The Changing NLRB and Its Impact on Employers

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- National Labor Relations Board is charged with enforcing the NLRA
- 5 member Board in Washington D.C. – presidential appointees
  - 26 Regional Offices around the country
- NLRB General Counsel prosecutes alleged violations of the NLRA
- NLRB decides whether employers or unions have violated the NLRA by engaging in “unfair labor practices.”
- The NLRB conducts and oversees union elections.

The Changing NLRB –Members of the Board

- Board Members are appointed by the President to 5 year term
- Three members form the President's party; two from the opposition
- In January 2021, there were three "R" and one "D" members
  - "R" -- William Emmanuel, John Ring and Marvin Kaplan
  - "D" – Lauren McFerran (appointed Chair on Jan. 20, 2021
- Today, there are three "D" and two "R" members
  - "D" – Lauren McFerran, Gwynne Wilcox, David Prouty
  - "R" – John Ring and Marvin Kaplan
- Wilcox and Prouty are Union-side lawyers
- **Expect significant changes to Board jurisprudence!**

The Changing NLRB – General Counsel

- Presidential appointee – 4 year term
- The General Counsel has ***a lot*** of authority in shaping the Board's enforcement priorities and the development (or regression) of how the Act is applied and interpreted.
- On Inauguration Day, President Biden fired GC Peter Robb.
  - Fired his deputy the next day – unprecedented actions.
- Appointed Peter Sung Ohr as Acting GC
- Ohr immediately set about reordering the NLRB's priorities by issuing "**General Counsel Memoranda**"

The Changing NLRB – Acting GC Ohr

- In just 6+ months on the job, Ohr set the tone for a massive pendulum swing in enforcement of the Act.
- Within days of his appointment, Ohr issued a Memorandum pronouncing that it is **the policy of the United States** "*to **encourage** the practice and procedure of collective bargaining and to protect the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection*."

NLRB General Counsel Mem. GC 21-02 and GC 21-03

Rescission of GC Robb's Memoranda

- GC 21-02 – "Rescission of Certain General Counsel Memoranda"
  - Mainly small bore changes benefiting unions with regard to their participation in decertification election proceedings, their duty to advise employees of their Beck rights and the Board's handling of cases brought by employees challenging the Union "agency fees" assessed upon them.
  - Also effected changes to certain NLRB investigative practices, including Regional Offices' handling of audio records pertaining to ULP cases.

  (02/01/2021)

  www.nlrb.gov/guidance/memos-research/general-counsel-memos

Vigorous Enforcement of Section 7

- GC 21-03 “Effectuation of the NLRA Through Vigorous Enforcement of the Mutual Aid or Protection and Inherently Concerted Doctrines”
- Section 7 provides that “employees shall have the right to self organization, to form, join or assist [unions], to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection . . . .”
- Ohr notes that protected concerted activity can occur outside the context of union activity, “such as [where] employees raise safety concerns or seek protection from government agencies.”

Vigorous Enforcement of Section 7

- GC 21-03 (continued)
- "Mutual aid or protection" focuses on the goal of concerted activity, specifically, "whether there is a link between the activity and matters concerning the workplace **or** employees' interests as employees."
- "Mutual aid or protection" covers employee efforts to improve their lot as employees through channels outside the immediate employee-employer relationship **as well as** activities in support of employees of employers other than their own."
- Ohr continues: "employee advocacy can have the goal of mutual aid or protection *even when the employees have not explicitly connected their activity to workplace concerns*."

Vigorous Enforcement of Section 7

- GC 21-03 (continued)
- This includes employees' political and social justice advocacy when the subject matter has a direct nexus to employees' interests as employees.
  - Employee's interview with a journalist about how earning minimum wage affects her and her employees
  - A "solo strike" by a single employee to attend a demonstration where she and others (not her co-workers) advocated for a $15 minimum wage
  - Protests in response to enforcement of immigration laws

Vigorous Enforcement of Section 7

- GC 21-03 (continued)
- "Finding Certain Conduct to be Inherently Concerted"
  - Conduct generally becomes concerted when it is engaged in **with** or on the **authority of other employees**," or when an employee seeks either to initiate or to induce or to prepare for group action.
  - Employees are acting in concert when discussing shared concerns about terms/conditions of employment and it "involves only a speaker and a listener."
  - Employee discussion about wages, benefits, working conditions, job security, workplace health and safety and even racial discrimination all may be "inherently concerted."

The Changing NLRB
GC Jennifer Abruzzo

- Biden appointee – began serving on July 22, 2021
- Career NLRB employee
  - Started as Field Attorney
  - Served as Deputy General Counsel and Acting GC
- During Trump administration, Abruzzo worked for the CWA
- Expect **major** changes ahead
- (Ohr is now Deputy General Counsel)

Mandatory Submissions to Advice

- GC 21-04 “Mandatory Submissions to Advice” (Aug. 12, 2021)
  - NLRB’s Division of Advice reports up to GC
- Mandatory submissions to advice signal the GC’s interest in pursuing changes in a certain area of the NLRA.
- **GC 21-04 signals that virtually every major decision of the Trump Board will be up for review. E.g.,**
  - Employer handbook rules (*The Boeing Co*., 365 NLRB No. 154 (2017))
    - Suggests a return to the prior standard where a handbook rule will be viewed as unlawful if an employee reasonably would view it as limiting Section 7 rights.

Mandatory Submissions to Advice

- Confidentiality provisions / Separation agreements
  - Reflects hostility to Board's decision in *Baylor University Medical Center* approving inclusion of confidentiality and non-disparagement clauses in separation agreements, as well as those clauses prohibiting departing employees from participating in third party claims against the employer in exchange for severance monies.
  - Seeks to revisit Board's recent decision in *Apogee Retail LLC d/b/a Unique Thrift Store* assessing confidentiality rules applicable to workplace investigations.
- Union access
  - Seeks to revisit Board decisions upholding employers' rights to limit access to its property by union representatives and off duty employees.

