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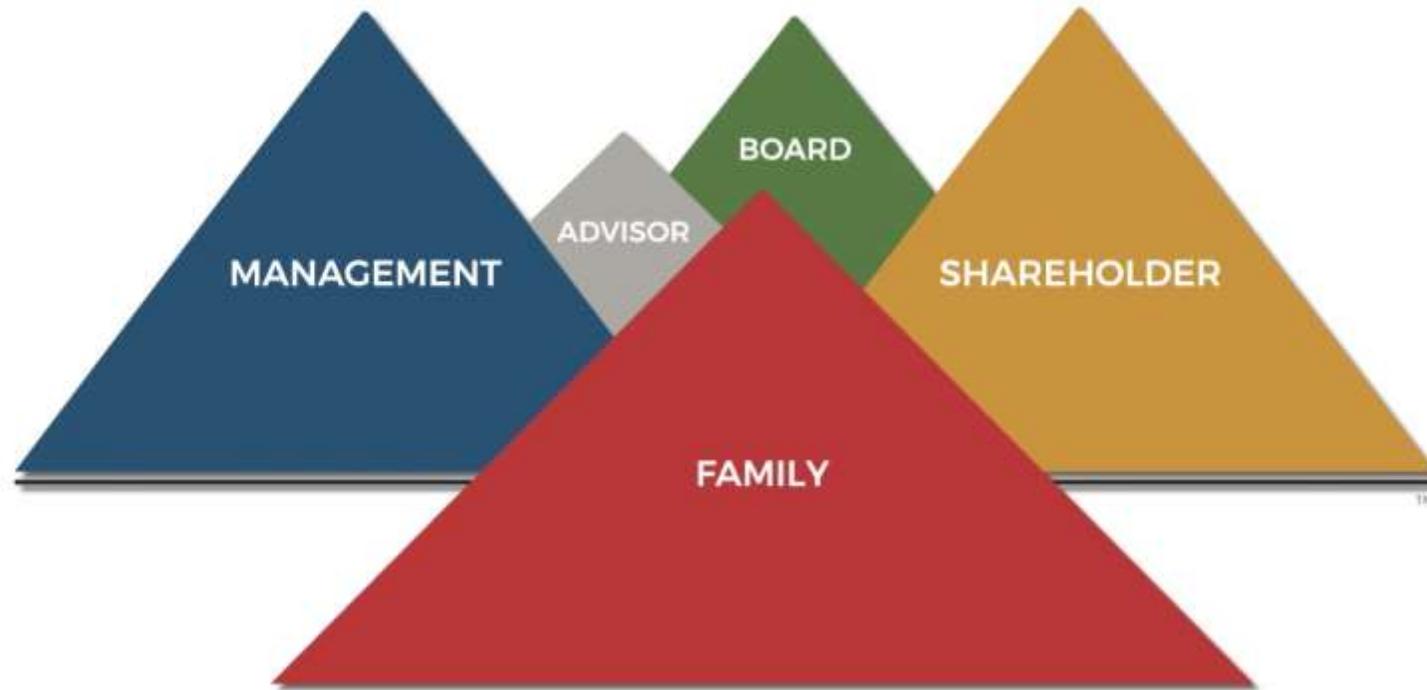
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President Biden's Pro-Labor Agenda, the PRO Act and Its Significance For Employers

Delaware Valley Family Business Center

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BACKGROUND: NLRA & NLRB

- National Labor Relations Act (1934, amended in 1947 and 1959) is the federal law governing labor relations in the private sector.
- National Labor Relations Board is charged with enforcing the Act
- **NLRA applies to virtually all private sector employers**
- NLRB General Counsel prosecutes alleged violations of the NLRA
- NLRB decides whether employers or unions have violated the NLRA by engaging in “unfair labor practices.”
- The NLRB conducts and oversees union elections.



Change Has Arrived, and More is Coming

- Although an independent federal agency, Board members are appointed by President with consent of Senate to 5 year terms and General Counsel appointed to 4 year term.
- Traditionally, the White House holds a 3-2 advantage for Board members.
- Although there are presently 3 Republican members, it is expected that by this Fall, the Board will be 3-2 Democrats.
- The Trump appointed GC, Peter Robb, was **fired** by President Biden almost immediately after he was sworn in. Jennifer Abruzzo, a union lawyer who is special counsel to CWA, has been nominated to fill the post.



President Biden's Declared Agenda

- Mostly set forth in the Protecting the Right to Organize (PRO) Act, to be discussed today in greater detail.
- Overriding purpose is to make it easier for unions to organize nonunion workplaces, strengthen their hand in collective bargaining and increase penalties for employers who violate the NLRA.
- The President backs the PRO Act and is an avowed supporter of organized labor. He has said that he will be “the strongest labor president you have ever had.”



NLRA – Basics

- NLRA applies to virtually all private sector employers.
- Section 7 of the Act provides that employees may support, form or join a labor organization, or engage in other concerted activity for mutual aid or protection, or refrain from doing so.
 - PCA includes criticizing / disparaging supervisors, managers, the Company.
- Section 8(a) proscribes various employer unfair labor practices.
 - 8(a)(1): ER may not restrain or coerce employees in the exercise of Section 7 rights
 - 8(a)(3): ER may not discriminate against employees based on their support for a Union
 - 8(a)(5): ER may not fail or refuse to bargain in good faith with a Union certified as the representative of its employees



NLRA – Union Organizing – Basics

- Union may seek to organize a group of nonunion employees that constitutes an “appropriate unit.”
- Union may ask NLRB to conduct an election in an appropriate unit with a sufficient “showing of interest” (30% of unit).
- Scope of unit and other issues typically are worked out by agreement or at a hearing.
- Prior to the election, each side may campaign to win employees’ votes. The Union can say virtually whatever it wants; not so for the Company. (“TIPS” rule)
- NLRB conducts secret ballot election – the party which secures a majority of **votes cast** wins.



