Proskauer

GC Update: Abruzzo Issues New Memorandum Outlining Her Objectives

Labor Relations Update on **March 23, 2023**

On March 20, 2023, NLRB General Counsel Jennifer Abruzzo released a new Memorandum , updating all Regional Directors, Officers-in-Charge and Resident Officers regarding which issues *must* be submitted to the NLRB Division of Advice—and which need not, because Advice and/or the NLRB addressed them in the last several years.

Specifically, the Memorandum served as a follow-up to the General Counsel's Memorandum issued in August 2021, less than one month after she was sworn in. The August 2021 Memorandum (discussed here), outlined a wide variety of issues that Abruzzo required all Regional Offices to submit to Advice prior to issuing any decisions. In the August 2021 Memorandum, Abruzzo separated the issues she specifically wanted to address into the two broad categories: (1) subject matter areas where, in the last several years, the Board overruled legal precedent; and (2) new initiatives that the General Counsel would like to carefully examine.

Now, Abruzzo outlined only 15 issues from the original August 2021 Memorandum which must be sent to Advice. Abruzzo identified 46 topics on which the Division of Advice has already issued guidance, either "in the form of Significant Advice Memoranda or inserts to be used in briefs to ALJs and/or the Board, for around 46 Board decisions identified in the initial mandatory submission memo and in later GC memos."

The 15 issues that remain at the forefront of Abruzzo's prosecutorial agenda are as follows:

- Cases involving the applicability of *Ridgewood Health Care Center, Inc.*, 367 NLRB No. 110 (2019) (overruling *Galloway School Lines*, 321 NLRB 1422 (1996) and finding that a successor employer that discriminates in refusing to hire a certain number of the predecessor's workforce to avoid a Burns successorship bargaining obligation does not necessarily forfeit the right to set employees' initial terms).

- Cases involving the applicability of *Pittsburgh Post-Gazette*, 368 NLRB No. 41, slip op. at 3, n.5 (2019) (distinguishing *Finley Hospital*, 362 NLRB 915 (2015) in determining whether the post-contract status quo required increases to employer fund contributions).
- Cases involving the applicability of *Brevard Achievement Center, Inc*., 342 NLRB 982 (2004) (declining to extend the Act's coverage to individuals with disabilities on grounds that these individuals, where working in a rehabilitative setting, are not employees within the meaning of Section 2(3) of the Act).
- Cases involving the applicability of *United States Postal Service*, 371 NLRB No. 7 (2021) (Board refusing to find a pre-disciplinary interview right to information, including the questions to be asked in the interview, as a purported extension of *Weingarten*).
- Cases involving the applicability of *ABM Onsite Services-West*, 367 NLRB No. 35(2018) (Board, after initially asserting jurisdiction and certifying the union as representative of the employer's airport bag jammer technicians and dispatchers, reversed course and deferred to a National Mediation Board advisory decision in which NMB found Railway Labor Act jurisdiction under traditional six-factor carrier control test and overruled NMB cases requiring carrier control over personnel decisions).
- Cases involving a refusal to furnish information related to a relocation or other decision subject to *Dubuque Packing* (see former Chairman Liebman's dissent in Embarq Corp., 356 NLRB No. 125 (2011) and OM-11-58).
- Cases involving the applicability of *Shaw's Supermarkets, Inc*., 350 NLRB 585 (2007) (to assess whether this case should be overruled. The case permits midterm withdrawals of recognition where they occur after the third year of a contract of longer duration).
- Cases involving the applicability of *Wal-Mart Stores*, 368 NLRB No. 24 (2019) (broadly defining an intermittent strike).
- Cases involving the applicability of *Service Electric Co*., 281 NLRB 633 (1986) (allowing an employer to unilaterally set terms and conditions of employment for replacements even where those terms are superior to those that had been paid to striking unit employees).
- Cases involving the applicability of *Ex-Cell-O Corp*, 185 NLRB 107 (1970) (declining to provide a make whole compensatory remedy for failures to bargain).
- Cases involving the applicability of *Cordua Restaurants, Inc*., 368 NLRB No. 43 (2019) (Board finding, among other things, that an employer does not violate the Act by promulgating a mandatory arbitration agreement in response to employees

engaging in collective action).

In addition, Abruzzo confirmed that Regions are still required to submit to the "Division of Advice cases involving electronic surveillance or algorithmic management that interferes with the exercise of Section 7 rights."

This new Memorandum provides an important checkpoint in Abruzzo's tenure, reflecting on the progress her Office has achieved since her appointment in July 2021, and the work that remains until her term concludes in 2025. Employers should be particularly cognizant of issues that arise, which may touch on the prior precedent highlighted above, and evaluate the potential that if such issues were litigated before the NLRB, then they could become fodder for reversal by the current Board.

We will keep you informed of any new developments that arise at the NLRB.

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