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Out With the Old, In With the New: President Biden Shakes Up Federal Labor Law

Discharged agency personnel, revocation of prior agency guidance, and legal challenges show an immediate shift at the National Labor Relations Board (NLRB), focusing on employee and union rights.

Unprecedented Change in NLRB Personnel

Ignoring decades of precedent allowing individuals to finish out their terms, when President Joe Biden assumed office, he immediately requested the resignation of NLRB General Counsel Peter B. Robb, whose term was set to expire in November. When Robb refused to resign, President Biden discharged him. A day later, President Biden asked for the resignation of, and then discharged, Robb's successor, Deputy General Counsel Alice Stock, who also refused to resign. Prior to their positions with the NLRB, both Robb and Stock were attorneys representing management in labor relations matters. On January 25, President Biden appointed Peter Sung Ohr as Acting General Counsel. Ohr is a career NLRB employee who had recently been serving as the NLRB Regional Director of Region 13 in Chicago.

Revocation of Prior Agency Guidance

In February, Ohr quickly rescinded ten of Robb's General Counsel Memos and two Operations Management Memos. General Counsel Memos serve to guide the agency's enforcement position and Operations Management Memos provide direction on case-handling matters to the NLRB's field offices. Ohr's stated rationale for the rescission of these memos is that they were inconsistent with the purposes of the National Labor Relations Act (NLRA), which was to foster collective bargaining and protect workers' rights. In some but not all cases, the memos were no longer necessary because subsequent NLRB decisions provided guidance on the subjects or overturned cases cited in the memos.

The rescinded General Counsel Memos are:

- GC Memo 18-04 provided guidance on handbook policies following the NLRB's *Boeing* decision. Ohr stated this memo was no longer necessary given the number of Board cases decided since the *Boeing* decision. The *Boeing* decision was favorable to employers and Ohr's rescission suggests the Biden Board will be more critical of employer policies that address employee conduct.
- GG Memo 18-06 instructed Regions to no longer oppose, at or during unfair labor practice (ULP) hearings, timely motions to intervene filed by (1) employees who have filed decertification petitions with a regional office and where the ULP proceedings may impact the validity of their petitions, and (2) employees who have circulated a document upon which the employer has unlawfully withdrawn recognition.
- GC Memo 19-01 provided instructions on NLRA Section 8(b)(1)(a) duty of fair representation charges and required unions raising a "mere negligence" defense to such charges to show they maintained reasonable procedures to track grievances. The memo also set forth that a union's failure to respond to a grievant's inquiries would be considered unlawful arbitrary conduct. Rescission of this memo makes it easier for unions to defend against charges alleging that they failed to fairly represent employees in their grievances.

- GC Memo 19-03 addressed deferral to arbitration under *Dubo Manufacturing Company*, 142 NLRB 431 (1963). The rescission of this memo signals that Regions will be less likely to defer disputes to parties' agreed-upon grievance-arbitration procedures when a matter has been raised and is being processed through those procedures.
- GC Memo 19-04 provided guidance on unions' obligations to notify employees of their *General Motors/Beck* rights and their obligation to accept dues checkoff revocations after contract expiration.
- GC Memo 19-05 clarified unions' Section 8(b)(1)(A) duty of fair representation obligations, in light of GC Memo 19-01, by verifying that unions are not required to present a detailed defense of their decision not to pursue a grievance, or to abandon one, as long as they acted reasonably in doing so.
- GC Memo 19-06 addressed the handling of *Beck* cases under *United Nurses & Allied Professionals (Kent Hospital)*, 367 NLRB No. 94 (Mar. 1, 2019). This memo stated that *Beck* objectors would not need to provide an explanation to the NLRB as to why a particular expenditure is non-chargeable or provide evidence of their contention, and required Regions to follow up with unions to ensure that *Beck* objectors filing a complaint were not charged for expenses outside collective bargaining, contract administration and grievance handling.
- GC Memo 20-08 addressed the use of audio recordings during NLRB investigations and required NLRB staff to inform whistleblowers that they could face legal charges or discipline by their employer if they provided illegally obtained video or audio to the NLRB. However, Ohr has continued to advise that, "Regions should continue to not accept recordings that violate the Federal Wiretap Act and to apprise individuals who proffer recorded evidence when it may violate state law."
- GC Memo 20-09 addressed make-whole remedies in duty of fair representation cases.
- GC Memo 20-13 addressed neutrality agreements and employer assistance in union organizing. The rescission of this memo results in less resistance to union organizing in the workplace by permitting employers and interested unions to agree to the promotion of the union agenda unopposed.

The majority of the rescinded General Counsel Memos relate to policing the NLRB and union activities.

Ohr also discarded Operations Management memos that restrained Regional Directors from issuing investigative subpoenas to non-compliant charged parties and prevented NLRB non-supervisory personnel from speaking at public conferences and events without prior permission from the General Counsel's office. The rescission of these memos overall will provide NLRB Regional Directors with more autonomy, will permit regional staff to engage in more detailed investigations brought before them for review, and is likely to decrease the transparency unions provide to the bargaining unit members they represent.

In addition to the above, the NLRB has permitted Ohr to withdraw Robb's brief in a pending case critical of the NLRB's current "contract bar" doctrine. This doctrine currently limits when employees can try to remove an existing union from their workplace.

Pending Legal Challenges

House Oversight Committee Republican Leader James Comer (R-KY) and House Education and Labor Committee Republican Leader Virginia Foxx (R-NC) have asked President Biden's administration to turn over documents related to the unprecedented discharges of Robb and Stock. This request seeks to ensure that the NLRB remains an independent agency free from the political whims of the sitting Presidential administration and that the actions in discharging two high-level NLRB officials do not undermine the agency's impartiality in enforcing federal labor law.

Further, given the delay in the NLRB's hearing of a case alleging that two unions tried to force United Natural Foods Inc. to discriminate based on the union status of its employees, the company is challenging Ohr's appointment, alleging that President Biden's action was a purely political move that would do irreparable damage to the functioning of the NLRB. Philip Miscimarra, a former Republican NLRB Chairman who has a reputation for his lengthy dissents favoring management, represents United Natural Foods Inc. in this case.

There are a few additional cases challenging Robb's removal as illegal and subsequent actions taken by Ohr as invalid.

Nomination of New General Counsel

On February 17, President Biden nominated Jennifer Abruzzo to serve as the next NLRB General Counsel. Abruzzo is currently working as Special Counsel of Strategic Initiatives for the Communications Workers of America. She previously worked with the NLRB for decades, including as both Deputy General Counsel under President Barack Obama and Acting General Counsel for two weeks in 2017 before the Senate confirmed Robb. Abruzzo's appointment must be confirmed by a majority of the Senate.

Takeaway

Additional changes to the NLRB's processes, procedures, guidance and case law, resulting in law and administrative guidance that are pro-employee and pro-union, are expected. These changes will likely make it easier for unrepresented employees to file claims that their employers' workplace policies violate the NLRA and for workers to organize. Employers should take the opportunity to use the time before August 2021—when the composition of the NLRB will change again—to review and ensure that their workplace policies do not violate employees' rights to engage in protected concerted activity.

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