December 11, 2017

National Labor Relations Board's General Counsel Memo Turns a Page on the Obama NLRB Enforcement Policy

On December 1, 2017 new General Counsel, Peter B. Robb ("Robb") of the National Labor Relations Board ("Board") issued an important memo outlining guidelines he will follow on future cases coming before the Board.

The two very significant reversals of enforcement he has signaled relate to the former General Counsel memos concerning Employer Rules and *Collyer* Deferral.

Employer Rules. In recent years the NLRB has issued citations on a variety of common handbook rules finding them to be unlawful. These include rules involving: confidentiality; employee conduct toward the Company, supervisors, fellow employees, and interactions with third parties; restricted use of Company logos, copyrights, and trademarks; rules restricting photography/recording and employees from leaving work; and conflict-of-interest rules. In the prior General Counsel advice that has now been rescinded, the former General Counsel provided guidance as to what language was found to be unlawful and the reasoning for their finding. These decisions were all made in reliance upon the Board's decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) which found that an employer's mere maintenance of a work rule that had a chilling effect on employee's Section 7 rights could violate Section 8(a)(1) of the Act. A facially unrestrictive rule could "still be found unlawful if 1) employees would reasonably construe the rule's language to prohibit Section 7 activity; 2) the rule was promulgated in response to union or other Section 7 activity; or 3) the rule was actually applied to restrict the exercise of Section 7 rights." Now that this guidance has been rescinded, any of the General Counsel's guidance regarding language that is unlawful has been voided and the only portions of his memo which remain good law are those which are based upon Board issued decisions.

Collyer Deferral. The General Counsel memo issued in January 2012 addressed issues under the *Collyer* deferral standard. Under the *Collyer* deferral policy, the Board would "defer meritorious ULP charges to the parties' contractual grievance-arbitration procedure where the conflict arises out of a long and productive bargaining relationship, there is no claim of employer enmity towards employees' exercise of protected rights, the arbitration clause covers the dispute at issue, the employer manifests a willingness to arbitrate the dispute, and the alleged unfair labor practice lies at the center of the dispute." This memo changed the Board policy by eliminating automatic deferral to arbitration of 8(a)(1) and (3) cases unless the arbitration would be completed within one year. Now that this guidance has been rescinded, the Board will return to the more generous deferral standard established under *Collyer*.

Robb has instructed that all decisions will be based upon existing Board precedent. However, the Division of Advice is looking for submissions on various subject matters, inferably as vehicles to change that precedent. This has largely positive implications for employers, including in the following areas:

- Concerted activity for mutual aid and protection
- Common employer handbook rules found unlawful
- *Purple Communications*
- *Quietflex*
- Off-duty employee access to property
- Conflicts with other statutory requirements

- *Weingarten*
- Disparate treatment of represented employees during contract negotiations
- Joint Employer
- Successorship
- Unilateral changes consistent with past practice
- *Total Security*
- Duty to provide witness statements to union
- Dues check-off

Thus, the recent memo from General Counsel Robb signals that the National Labor Relations Board likely will look more favorably upon employers.

Authors

Rachel A. Gonzalez

Partner

Parsippany, NJ | (973) 966-8201

New York, NY | (212) 297-5800

rgonzalez@daypitney.com