SpencerFane®

The Pendulum Swings at the NLRB: General Counsel Rescinds Previous Policies

On February 14, 2025, the Acting General Counsel of the National Labor Relations Board (NLRB), William Cowen, rescinded numerous policy memoranda issued by his Biden-era predecessor. This is merely one of the first steps in what is almost certain to be huge changes in NLRB law and procedure as President Trump appoints new NLRB members, and as they review controversial decisions issued by the NLRB within the past few years. These developments will be significant not only for employers who have relationships or issues involving labor unions, but also for nonunion employers.

NLRA Regulates Not Only Traditional Union Activity But Also "Concerted Activity" in Nonunion Companies

Many think the National Labor Relations Act (NLRA) applies only to union activity, such as trying to organize a union and relationships between management and unions. However, the NLRA also protects and regulates "concerted activity" in all companies within the jurisdiction of the NLRA, which covers most private sector employers, but not government employers. For example, if two or more employees in a nonunion company discuss among themselves and complain to management about work-related issues such as wages, benefits, or other terms and conditions of employment, their activity is "concerted" and is usually protected by the NLRA with limited exceptions such as grossly insubordinate, profane, unlawful, or other wrongful conduct. Note, however, the NLRA applies only to "employees" as defined in the Act, and it does not apply to supervisors and other managers excluded from its coverage.

Role of the NLRB's General Counsel

The NLRB's General Counsel (GC) is like a prosecutor before the NLRB who manages the regional offices throughout the country and directs regional officers and attorneys to bring cases in the GC's name before administrative law judges and then the NLRB (the decision-making body in Washington, D.C., known as the Board). The Board is an appellate administrative tribunal consisting of five members appointed by the president and approved by the Senate. The Board establishes labor law policies under the NLRA, subject to appeal to the federal courts of appeals and U.S. Supreme Court.

GC memoranda are blueprints for the direction the GC intends to take in pursuing issues and initiatives before the Board. The Biden Administration's GC, Jennifer Abruzzo, pursued an aggressive agenda expanding the coverage of the NLRA in new and unprecedented directions. For example, GC Abruzzo scrutinized employee handbooks and claimed that common contractual clauses prohibiting employees from "disparaging" their employer could interfere with employee rights under the NLRA.

Policy Initiatives Rescinded by New Acting GC

On January 27, 2025, President Trump terminated GC Abruzzo, effective immediately. The new Acting GC subsequently rescinded memoranda covering numerous issues, many of which could affect nonunion as well as union companies. Here is a partial list of memoranda that he rescinded. For the convenience of clients and attorneys, the numbers of the memoranda are included and can be searched further on the NLRB's website:

- **GC 21-06** and **GC 21-07** address remedies to be sought. GC Abruzzo had directed NLRB regions to seek expanded damages, especially in discharge cases beyond simple back pay, including front pay – paying an unlawfully discharged employee for several years into the future – and "consequential damages," such as loss of home or car due to unlawful discharge.
- **GC 21-08** focuses on the rights of student-athletes under the NLRA. This memorandum contended that many student-athletes should be considered employees under the NLRA with the full panoply of employee rights.

- **GC 23-02** regarding electronic monitoring, claiming that modern electronic monitoring could constitute prohibited "surveillance" of employees' concerted or union activity or interfere with such activity.
- **GC 23-05** concentrates on severance agreements, applying the Board's decision in *McLaren Macomb*, which held that "overly broad" non-disparagement and non-disclosure provisions violate the NLRA. Note that the *McLaren* decision can only be overruled by the Board, which will likely occur once the Board has a majority of Trump-appointed members and the GC presents this issue to them.
- **GC 23-08** and **GC 25-01** relating to non-compete agreements, claiming that non-compete and "stay or pay" provisions (such as repayment of training expenses if employees resign) "chill" employees in the exercise of their rights to engage in concerted activity and are thus illegal.
- The Acting GC rescinded but will provide further guidance on **GC 24-01** concerning the Board's decision in *Cemex Construction*, which required an employer confronted with a union demand for recognition to either promptly recognize the union or file an election petition. This is another decision that will likely be overturned quickly by the Trump-appointed Board.

Key Takeaways

1. The full impact of the changes at the NLRB will not be felt until a majority of the Board has been appointed by Trump. Currently, the Board has only two members (at least three are required to issue decisions). However, as both the officer responsible for prosecution of cases before the Board and general supervision over all regional offices, the GC sets the agenda for issues and initiatives to be decided under the NLRA.
2. Under the current administration, the GC and the Board are likely to take a less intrusive, more "employer-friendly" role in reviewing employer conduct and policies such as handbook language, non-disparagement provisions in handbooks and settlement agreements, noncompetition and non-solicitation agreements, remedies for NLRA violations such as illegally discharging employees or bargaining problems with unions, and other issues.
3. Regardless of the labor law issues regulated by the NLRB under federal law, each state and, to a lesser extent, each local jurisdiction has its own labor and employment laws that apply unless "preempted" or superseded by federal law.

Employers should consider consulting a labor and employment attorney to ensure compliance with the increasingly complex web of federal, state, and local labor and employment laws.

This client alert was prepared by Michael Belo, an attorney in the Denver, Colorado office of Spencer Fane. For more information, please visit www.spencerfane.com.

*Click **here** to subscribe to Spencer Fane communications to ensure you receive timely updates like this directly in your inbox.*