NLRA – Collective Bargaining – Basics

- If the Union wins, it is the exclusive bargaining representative for ALL employees in the unit. Typically, the Union's goal is to negotiate a contract covering wages, benefits and working conditions for employees in the unit.
- Bargaining starts from the status quo. The parties are required to bargain in good faith. This includes making and responding to proposals, but not necessarily *agreeing* to any particular proposal or a contract as a whole.
- Neither the Union, nor the NLRB, nor the courts can force an employer to agree to a contract. Instead, the Union can try to exert pressure through various means, including publicity, work stoppages and filing charges.
- Picketing, strikes and lockouts.
- Frequently takes more than 1 year to negotiate a first contract.



NLRA – Union Gripes

- “*The NLRB favors employers.*”
 - Not so.
- “*Employers intimidate and coerce employees.*”
 - Already illegal.
- “*The law’s enforcement provisions are too weak.*”
 - No punitive damages, compensatory damages or attys’ fees in ULP cases.
 - No mechanism to impose CBA on recalcitrant employers.
 - Bosses do not face liability for their illegal actions.



The PRO Act: Impact of Potential Legislation

- Congressional change would have a longer lasting impact than any action by the “Biden Board”
- The Protecting the Right to Organize Act would drastically change the labor landscape
- **PRO Act already passed the U.S. House.**
- Chances of passing the Senate are slim, unless:
 - It is deemed related to a budget bill (reconciliation)
 - Filibuster is eliminated
 - The bill is trimmed to gain sufficient Republican support (unlikely)



PRO Act: “Take Me Back . . . to 1946”

- PRO Act would undo key provisions of the Taft-Hartley Act, which became law in 1947.
 - Override state “right-to-work” laws, which generally allow employees to opt out of dues payments to unions
 - Allow secondary boycotts – this would permit unions to picket or otherwise coerce neutral businesses as a means to put pressure on their primary target in a labor dispute, such as the target’s customers, vendors and suppliers.
 - Permit intermittent strikes and slowdowns.



PRO Act: Gifts to Unions to Facilitate Unionization of Employers

- The law would:
 - Strangle employers' voices in union elections and abolish employer's input in NLRB election proceedings, including regarding scope of the unit.
 - Also would prohibit so called "captive audience" meetings (**AMAZON**)
 - Aid unions in election campaigns
 - Employee use of employer email systems
 - Union decides the manner of election – in person, mail, or email elections
 - Facilitate organizing in "micro-units"
 - Codify *Gissel* bargaining orders in lieu of re-run elections



PRO Act: Disempowering Management

- Interest arbitration would be mandated if the employer and union cannot agree to a first contract.
 - The CBA would be *imposed* by the government
- Prohibit employers from permanently replacing economic strikers.
- Ban lockouts.
- Abolishment of individual arbitration agreements that currently prohibit class actions.
- Codification of “persuader rule” requiring employers to report payments for labor relations advice to US DOL.



PRO Act: New Wave of Lawsuits

- The bill would allow unions and employees to file suit in court in cases where the NLRB declined to prosecute their charges.
- New remedies include:
 - Backpay without offsetting of interim earnings
 - Liquidated damages of double the damages awarded
 - Attorneys' fees to plaintiff's lawyers
 - Punitive damages
 - Individual liability for officers and executives



PRO Act: Expanded Employee Coverage

- Independent contractors included unless they can meet the strict “ABC” test:
 - Free from employer control
 - Work outside the scope of the employer’s business
 - Independent trade or occupation
- Supervisors included even if they “assign” work to others
 - Only excluded if a majority of their work involves “supervisory” duties



PRO Act Survival Strategies

- Become familiar with NLRA requirements
- Review existing policies and procedures for compliance
- Train managers and supervisors
 - NLRA compliance (all companies)
 - Union avoidance (“outrunning the Bear?”)
 - Tactical: learning to spot signs of organizing, identifying allies
 - Strategic: avoiding conduct that alienates employees



DISCLAIMER

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Join us for These Best Practice Programs!

Considerations When Pursuing an Acquisition
as Part Of Your Family Business Growth Strategy

May 12 Best Practice Event

10:00am-11:30am

The Do's and Don'ts of Buy-Sell Agreements
For Family Businesses

July 15 Best Practice Event

9:00am-10:30am



Andrew Grau



Steve Staugaitis



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Ian Meierdiercks



Mike Maransky



Join us for These Future MOUNTAIN Programs!

THE BOARD MOUNTAIN: Balancing Accountability Between Shareholders & Management

May 27 Forum 9:00 – 10:30 am

David Griffith and Julia Klein



David Griffith



Julia Klein



THE MANAGEMENT MOUNTAIN: Strategy, Culture, & Accountability

June 22 Forum 9:00 – 10:30 am

Brandon Mc Vaugh and Jim Smucker



Brandon McVaugh



Jim Smucker



THE ADVISOR MOUNTAIN: Herding Cats
September 23 Forum 9:00 – 10:30 am



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