

NEW NLRB GENERAL COUNSEL MEMORANDUM HINTS THAT CHANGES MAY BE COMING

Labor and Employment Alert
December 12, 2017

On December 1, 2017, Peter B. Robb, the new General Counsel for the National Labor Relations Board (“Board”), issued an advice memorandum outlining the Board’s enforcement priorities and policy objectives. Many of these objectives focus on revisiting, and undoing, what had been described as employee-friendly rules that were pursued by the Board during the Obama administration. In addition, Robb’s memo rescinds a number of prior General Counsel memoranda, some of which had imposed stringent requirements regarding common employer policies. While the memorandum indicates a clear shift in the Board’s interpretation of the National Labor Relations Act (“NLRA”) requirements, the former Board’s interpretations have been, in many cases, adopted by the federal courts. The Obama Board’s legacy will continue until reversed by the courts and employers will have to carefully scrutinize employment decisions and policies in order to conform with the court precedent.

Robb’s Memorandum

Robb’s memorandum identified a number of cases that regional offices must now submit to the Division of Advice before the issuance of a complaint. The list of mandatory submissions includes, but is not limited to, cases involving:

- Common employer handbook rules found unlawful.
- Concerted activity for mutual aid and protection.
- Conflicts with other statutory requirements.
- Joint employment.
- Off-duty employee access to property.
- Disparate treatment of represented employees during contract negotiations.
- Successorship.
- Joint employer status.
- Unilateral changes consistent with past practice.
- Duty to provide witness statements to a union.
- Dues check-off.

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- Remedies.
- Issues associated with the following cases: *Purple Communications*, *Quietflex*, *Weingarten*, *Total Security Management*.

Robb also rescinded the following memoranda that were issued by his predecessors:

- GC 17-01 – General Counsel’s Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context.
- GC 16-03 – Seeking Board Reconsideration of the Levitz Framework.
- GC 15-04 – Report of the General Counsel Concerning Employer Rules.
- GC 13-02 – Inclusion of Front Pay in Board Settlements.
- GC 12-01 – Guideline Memorandum Concerning Collyer Deferral.
- GC 11-04 – Revised Casehandling Instructions Regarding the Use of Default Language in Informal Settlement Agreements and Compliance Settlement Agreements.
- OM 17-02 – Model Brief Regarding Intermittent and Partial Strikes.

Employers will be relieved that Robb has stated that the following NLRB initiatives are no longer in effect:

- Seeking to extend *Purple Communications* to electronic systems beyond email systems.
- Seeking to narrow certain employer rights to communicate with employees during a union organizing campaign.
- Seeking to put the burden of proof on an employer to demonstrate that a union salt would not have remained with the employer for the duration of the claimed backpay period.
- Seeking to establish that misclassification of employees as independent contractors is a violation of the National Labor Relations Act.
- Seeking to apply *Weingarten* in non-union settings.

Additionally, Robb’s memorandum states that NLRB regional offices must now submit to the Division of Advice matters that involve “significant legal issues,” including cases that: have overruled precedent and involved one or more dissents over the past eight years; contain issues the Board has not yet decided; and any other cases that may be of importance to the General Counsel’s office.

The Takeaway for Employers

The General Counsel’s office will continue to enforce the Board’s rulings until precedent is overturned. Thus, immediate changes with respect to issues arising under the NLRA are unlikely. In addition, as stated at the outset of this alert, employers will have to balance the potential changing perspectives at the Board with NLRA case law, which will continue to apply to employers.

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We will continue to monitor these developments. In the meantime, if you have any questions, please contact any one of our labor attorneys.

