

A New Direction for the National Labor Relations Board

December 7, 2017

Sworn in less than a month ago, National Labor Relations Board's new General Counsel Peter B. Robb is wasting little time setting a new direction for the NLRB.

On Dec. 1, 2017, Robb issued General Counsel Memorandum 18-02, which sets forth guidelines for regional NLRB offices to follow when submitting cases to the general counsel's office for advice on which cases to prosecute. Robb, who was sworn in on Nov. 11, 2017, specifically identified cases that relate to "significant legal issues include[ing] cases over the last eight years that overruled precedent and involved one or more dissents . . ."

The memorandum provided examples of cases that might support the issuance of a complaint and where the general counsel's office may want to provide the NLRB with an alternative analysis, i.e., cases where Robb feels that the original cases may have been wrongly decided. Examples include:

- Cases finding concerted activity involving only one employee
- Cases holding that employees have the right to use company email to engage in Section 7 activities
- Cases concerning off-duty access to company property
- Cases expanding employee *Weingarten* rights
- Joint-employer cases
- Cases concerning stopping dues check-off after the expiration of a collective bargaining agreement

Additionally, the memo takes aim at employee handbook policies which have been found unlawful, specifically identifying policies prohibiting "disrespectful" conduct, employee use of employer trademarks and logos, employee recording of meetings, rules requiring employees to maintain confidentiality of workplace investigations, and other employee handbook policy cases where "the outcome would be different" under current NLRB Chairman Philip Miscimarra's dissenting opinions.

The memo also rescinded a handful of former general counsel memos including those concerning statutory rights of university faculty and students in the unfair labor context, the inclusion of front pay in NLRB settlements, and deferral of unfair labor practice charges to arbitration.

Finally, the memo rescinded NLRB initiatives set out in former advice memoranda seeking to extend the right to use employer email to engage in Section 7 activities to other employer electronic systems and arguing that misclassification of employees as independent contractors in itself should be an unfair labor practice, among other initiatives implemented by the former NLRB general counsel.

The NLRB has a Republican majority, but Miscimarra's term expires Dec. 16, 2017, which will leave the NLRB with two Democrat and two Republican members until a new NLRB member is appointed by the president and confirmed by the Senate. As the items set forth in Robb's memorandum show up in your workplace, make sure to check with your labor counsel to verify the current status of the NLRB case law. As always, we will keep you informed of any significant decisions.