NLRB General Counsel Doubles Down on Captive Audience Meetings in Response to Legal Challenge

Insights
3.24.23

As you may know, the NLRB's top prosecutor issued a memo last year seeking to bar employers from convening employee meetings on working time to address union representation unless they provide employees specific assurances that participation is completely voluntary. General Counsel Jennifer Abruzzo has taken this position on so-called "captive audience" meetings even though they have been a staple in the American workplace for nearly 75 years. A business group recently filed a lawsuit, however, claiming the memo violates employer free speech rights. Days after the lawsuit was filed, GC Abruzzo quickly issued a new memo on March 20 that doubles down on her position. You'll want to pay close attention, since employee meetings are routinely conducted to educate employees – particularly in response to arguments advanced by organized labor outside the workplace. Here's what you need to know about the latest developments.

Intent to Overturn Established Precedent

Jennifer Abruzzo began serving as the NLRB's General Counsel in mid-2021. Shortly thereafter, she issued her first guidance memo declaring her intent to overturn recent Trump-era precedent, reassess long standing agency doctrine, and actively enforce the NLRA consistent with her own views, even if they conflict with Board precedent.

Since that time, she has issued 16 additional guidance memos, giving rise to accusations that she wants to use her position as the NLRB's chief prosecutor to rewrite labor law.

You should note that while GC Memos don't represent the official legal position of the entire agency, they do represent the policy and guidance for all Regional Offices investigating and prosecuting charges against employers.

The "Captive Audience" Memo

The latest developments serve as a prime example of how General Counsel Abruzzo is attempting to rewrite labor law. Last April, she issued GC Memo 22-04 addressing "captive audience meetings" where employers meet with employees during work time to address union representation. She opined that such meetings violate the National Labor Relations Act (NLRA), even though these meetings have generally been deemed lawful dating back to 1948 when the NLRB issued its *Babcock & Wilcox Co.* decision.

GC Abruzzo acknowledged that her view that such meetings violate Sections 7 and 8 of the NLRA ran counter to nearly 75 years of NLRB precedent. But she maintained that such meetings were now "at odds with fundamental labor-law principals," statutory language, and congressional mandate. In doing so, Abruzzo urged the Board to reconsider its precedent and deem such meetings unlawful in the absence of affirmative assurances that attendance at such meetings is purely voluntary.

Businesses React

As one might expect, this memorandum sent shock waves across the labor relations arena. Employers had long viewed such meetings as a lawful exercise of their free-speech rights and an effective way to share their opinions regarding third-party representation. In the face of the memorandum, employers risked being charged with violating the NLRA if they held such meetings (even in the absence of organizing activity), against the backdrop of an increase in union representation petitions. At various points, the memo is both broad and vague, giving rise to a great deal of uncertainty within the business community.

Employer Group Sues

One group of employers decided not to take the General Counsel's threat of prosecution lying down. On March 16, the Associated Builders and Contractors of Michigan (ABC) sued the General Counsel seeking declaratory and injunctive relief, claiming that the GC Memo is an *ultra vires* act in violation of employer free speech rights. The complaint alleges that since her appointment, GC Abruzzo "has embarked on a personal campaign to transform federal labor law under [the NLRA] to favor unions, and to disfavor employers."

The complaint goes on to accuse her of seeking to "cajole unions to file charges against employers" on issues such as captive audience meetings to further her campaign to shift the balance of federal labor law to favor unions. The complaint calls the memo a censorship scheme aimed at intimidating employers from expressing their opinions to employees. Thus, the business groups assert that the memo violates the law and the Constitution by threatening prosecution in a way that infringes on free speech.

The General Counsel's Latest Defense

Seemingly not by coincidence, GC Abruzzo issued another memorandum four days later praising actions she has taken as General Counsel and the work of the Regional Offices in implementing her guidance. GC 23-04 characterizes her efforts to have the Board reconsider long-standing precedent as "one of [her] most important objectives as General Counsel." In a footnote, she specifically includes the *Babcock and Wilcox Co.* decision among those calling for reconsideration.

Another glaring point (though it was also relegated to a footnote) is the running tally of cases the General Counsel identified that prompted the Board to take the opportunity to reconsider past

precedents. She cites five cases in which the Board "agreed with the General Counsel's position" and overturned them.

The March 20 memo appears to be an attempt at both a victory lap and to justify the prior memos she issued, laying the foundation for changes she has been seeking and, seemingly, her defense against the ABC lawsuit. In the memo, she maintains that the Regional Offices' vigorous implementation of her guidance has allowed the NLRB to more fully implement its congressional mandate and defends her use of guidance memos by essentially arguing that the proof is in the pudding: she claims her approach is valid because it has resulted in Board decisions agreeing with her position.

What Should Employers Do?

Obviously, this fight is far from over. The General Counsel shows no signs of ceding any ground even in the face of the ABC lawsuit, and we will all have to stay tuned to see how that turns out.

In the meantime, captive audience meetings remain both legal and risky in light of the General Counsel's memo, and employers remain in limbo. Consequently, you should continue to consider the recommendations covered more extensively in our previous Insight covering GC Memo 22-04, such as training supervisors on the activities protected by the NLRA, giving assurances that attendance is voluntary at employee meetings or discussions at which union representation is discussed, and collaborating with internal stakeholders and labor counsel to tailor an appropriate compliance strategy around the unique aspects of you workplace culture.

We will continue to monitor developments as they unfold. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information direct to your inbox. For further information, contact your Fisher Phillips attorney, the author of this Insight, or any member of our Labor Relations group.

Related People

Alexander A. Wheatley

Partner
503.205.8054
Email

Service Focus

Labor Relations