CLIENT ALERTS & INSIGHTS

Change is Coming: New NLRB General Counsel Issues Memorandum Rescinding Controversial Policies and Signaling Change

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The National Labor Relations Board's new General Counsel, Peter Robb, has made the most of his first month in office. Robb, who was nominated by President Trump to replace controversial predecessor Richard Griffin, was sworn in on November 17. Now still in the first month of his four-year term, Robb has issued *Memorandum GC 18-02*: a directive to the Board's Regional Directors and other officers that makes several critical and immediate changes to Board policy.

First, the Memorandum instructs the Board's Regional Directors and other officers to submit cases involving "significant legal issues"-including cases that were decided during "the last eight years that overruled precedent"-to be submitted to the Board's General Counsel for advice. The Memorandum further calls out several infamous Griffin-era decisions by name, noting that the General Counsel "might want to provide the Board with an alternative analysis," including:

- Purple Communications, 363 NLRB No. 162 (2016), in which the Board held that employees have a presumptive right to use their employer's email system to engage in activities protected by Section 7 of the NLRA, including union organizing.
- Browning-Ferris Industries of California, Inc., 362 NLRB No. 186 (2015), in which the Board found that mere **potential** control over the working conditions of another employer's employees was sufficient to find a joint employer relationship.
- A series of decisions that expanded the range of union representatives in Weingarten interviews, such as Fry's Foods Stores, 361 NLRB No. 140 (2015). Prior to Fry's Food Stores, it was well-settled that an employee represented by a union is entitled, upon request, to union representation at an investigatory meeting in which the employee has reasonable grounds to fear that the meeting will result in disciplinary action. NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). Fry's Foods, however, expanded upon Weingarten by holding that an employee also has the right to consult with a union representative **before** the employer interviewed the employee about the misconduct, even without the employee requesting such a meeting.
- A series of decisions that found common employer handbook rules to be unlawful, such as Casino San Pablo, 361 NLRB No. 148 (2014) (finding that a rule prohibiting "insubordination or other disrespectful conduct" to violate the National Labor Relations Act because the rule might be deemed as "encompassing any form of Section 7 activity that might be deemed insufficiently deferential to a person in authority").

Next, the Memorandum rescinds a total of seven memoranda previously issued by the Board's Office of General Counsel. Among the newly-rescinded memoranda is *Memorandum GC 15-04,* a directive that held that many seemingly-innocuous employer work rules were *actually* unlawful, as they supposedly chilled an employee's ability to discuss the terms and conditions of employment. (*See*, e,g., *Memorandum 15-04*, reasoning that a rule prohibiting making "insulting, embarrassing, hurtful or abusive comments about other employees online" is unlawful because it could be viewed by employees to limit their right to debate about unionization). Similarly, the Memorandum rescinds several stated Griffin-era policies, including the policy of seeking to "extend *Purple Communications* to other electronic systems," and policy of seeking to apply union-specific *Weingarten* rights in non-union settings.

Robb's Memorandum cautions that it is not to be read to "imply how the General Counsel will ultimately" argue cases or weigh in on certain policies. Nevertheless, the Memorandum leaves little doubt that change is coming, and that such change will likely involve the rollback of many, if not all, of the union-friendly decisions issued in recent years by a Democratic-majority Board.

For more information on this topic, please contact a member of Benesch's Labor & Employment Practice Group.

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