New NLRB General Counsel’s Revolutionary Reversal of Direction
December 11, 2017

The newly-appointed General Counsel (GC) of the National Labor Relations Board (NLRB), Peter B. Robb, issued his first GC Memorandum (GC 18-02) on December 1, 2017, which provides guidance on the priorities of the Trump-era NLRB.

This new memorandum is significant for employers because it signals GC Robb’s intention to undo many decisions of the Obama-era NLRB that created new, pro-worker liabilities for employers, and compelled undesirable changes to workplace policies and rules.

The new Memorandum rescinds several GC Memoranda previously issued by GC Robb’s predecessors, including Memoranda that addressed employee handbooks, joint employer status, employer email, the expansion of Weingarten rights and whether offensive speech that may violate civil rights laws is protected under the National Labor Relations Act (NLRA).

Those rescissions are effective immediately, and they include:

- GC Memorandum 17-01 (General Counsel’s Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context).
- GC Memorandum 16-03 (Seeking Board reconsideration of the Levitz framework under which an employer is barred from withdrawing recognition from an incumbent union unless it is able to objectively show, by a preponderance of the evidence, that the union had lost the support of a majority of bargaining unit employees).
- GC Memorandum 13-02 (Inclusion of Front Pay in Board Settlements).
- GC Memorandum 12-01 (Guideline Memorandum Concerning Collyer Deferral, regarding deferral of certain charges to arbitration).
- GC Memorandum 11-04 (Expansion of the use of default language in all informal settlement agreements and all compliance settlement agreements).
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Subsequent to the issuance of the now-rescinded GC Memoranda, the NLRB Members had issued decisions with respect to some of the topics addressed in those Memoranda, and the Board Members have not yet issued any new opinions overruling their prior decisions, so GC Robb’s memorandum does not require any immediate revisions to employee handbooks or other workplace rules.

GC Robb also stated that the following “initiatives” set out in Advice memoranda “are no longer in effect,” meaning that the GC will not pursue unfair labor practice complaints on these issues:

- extending the decision in *Purple Communications*, which held that “employee use of email for statutorily protected communication on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems” to other electronic systems (e.g., internet, phones, instant messaging) if employees use those regularly in the course of their work.

- overturning the Board’s *Tri-cast* doctrine regarding the legality of employer statements to employees, during organizing campaigns, that they will not be able to discuss matters directly with management if they select union representation.

- overturning *Oil Capitol*, to put the burden of proof on the respondent employer to demonstrate that a salt would not have remained with the employer for the duration of the claimed backpay period.

- arguing that an employer’s misclassification of employees as independent contractors, in and of itself, violates Section 8(a)(1) (but noting that “Regions should submit to Advice any case where there is evidence that the employer actively used the misclassification of employees to interfere with Section 7 activity.”)

- overturning *IBM* to apply *Weingarten* in non-union settings.

GC Robb states that he “will base decisions [about the issuance of unfair labor practice complaints] on extant law,” and “[n]o new theories will be presented on cases that have been fully briefed to the Board [Members] in order to avoid delay.” He nevertheless advises that any new cases that involve certain “significant legal issues” must be referred to the GC’s Division of Advice, (“Advice”).

Some of the “significant legal issues” identified by GC Robb, which now must be submitted to Advice before the GC will issue a complaint are, “cases over the last eight years that overruled precedent and involved one or more dissents” such as those “where complaint issuance is appropriate under current Board law, but where we might want to provide the Board [Members] with an alternative analysis.”This seems to signal that the GC may argue to the Board Members
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that some recent precedents should be overturned and prior decisional law should be reinstated.

The new GC Memorandum provides a non-exhaustive list of these “significant legal issues,” including:

- whether conduct is for “mutual aid and protection” and thus protected under the NLRA where only one employee is concerned. *(See, e.g., Fresh & Easy Neighborhood Market, 361 NLRB No. 12 (2014) (individual sexual harassment claim)).

- whether obscene, vulgar, racist or other similar speech, including social media posts, is protected speech under the NLRA. *(See, e.g., Pier Sixty, LLC, 362 NLRB No. 59 (2015); Cooper Tire & Rubber Co., 363 NLRB No. 194 (2016); Pier Sixty, LLC, 362 NLRB No. 59 (2015)).

- employer handbook rules which the NLRB has previously held are unlawful, such as confidentiality policies, policies prohibiting “disrespectful” conduct, policies requiring employees to maintain the confidentiality of workplace investigations, no camera or recording rules and rules regarding employee use of an employer’s logo or trademark. *(See, e.g., Casino San Pablo, 361 NLRB No. 148 (2014); Boch Honda, 362 NLRB No. 83 (2015); see also dissent in William Beaumont Hospital, 363 NLRB No. 162 (2016)).

- the Board’s holding in Purple Communications, 361 NLRB No. 126 (2014) that employees have a right to use their employer’s email system to engage in Section 7 activities.

- off-duty employee access to an employer’s property. *(See, e.g., Capital Medical Center, 364 NLRB No. 69 (2016) (equating picketing with handbilling despite greater impact on legitimate employer interest (including patient care concerns); Piedmont Gardens, 360 NLRB No. 100 (2014) (finding that access must be permitted unless employees are excluded for all purposes).

- union representation in certain meetings (“Weingarten” rights). *(See, e.g., Fry’s Food Stores, 361 NLRB No. 140 (2015); Howard Industries, 362 NLRB No. 35 (2015); Manhattan Beer Distributors, 362 NLRB No. 192 (2015) (application of Weingarten in the drug testing context)

- joint employer status. *(See, e.g., Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, 362 NLRB No. 186 (2015)).

- successorship. *(See, e.g., GVS Properties, 362 NLRB No. 194 (2015) (successorship based on the hiring of predecessor employees that was required by local statute)
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- dues check-off obligation after contract expiration. (See, e.g., Lincoln Lutheran of Racine, 362 NLRB No. 188 (2015)

The December 1, 2017 Memorandum provides the newly-appointed GC’s opinion on various issues and sends a clear signal that, as expected, the new “Trump” NLRB will have very different priorities than did the Obama-era NLRB. However, while the new GC Memorandum is informative, the NLRB has not yet issued any opinions overruling prior decisions. Employers may wish to proceed cautiously and wait for further action by the NLRB before modifying any existing workplace rules or policies.

Please do not hesitate to contact any of our attorneys if you have any questions about the particular issues addressed in the new GC Memorandum and how this guidance may affect your company or industry.