, which most forecasts predict to be very closely divided no matter which party is in control. Lotito said that even if Republicans look to add riders to funding bills, they might not survive in a tight Senate.

Similarly, Madland pointed out Democratic legislative goals, such as allowing the NLRB to impose fines against labor law violators, are also highly unlikely to pass the Senate with the legislative filibuster intact.

Looming NLRB Nominations

A more distant issue for lawmakers will be filling upcoming vacancies on the NLRB. Board members serve staggered five-year terms, and there is a historical practice of keeping some level of partisan balance among the five members.

Member John Ring, who served as chairman of the NLRB under former President Donald Trump, is scheduled to leave the board in December, while Wilcox's term expires in August 2023.

Mark Carter, a partner at the management-side firm Dinsmore & Shohl LLP who served as chair of the Federal Service Impasses Panel during the Trump administration, said he would be surprised if Biden moved to replace Ring's spot on the board quickly. Instead, he said it is likely the administration would prefer to negotiate a package to have the Senate reconfirm Wilcox and place a Republican in Ring's seat simultaneously.

Lotito said that if Democrats are in control of the Senate, a package deal would likely involve renominating Wilcox along with a Republican that the White House views as more moderate than Ring.

From the perspective of Democrats, McNicholas said that it would be "political negligence" to fill Ring's seat without having a deal to renominate Wilcox and that she hopes Biden starts looking for potential Ring replacements to include in a package deal.

"I think that it would make a lot of sense to move that as a pair and keep the board fully functional," McNicholas said.

King, with the HR Policy Association, said the Ring and Wilcox seats are meaningful for very different reasons. Democrats could ensure a majority on the board well into 2024 if they are able to reconfirm her, while filling Ring's seat would keep the balance at three Democrats and two Republicans and make it possible for some of the panels that decide most cases to have a Republican majority.

The nominations issue could become more complicated if Republicans are in control of the Senate. Lotito said Republicans may decide not to fill Wilcox's seat at all, leaving the board with a 2-1 Democratic majority. He said it is possible they then decide not to fill Chair Lauren McFerran's seat when her term expires in December 2024, betting instead that a Republican wins the 2024 presidential election and gets the chance to appoint two Republicans very soon after taking office.

"Assuming Republicans have the Senate so that that goes through relatively easily, the board would flip to a Republican majority very early in 2025," Lotito said.

--Editing by Abbie Sarfo. Editing by Nick Petruncio.

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