New General Counsel Memo Highlights Key NLRB Priorities, Areas for Employer Caution

August 17, 2021

Key Points

- On August 12, 2021, the National Labor Relations Board's (NLRB) recently appointed General Counsel issued a memorandum requiring reexamination of labor law doctrine in several key areas.
- The memorandum is important because it signals a new direction for the NLRB in the Biden-Harris administration. A change in the legal landscape could expand the circumstances in which businesses risk union organizing and litigation for unfair labor practices under the National Labor Relations Act (NLRA).
- The memorandum has significant implications not just for employers with unionized workforces, but for nonunionized employers, including companies that use independent contractors, franchisors and private equity firms in regard to their relationships with portfolio companies.

On August 12, 2021, the NLRB's newly-confirmed General Counsel issued a memorandum flagging several workplace issues for reexamination. The memorandum requires the NLRB's Regional Directors to submit these issues to the "Advice Branch" to determine whether to prosecute employers that may otherwise be in compliance with existing law. Prosecutions over these issues could shift precedents and expand application of the NLRA, affecting both union and non-union employers.

By way of background, the NLRA gives employees the right to join together to bargain collectively with their employers. It also seeks to secure for employees the liberty to join unions—and not to join unions. In seeking to balance these sometimes competing objectives, Congress provided the NLRB an enforcement regime to police employers and unions so that they may not restrain or coerce employees into engaging in protected activities.

Unlike most federal agencies that announce and implement new rules through the notice-and-comment rulemaking process, the NLRB has historically issued new rules through the adjudication of individual cases.[1]

Contact Information

If you have any questions concerning this alert, please contact:

Bob Lian
Partner
blian@akingump.com
Washington, D.C.
+1 202.887.4358

James C. Crowley
Counsel
jcrowley@akingump.com
Washington, D.C.
+1 202.887.4579

While the law can change in unanticipated ways, the NLRB General Counsel enforcement priorities often foretell a change in direction. The August 12, 2021 General Counsel memorandum signals the potential for changes in the following critical areas:

- *Employees and independent contractors*: Companies often face challenges in answering what might seem like a basic question—is a worker the employee of that company? In many industries, the answer turns on whether a worker is properly classified as an independent contractor. The legal standard used by the NLRB has significant implications for businesses that rely on contracted workers. A broader legal standard could render companies liable for workers over whom they previously had little control, and subject them to the type of economic pressure that the NLRA normally forbids.
- *Employer handbook rules and policies*: An employer can be found to have committed an unfair labor practice simply by maintaining a handbook rule that constrains NLRA-protected activity. In 2017, the NLRB attempted to find a middle ground in Boeing Company, 365 NLRB No. 154 (2017). In that case, the Board adopted a test for balancing employee rights with employer business justifications for handbook rules. Older tests asked only whether employees would read rules to prohibit NLRA-protected activity. Among other things, a change in precedent could strike down confidentiality rules, non-disparagement rules, social media rules, media communication rules, civility rules, offensive language rules and no-camera rules. For example, even nonunionized companies may face challenges at the NLRB if they have confidentiality policies that require employees to refrain from discussing salary structures, organizational charts, employer business, financial data, and private information. Policies prohibiting disruptive conduct, insubordination, photography, offensive language and rude behavior may also be vulnerable to challenge.
- *Separation, non-disparagement, and confidentiality agreements*: In recent years, the NLRB has upheld confidentiality and non-disparagement clauses in separation agreements. This includes clauses prohibiting departing employees from participating in claims brought by third parties against the employer. A change in precedent could make these clauses unenforceable. For instance, new precedents may challenge release agreements that prohibit disclosure of settlement terms or arbitration agreements that restrict sharing evidence or awards beyond the arbitration proceeding. Non-disparagement agreements also may be vulnerable to challenge if they prohibit employees from making any public statements detrimental to the business or reputation of the employer.
- *Confidential investigations*: In Apogee Retail LLC d/b/a Unique Thrift Store, 368 NLRB No. 144 (2019), the NLRB upheld an employer's right to require confidentiality during workplace investigations. A change in precedent could require disclosure of investigations, even in sensitive areas, such as sexual harassment claims.
- *Protected concerted activity and off-duty activities*: To be protected by the NLRA, employees usually must act in "concert." What rises to the level of concerted activity is sometimes disputed, but, at a minimum, it must impact employees' collective interests in the terms and conditions of their employment. A change in precedent could broaden the scope of protected activity to cover a variety of societal issues, such as off-duty political activities and protests—not just working conditions.

- *Electronic media and email*: In Rio All-Suites Hotel and Casino, 368 NLRB No. 143 (2019), the NLRB held there is no right to use an employer's email system for concerted activity. New precedents could open email and other electronic media to union organizing.
- *Union access*: Employers are generally permitted to exclude off-duty workers from their property. A change in precedent could require union access when these workers seek to engage in concerted activity.
- *Union dues*: Unionized employers often cease deducting union dues when collective bargaining agreements expire, thereby affecting the inflow of money to the union. A change in precedent could put that practice in peril.
- *Weingarten rights*: Since NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), unionized employees could be accompanied by a union representative at investigatory meetings in the workplace. New precedent could expand that right to cover nonunionized workers and all assortment of meetings between employers and employees.
- *Religious institutions*: The NLRB has declined to take jurisdiction over most religious institutions. If the NLRB changes course, many religious institutions could become vulnerable to union organizing.

What does this mean for businesses covered by the NLRA?

The legal standards used by the NLRB have significant implications for businesses that rely on workers of any kind. The General Counsel's memorandum targets issues important to employers with unionized workforces as well as nonunionized employers, companies that use independent contractors, franchisors and private equity firms in their relationships with portfolio companies. While not binding authority, the memorandum challenges legal precedents that strike a balance between employee rights and management interests, increasing the risk of litigation for unfair labor practices.

The memorandum also follows closely behind the Protecting the Right to Organize Act ("PRO Act")—a proposed law that would expand various labor protections, which has foundered in Congress. In providing an agenda for future cases at the NLRB, the memorandum signals a roadmap for implementing some of the PRO Act's goals without the need for Congressional approval. Chief among them is an expansion of many companies' obligations to bargain with contracted workers. For instance, a broader definition of "employee" under the NLRA would not only subject many businesses that work with contractors to union organizing, but it also would limit the types of workplace policies these businesses could maintain.

The General Counsel's agenda will inevitably face challenges in court and those priorities will not inevitably become law. Nevertheless, the agenda highlights the critical need for companies to be vigilant in watching for signs of union organizing efforts, maintaining open and strong communications with workers, and having lawful workplace policies. The memorandum also is a reminder of the need for employers that have not traditionally thought of the NLRA as a source of regulation of their workplace activities to be mindful of ways in which the NLRA could potentially be implicated by company activities in the various areas described above and elsewhere.

[1] The outcome of those cases impacts not just the litigants, but other employers as well. While the NLRB is free to make new rules of broad application through such adjudications, its decisions must be principled and

reasonable. Despite this requirement, the NLRB approach to important legal issues tends to shift based on the party that controls the White House, making it difficult for companies to avoid unfair labor practices. With changes in the administration, the NLRB often changes its rules mid-stride, notwithstanding decades of settled law to the contrary. Months, sometimes years, after employers have adopted workplace policies, the NLRB will invoke its new rules to conclude the policies were unlawful. While employers may seek judicial review of these decisions, a final resolution could take years.

akingump.com