Mandatory Submissions to Advice

- Employer Duty to Recognize and Bargain
  - With regard to managements' rights in CBA, a possible return to the "clear and unmistakable waiver" standard instead of the "contract coverage" standard the Board adopted in *MV Transportation*.
  - Cases involving application of *Raytheon Network Centric Systems*, where the Board held that actions consistent with past practice did not constitute a "change" triggering a notice/bargaining obligation
  - Successorship cases involving an employer's discriminatory refusal to hire predecessor's workforce and its impact on right to set initial terms and conditions of employment
  - Cases involving application of *Care One at New Milford*, where the Board ruled that employers bargaining for a first contract are not obligated to bargain over discrete acts of discipline consistent with past practice; suggests a return to *Total Security Management*.

Mandatory Submissions to Advice

- Employee Status
  - Cases involving applicability of *Velox Express, Inc*., where the Board found that misclassification of employees as contractors is not a ULP; and other cases pertaining to the burden of proof in establishing whether a worker is a contractor or employee.
- *Weingarten* rights
  - Cases involving the applicability of Weingarten principles in nonunionized settings.
  - Cases involving whether *Weingarten* creates a right to information before the disciplinary interview, including the questions to be asked.

Mandatory Submissions to Advice

- Employees' Section 7 right to strike and/or picket
  - Cases involving an allegation that an employer's permanent replacement of economic strikers had an unlawful motive
  - Cases assessing the contours of an illegal "intermittent strike"
  - Cases holding that an employer has the right to set terms/conditions of employment for striker replacements superior to those offered to striking employees.
- Employer interference with employees' Section 7 rights
  - Cases involving employer statements to employees that "employee access to management will be limited if employees opt for union representation."
  - *Joy Silk* bargaining orders (discussed below)

Injunction Junction, What's Your Function?

- GC 21-05 "Utilization of Section 10(j) Proceedings" (Aug. 19, 2021)
- Section 10(j) of the Act authorizes Regional Directors to seek interim injunctive relief in federal court to restore or preserve the status quo ante pending resolution of the ULPs through the Board's (slow) processes.
- Historically reserved for "major" cases involving serious ULP's
  - Withdrawal of recognition
  - Mass terminations in context of union organizing
  - Runaway shop
- Abruzzo suggests that Section 10(j) should be used more often.
  - Notes that cases in which Section 10(j) relief was authorized had near 100% "success rates" in FY 2020 and 2021.

Expanded (More Painful) Remedies for ULP's

- GC 21-06 "Seeking Full Remedies" (Sept. 8, 2021)
- Under Section 10(c) of the Act, the Board possesses "broad discretionary authority to fashion just remedies to fit the circumstances of each case it confronts."
- Regions should request from the Board "**the full panoply of remedies available**" to ensure that victims of ULPs are made whole for losses.
- Notes Trump Board's willingness to explore new remedies, such as compensation for health care expenses occasioned as a result of loss of health insurance, or compensation for credit card late fees incurred as a result of unlawful discharge.

Expanded (More Painful) Remedies for ULP's

- In cases involving discriminatory firings under Section 8(a)(3), Regions should seek compensatory damages in addition to backpay and reinstatement or front pay, in some circumstances.
- For ULP's committed during a union organizing drive, Regions should consider seeking the following remedies:
  - Union access to employees, including provision of employee contact information, access to Employer bulletin boards and "**equal access to address employees" if they are convened for a captive audience speech by the Employer**.
  - Reimbursement of the Union's organizing costs
  - Reading of Notice Postings by Board Agent or Employer principal, with Union reps being permitted to attend.

Expanded (More Painful Remedies) for ULP's

- SHAMING -- Publication of the Notice in newspapers and/or online forums chosen by the Regional Director and paid for by the Employer.
  - Stated goal is to "reach all current and former employees, as well as potential hires."
- Visitorial and discovery clauses to assist the Board in monitoring compliance with Board orders.
- Training of employees, supervisors and managers on employees' rights under the Act and/or compliance with the Board's Orders
  - Training curriculum to be approved by the Board, or ***conducted*** by the Board
- Instatement of a qualified applicant of the Union's choice in the event a discharged discriminatee is unable to return to work.

Expanded (More Painful) Remedies for ULP's

- In cases where unlawful "disruptions to bargaining have occurred," Regions are instructed to seek in all appropriate cases:
  - Bargaining schedules (e.g., *requiring Respondent bargain not less than 2x per week, at least six hours per session, until an agreement or impasse is reached*)
  - Submission of sworn "periodic progress reports" to the Board showing in detail the nature and course of bargaining
  - Reinstatement of unlawfully withdrawn bargaining proposals
  - Reimbursement of the other party's bargaining expenses for expenses incurred during the entire period in which the party fails to bargain in good faith.
  - Training of current and/or new supervisors and managers
  - Electronic dissemination of Notice Postings

No More Elections?

- In both GC 21-04 and 21-06, GC Abruzzo has suggested an Employer may violate the Act where a Union presents evidence of a card majority and the employer is unable to establish a good faith doubt as to majority status; specifically, where the employer has either engaged in ULPs **or** where the employer is unable to explain its reason for doubting majority status in rejecting the Union's demand for recognition.
- *Gissel* bargaining orders and "*Joy Silk*" bargaining orders.
- *Joy Silk Mills, Inc.* 85 NLRB 1263 (1949)
- Is this legal??

Conclusion

MAY YOU LIVE IN INTERESTING TIMES

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