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Newly-Appointed NLRB General Counsel Moves to Roll Back Agency Overreach and Activism

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By Eric C. Stuart

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The National Labor Relations Board's (NLRB) new general counsel wasted no time in issuing comprehensive guidelines to the agency unequivocally indicating that the era of unbridled activism and overreach by the Board will likely end. On December 1, 2017, Peter B. Robb issued General Counsel (GC) Memorandum 18-02, providing employers and employees with the proverbial "light at the end of the tunnel." After eight years of reversing decades of legal precedent and skewing the playing field decidedly against employers, the NLRB seems headed toward creating a less polarized labor environment.

While the composition of the five-member Board and President Trump's recent appointments have received much attention, there hasn't been enough focus on the importance of the NLRB's GC—specifically, the critical role the GC plays in shaping national labor policy. Indeed, the GC has extensive,

unreviewable discretion in the issuance of complaints and is the gatekeeper in determining which cases advance to the Board for decision. The GC is also responsible for the Board's local regional offices and their attorneys throughout the country and helps set Board policy by instructing regional offices and their lawyers on the handling of cases and identifying issues and policy initiatives the general counsel chooses to pursue.

Over the past eight years, employers have been relegated to pursuing expensive appeals before federal courts in order to obtain judicial review of NLRB rulings, many of which created a tsunami of compliance challenges. These cases will no doubt continue to be hotly contested. Nevertheless, the labor relations outlook for 2018 is changing—hopefully for the better. Memorandum 18-02 is remarkable because it signals that General Counsel Robb is fully engaged in correcting what many employer-side attorneys view as an agency determined to advance a extreme ideological framework regardless of the practical consequences to stakeholders.

The memorandum identifies a wide range of cases that regional offices must now submit to the Division of Advice, including cases that: (1) have overruled precedent and involved one or more dissents over the past eight years; (2) contain issues the Board has not yet decided; and (3) are believed to be of importance to the GC. The memorandum also rescinds certain enforcement and other related policy initiatives dictated by predecessors Lafe Solomon and Richard Griffin.

Issues to Be Submitted to the Division of Advice

General Counsel Robb identifies a host of unfair labor practice cases that must now be submitted to the Division of Advice prior to the issuance of a complaint. Such mandatory submissions to advice include the following matters:

- Concerted activity for mutual aid or protection:
  Where only one employee has "an immediate stake in the outcome"
  Where employee displays "obscene, vulgar, or other highly inappropriate conduct"
- Employer handbook rules:
  Application of *Lutheran Heritage* test (i.e., a rule is unlawful if it (1) explicitly restricts Section 7 activities, (2) would reasonably be construed by employees to restrict such activity, (3) was promulgated in response to union activity, or (4) has been applied to restrict the exercise of Section 7 rights)
  Rules that (1) prohibit "disrespectful" conduct, the use of employer trademarks or logos, or cameras or other recording devices in the workplace, or (2) require employees to maintain the confidentiality of workplace investigations
- Employee use of employer email systems to engage in Section 7 activity
- Strikes, work stoppages, and prior initiatives favoring protection of such activity
- Off-duty employee access to employer property

- Weingarten rights:
  Conduct of union representatives
  Application in the drug testing context
- Status quo during collective bargaining negotiations
- Findings of joint employer status (under *Browning-Ferris Industries* based on *indirect* or *potential* control over working conditions of another employer's employees
- Successorship liability
- Employer duty to bargain over discretionary discipline prior to execution of a collective bargaining agreement
- Dues check-off surviving expiration of a collective bargaining agreement
- Unfair labor practice remedies

Previous GC Memoranda to Be Rescinded

General Counsel Robb also identified the following GC memoranda, issued by predecessors, for immediate rescission, including:

- GC 15-04 (Report of the General Counsel Concerning Employer Rules), which resulted in the Board's hyper scrutiny of employer handbooks, policies, and work rules
- 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) (Under *Levitz*, an employer can lawfully withdraw recognition if it has "objective evidence" that a union has lost its majority status, even if the union has not been formally decertified in a secret ballot election. This GC memo instructs regions to request that the Board adopt a rule that "absent an agreement between the parties, an employer may lawfully withdraw recognition from a Section 9(a) representative based only on the results of an RM or RD election.")
- GC 13-02 (Inclusion of Front Pay in Board Settlements)
- GC 12-01 (Guideline Memorandum Concerning Collyer Deferral Where Grievance-Resolution Process is Subject to Serious Delay)
- 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)

Previous GC Initiatives to Be Terminated

Finally, GC 18-02 terminated certain initiatives set out in advice memoranda, including those that:

- extended the *Purple Communications* decision to other electronic systems;

- narrowed employer rights under Section 8(c) of the National Labor Relations Act to communicate with employees during a union organizing campaign about the realities of unionization;
- shifted the burden of proof to employers in mitigation of damages issues relating to salts;
- argued that a misclassification of employees as independent contractors is in and of itself a violation of the Act; and,
- sought to overturn a decision seeking to apply "Weingarten rights" only in unionized settings.

Key Takeaways

Over the past eight years, the Board has issued numerous decisions overturning long-established precedent, in spite of strongly-worded dissenting opinions. These decisions have represented major shifts in labor policy that markedly disadvantage employers. Although change will likely not come as swiftly as many in the business community would like, General Counsel Robb's guidance in GC 18-02 is a welcome harbinger of a renewed appreciation for legitimate employer concerns.

Ogletree Deakins' Traditional Labor Relations Practice Group and Ogletree Governmental Affairs, Inc. will keep readers apprised of developments at the NLRB during the new GC's tenure. For a more in-depth discussion of the likely impact of General Counsel Memorandum 18-02, please join us at Not Your Father's Labor Environment: The New Horizon in Las Vegas, Nevada on December 7-8, 2017.

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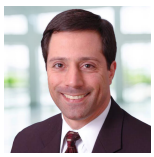

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