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The NLRB'S Recently Seated General Counsel Plots Entirely New Direction for the Board

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Less than a month after being sworn in as the new General Counsel of the NLRB, Jennifer Abruzzo defined a bold new direction for the Board's enforcement priorities in a memo issued on August 12, 2021. The memo, Mandatory Submissions to Advice GC Memorandum 21-04 (August 12, 2021), lays out subject matters that NLRB Regions must submit to the Office of the General Counsel for Advice prior to any decision. Abruzzo's memo makes clear she seeks to depart sharply from the priorities outlined by her predecessor, Peter Robb, and specifically targets for review areas where the Trump Board overruled past legal precedent.

The GC identifies three broad categories of topics that must be submitted for advice: (1) subject matter areas where, in the last several years, the Board overruled legal precedent; (2) new initiatives that the General Counsel would like to carefully examine, and; (3) matters traditionally submitted to Advice.

The lists of topics are telling and indicate to employers quite clearly that the Board is going to plot a new course from the Trump Board.

Topics Overturned by the Trump Board

The General Counsel all but promised change in these subject matters, criticizing the Trump Board for "overruling many legal precedents which struck an appropriate balance between the rights of workers and the obligations of unions and employers." The memo identified the following topics for reassessment:

- Employer handbook rules: in particular the new, more lenient, test for the legality of an employer's handbook and policies articulated *The Boeing Co.*, 365 NLRB No. 154 (2017).
- Confidentiality provisions: a slate of decisions which found confidentiality provisions in settlement agreements, workplace investigation procedures and arbitration agreements lawful.

- Protected concerted activity: a variety of decisions which narrowed what constitutes limitations on protected concerted activity (i.e., activity protected by the National Labor Relations Act), highlighting in particular a reassessment of decisions finding that limiting the use of email to only workplace communications lawful.
- Test for Unlawful Union Animus: in particular, *Tschiggfrie Properties, Ltd.,* 368 NLRB No. 120 (2019) and other cases heightening the animus requirement for showing unlawful union discrimination.
- Remedies Available: decisions which lowered the likelihood that an employer must offer reinstatement and lowered the standard for Regions to accept settlement agreements;
- Union Access: cases which limited certain employees and union representatives from the employer's property;
- Union Dues: cases which permitted employers to unilaterally cease remitting union dues after a collective bargaining agreement expires and imposed more duties on unions in relation to collecting dues;
- Employee Status: cases involving a 2019 decision which made it more likely that an employee with entrepreneurial opportunity would be deemed an independent contractor;
- Religious institutions: *Bethany College*, 369 NLRB No. 98 (2020), which articulated a new standard for assessing whether the Board has jurisdiction over a religious education institution;
- Employer duty to recognize and bargain with a union: the GC identifies multiple key doctrines developed over the last four years regarding a union's waiver of the right to bargain which provided employers with the right to promulgate policies without bargaining with a union, and decisions permitting employers to implement changes after a collective bargaining agreement expired;
- Deferral: cases involving deferral of discharge and discipline cases to arbitration and the more permissive standard reinstated by the Trump Board.

Other New Initiatives

The memo identifies initiatives to review seven other subject matters as well:

- Employee Status: cases involving misclassification of employees as independent contractors and the coverage of the Act to individuals with disabilities and applicants;

- *Weingarten*: involving the applicability of a right to information in the pre-disciplinary interview context and whether the right to representation applies in non-unionized settings as well;
- Jurisdiction of NLRB: assessing the jurisdictional contours between the NLRB and the National Mediation Board (jurisdiction over rail and airline industries);
- Employer duty to recognize and bargain with a union: in addition to identifying issues related to surface bargaining and a refusal to furnish information related to a plant relocation, the GC particularly identified that the Board will consider overturning *Shaw's Supermarkets, Inc.*, 350 NLRB 585 (2007), which permits mid-term withdrawals of recognition after the third-year of a contract;
- Employees' rights to strike and/or picket: cases involving replacement of strikers, the broad definition of an intermittent strike, and strikes with an unlawful secondary object;
- Remedies and compliance: issues involving make-whole remedies and a discriminatee's duty to conduct an adequate search for interim employment;
- Interference with employee's rights: cases regarding statements that imply employees access to management will be limited if a union is voted in, involving an employer's threat to close a plant where the threat was not disseminated, and the promulgation of mandatory arbitration agreement in response to employee protected activity.

The memo concludes with a recitation of other casehandling matters that traditionally have been submitted to Advice.

More to Come and Takeaways

The memo, a dense ten pages, is a signal that the Board will be plotting a new course for at least the next four years. This combined with the recent confirmation of two new Board members (one already seated, and the other who will be seated later this month) makes clear that the ideology and leaning of the NLRB is rapidly changing. The GC's memo should be a clear signal to all that significant changes to labor law precedent are on the horizon. As always, we will keep you informed of any new developments.

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