Memo From Labor Board's Top Attorney Signals Change Is On Its Way

Insights
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The newly installed General Counsel for the National Labor Relations Board published a memorandum late last week indicating that the General Counsel is preparing to push to reverse many of the controversial positions taken during the Obama era, restoring much-needed balance and tilting the labor law playing field back to a reasonable level. Peter Robb's December 1 memo is a harbinger of significant changes to the agency's enforcement posture going forward, and should give hope to employers across the country – not just those with unionized workforces – that change will soon be on the way.

In A Nutshell
The General Counsel's memo might fly under the radar to some. On its face, it is merely a directive to all NLRB Regional Directors, Officers-in-Charge, and Resident Officers offering guidelines on the types of issues that may warrant "an alternative analysis" beyond existing Board standards. But the memo is no doubt intended to send a signal to employers and unions about what the near future may hold when it comes to certain significant and controversial positions adopted by the Board over the last several years. It was posted to the NLRB's website, after all, available for all to see.

In the five-page memo, titled "Memorandum GC 18-02: Mandatory Submissions to Advice," General Counsel Robb announces that he and the two new members of the Board (who provide a Republican majority for the first time in eight years) have not yet revealed their thoughts on many crucial labor law issues. And he reminds his direct reports that the Board "will base decisions on extant law, regardless of whether [we] may agree with the legal principles." He instructs Board personnel, in fact, to issue complaints and process future cases "according to existing law."

However, Robb then explains that he believes the Board should have a greater say in future cases involving "significant issues," specifically including "cases over the last eight years that overruled precedent and involved one or more dissents" as ones that he believes are ripe for a second look. The memo goes on to provide a detailed but non-exhaustive laundry list of issues and cases that should be submitted to the Board's Division of Advice for such a review.

Most importantly, the memo recommends that, in such cases, Board staff should also provide an "alternative analysis" besides an analysis of the matter under existing law, even in cases where a complaint has already issued (and so long as briefs have yet to be filed). Upon receipt of this

alternative analysis, the Division of Advice will provide appropriate guidance on how to present the issue to the Board.

What Specific Issues Have Been Identified?
Several months ago, members of the Fisher Phillips Labor Relations Practice Group predicted the most significant topics that were expected to be revised for the better in the near future given the new direction of the Board. It is perhaps no surprise, then, that Robb included many of these same issues in his list of standards that could soon be overturned. They include three of the more troublesome positions that have been adopted by the Board in recent years:

- **Concerted activity for mutual aid and protection** – The Board has expanded the type of activity that is considered protected by Section 7 of the National Labor Relations Act in recent years, including conduct where only one employee had an immediate stake in the outcome, and where an employee used obscene vulgarities to complain about his employer.

- **Common handbook rules found unlawful** – Employers have grown increasingly frustrated as the Board has struck down ordinary and familiar handbook policies as being in violation of the NLRA, including those requiring confidentiality in internal investigations, prohibiting cameras or recordings, and mandating a certain level of common civility in the workplace.

- **Use of company email systems** – The infamous *Purple Communications* decision from 2014 held that employers – whether unionized or not – generally must allow employees to use corporate email systems during non-work time to engage in concerted and protected activity.

Beyond these three areas, Robb's memo also identifies cases involving work stoppages, the joint employer standard, the perfectly clear successor standard, pre-contract discipline, discovery of witness statements, post-contract survival of dues-checkoff, social media postings, and back pay remedies as potential candidates for the alternative analysis, along with several other key topics.

On top of that, the memo also formally rescinds a host of recent General Counsel Memos authored by the previous regime, including those pertaining to reconsideration of the current standard on withdrawals of recognition, inclusion of front pay in Board settlements, and the Board's standard on default language within informal settlement agreements.

What Does This Mean For Employers?
You should begin by getting in touch with your labor counsel as soon as possible to begin development of a proposed strategy in light of these circumstances. Your business – unionized or not – needs to be prepared for the new era of labor relations that will soon take shape, and that may take many forms. The Fisher Phillips Labor Relations Practice Group stands ready to usher employers into this new period.

Employers should still be prepared to take the same precautions they have developed to respond to the Board's increasingly pro-union stances in the past several years, although the tide appears to be

turning for the better. By virtue of his rescission of a number of controversial previous General Counsel Memos that had imposed specific enforcement postures on the Board Regions in several key areas, Robb has jumpstarted the process of changing the way the Board goes about its business.

Remember, though: as chief prosecutor for the agency, Robb does not have decision-making authority. That lies within the exclusive province of the five-member NLRB. And although one can assume that the newly reconstituted NLRB will be far more likely to give due consideration to any proposed alternative analyses given the makeup of the new Board members, employers will need to wait patiently as the Board goes to work.

However, you now have an avenue to present arguments as to why some of these troublesome positions should be scrapped in favor of a more rational and balanced approach. You should work closely with your outside counsel to develop an alternative analysis within your first substantive response to the Region, such as in position statements filed in response to applicable unfair labor practice charges. You may also consider doing so in cases that have already been agendaed for complaint or where a complaint has already issued, depending on the issue at play. Finally, with respect to the Memos that have been formally rescinded, you should work with your labor counsel to identify changes to your current practices that might be warranted, including revisions to standard language in settlements and other agreements.

For more information, contact the authors or any member of the Fisher Phillips Labor Relations Practice Group, or your regular Fisher Phillips attorney.

This Legal Alert provides an overview of a specific Board memorandum. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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