

The NLRB's General Counsel Rescinds, Revokes and Questions

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On December 1, 2017, two weeks after being sworn in, NLRB General Counsel Peter Robb issued his first **GC Memorandum**. When the General Counsel's office changes hands from one party to the other, some disruption is expected. Here, Mr. Robb made quite clear that his agenda would not support many of the Obama-era initiatives. In fact, he called into question fifteen significant legal issues that will now be subject to "alternative analysis" (i.e., seeking reversal of earlier precedents that Mr. Robb deems to be wrongly decided), rescinded seven memoranda, and revoked five initiatives.

As Mr. Robb's agenda continues to unfold, we will track significant developments to explain how these decisions will impact employers. Here is the list of his actions so far plus an added bonus - NLRB decisions overruling Obama-era NLRB rulings:

Significant Legal Issues Subject to "Alternative Analysis"

- **Concerted Activity for Mutual Aid and Protection** (reviewing cases that lacked mutuality – only one employee had an immediate stake in the outcome – or protection – no loss despite inappropriate conduct).
- **Common Employer Handbook Rules Found Unlawful** (reviewing cases involving employer handbook rules prohibiting "disrespectful" conduct; prohibiting use of employer trademarks and logos; regarding no camera or recording; and requiring employees to maintain the confidentiality of workplace investigations).
- **Purple Communications** (reviewing employees' presumptive right to engage in protected Section 7 activities on an employer's email system).
- **Quietflex** (reviewing protected work stoppages).
- **Off-Duty Employee Access to Property** (reviewing off-duty employee access to property for picketing and other protected activities).
- **Conflicts with Other Statutory Requirements** (reviewing protected activity that violates EEO principles, such as a racist social media post).
- **Weingarten** (reviewing the expanded application of *Weingarten* rights, as defined below, in workplace interviews and in the drug testing context).
- **Disparate Treatment of Represented Employees during Contract Negotiations** (reviewing the legality of wage increases to newly represented employees during initial contract bargaining).
- **Joint Employer** (reviewing the Board's *Browning-Ferris* joint employment test based on evidence of indirect or potential control over the working conditions of employees).
- **Successorship** (reviewing the hiring of predecessor employees).
- **Unilateral Changes Consistent with Past Practice** (reviewing cases involving unilateral changes after contract expiration).
- **Total Security** (reviewing whether discretionary discipline is a term and condition of employment, and therefore subject to bargaining).
- **Duty to Provide Witness Statements to Union** (reviewing the duty to disclose witness statements).
- **Dues Check-Off** (reviewing whether the dues check-off obligations survives the expiration of the CBA).
- **Remedies** (reviewing cases where employers were not able to offset interim earnings or withheld dues from employees).

Rescinded Memorandums

- **GC Memorandum 17-01: General Counsel's Report on the Statutory Rights of University Faculty And Students in the Unfair Labor Practice Context** offered guidance to universities on the application of the NLRA to its employees in the unfair labor practice context.
- **GC Memorandum 16-03: Seeking Board Reconsideration of the Levitz Framework** favored an election (over an earlier preponderance-of-the-evidence standard) to permit employers to withdraw recognition from a union that lost majority support.

- **GC Memorandum 15-04: Report of the General Counsel Concerning Employer Rules** detailed its views on employee handbook rules and expanded the protections for violations of Section 7 activity.
- **GC Memorandum 13-02: Inclusion of Front Pay in Board Settlements** announced that the General Counsel's office would, contrary to earlier policy, permit the inclusion of front pay in Board settlement agreements.
- **GC Memorandum 12-01: Guideline Memorandum Concerning Collyer Deferral** proposed that the Board should decide cases in which an employee alleges discrimination on the basis of union activity, instead of deferring them to arbitration.
- **GC Memorandum 11-04: Default Language** expanded the use of default language in all informal and compliance settlement agreements.
- **OM Memorandum 17-02: Model Brief Regarding Intermittent and Partial Strikes** sought clarification on the NLRB's law on intermittent and partial strikes, as a means for employees to improve working conditions.

Revoked Initiatives

- **Purple Communications.** The NLRB General Counsel's office sought to expand employee rights to use other modes of electronic communication (in addition to the employer's email system, as permitted under *Purple Communications*) for NLRA-protected communications during nonworking time.
- **Tri-Cast.** The NLRB General Counsel's office sought to overturn the Board's *Tri-Cast* standard, which permitted employers to limit communication with employees who select union representation.
- **Oil Capital.** The NLRB General Counsel's office sought to overturn the Board's *Oil Capital* decision, which limits remedies available for construction industry "union salts."
- **Independent Contractors.** The NLRB General Counsel's office sought cases in which employers violated the NLRA by misclassifying employees as independent contractors.
- **Weingarten.** The NLRB General Counsel's office sought to overturn the Board's *IBM Corp.* decision, which entitles employees to the presence of a representative in workplace investigatory meetings that might lead to discipline ("*Weingarten* rights") only in unionized settings.

The rescinded memorandums and revoked initiatives demonstrate a clear rebuff of many key priorities of the Obama-era Board. These legal issues, though now subject to re-examination, will continue to be upheld until the Board overturns the existing precedent. This month, the NLRB has already overruled three significant decisions relating to joint employment, bargaining obligations, and bargaining units -- restoring pre-Obama Board precedent. We explore these decisions below, and will continue to track these important developments as they play out under Mr. Robb's leadership.

New Decisions

- **Browning-Ferris (365 NLRB No. 156).** On December 14, 2017, the NLRB overruled the Browning-Ferris test and reinstated the prior joint employment standard. The Board found that reserving the right to exercise control and exercising control in an indirect manner will not be sufficient to establish a joint-employer relationship.
- **Raytheon (365 NLRB No. 161).** On December 15, 2017, the NLRB restored the pre-Obama board precedent that an employer is not required to provide the union with notice and an opportunity to bargain when the employer unilaterally modifies employment conditions that are a continuation of past practice. Changes consistent with past practice are no longer mandatory subjects of bargaining.
- **PCC Structurals (365 NLRB No. 160).** On December 15, 2017, the NLRB overruled the *Specialty Healthcare* decision, and held that the Board "will determine whether the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit." The Board now has more flexibility to consider the merits of each case in determining the bargaining unit.

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