On August 12, 2021, Jennifer A. Abruzzo issued her first memorandum as newly
The sworn National Labor Relations Board ("NLRB" or "Board") General Counsel. The memo, Mandatory Submissions to Advice, Memorandum GC 21-04 ("GC Memo 21-04"), serves as a road map of the new General Counsel’s plans and her intent to depart from the priorities of her predecessor, Peter Robb, and to target cases and initiatives from the Trump Board that overruled the precedent from the Obama Board. As we have previously reported, President Biden, on the day of his inauguration, took the unprecedented step of firing Mr. Robb from the General Counsel position, a clear indicator of his intention for a significant change in direction for the NLRB to a more union-friendly agenda.

On August 19, 2021, one week after setting forth her pro-union agenda, the General Counsel issued a second memo, Utilization of Section 10(j) Proceedings ("10(j) Utilization Memo"), stating her intention to "aggressively seek" federal court interim injunction relief under Section 10(j) of the National Labor Relations Act ("NLRA" or "Act") to help give teeth to her enforcement priorities. Section 10(j) of the Act authorizes the NLRB to seek temporary injunctions against employers and unions in federal district courts to stop unfair labor practices ("ULPs") while the ULP allegations are being litigated before administrative law judges and the Board.

GC Memo 21-04 consists of three distinct sections, each addressing a separate aspect of the General Counsel’s priorities and instructions to the NLRB’s Regional Directors and staff. The first section identifies 11 categories of cases in which the General Counsel seeks to present a new Democratic majority Board with the opportunity to reverse recent Trump-era holdings. The second section identifies other initiatives and areas that, while not necessarily the subject of a more recent Board decision, are nevertheless ones the General Counsel would like to carefully "examine." The third section identifies other case handling and related issues that the agency’s Regional Offices have traditionally submitted to the Division of Advice for guidance.

In these issuances, the new General Counsel has identified at least 40 Board decisions and principles that she would like to “carefully examine” and undo. The General Counsel cautions readers in a footnote that more changes will come: “[T]here are many important cases and issues not included in this initial memo; I fully expect that this memo will be supplemented at some point in the future to include other important issues, as well as refinements.”

The 10(j) Utilization Memo, calling for more aggressive use of what has been considered to be a tool for use in extraordinary matters, is likely to be but the first in what is expected to be an aggressive agenda by the new General Counsel.

**Cases Involving Board Doctrinal Shifts**

In the first section of GC Memo 21-04, the General Counsel identifies 11 broad categories of Board cases, which are referred to as “doctrinal shifts,” where the Trump Board “overruled many legal precedents which struck an appropriate balance between the rights of workers and the obligations of unions and employers.” Those topics targeted for review include the following:

- **Employers Should Expect More Restrictive Employee Handbook Rules.** The Board’s 2017 decision on employer policies and handbooks in *The Boeing*
Company balanced an employer’s business justifications for a work rule with its effect on employees’ rights under the Act. The General Counsel is seeking to review that test and return to the Obama Board standard set out in Lutheran Heritage, where the Board determined that facially neutral work rules and policies would be deemed unlawful if the Board concluded that an employee could reasonably read the rule to prohibit or limit the exercise of their rights under Section 7 the NLRA. In GC Memo 21-04, the General Counsel specifically targets a wide array of common workplace rules that include, but are not limited to, rules concerning confidentiality, non-disparagement, media communications, and social media; civility rules; respectful and professional manner rules; offensive language rules; and rules restricting employee photography in the workplace.

- **Employers Should Expect More Restrictions Concerning Confidentiality Provisions in Separation Agreements.** According to GC Memo 21-04, separation agreements that contain confidentiality requirements and/or non-disparagement clauses and confidentiality rules governing workplace investigations are now subject to reexamination. Confidentiality in workplace examinations in particular is a concern in sexual harassment cases, and the new General Counsel’s position is at odds with the EEOC and common sense practices that encourage employers to maintain confidentiality in workplace investigations.

- **The General Counsel Will Pursue a Broader Definition of “Protected Concerted Activity.”** Section 7 of the NLRA guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” as well as the right “to refrain from any or all such activities.” Section 8(a)(1) of the NLRA, in turn, makes it a ULP for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7” of the Act. Activity is “concerted” if it is engaged in with or on the authority of other employees, including where a single employee seeks to initiate group action or brings a group complaint to the attention of management. The General Counsel seeks to expand what the Board considers protected concerted activity and appears to have adopted the controversial March 31, 2021, memo issued by then-Acting General Counsel Peter Sung Ohr, whom Ms. Abruzzi has appointed as her Associate General Counsel. During his brief tenure as Acting General Counsel, Ohr also revoked 10 memos issued by former General Counsel Robb. The March 31 Ohr memo, which we previously blogged about, argued for an expansive broadening of the types of activities to be protected as “protected concerted activity” under Section 7 of the NLRA to include a wide host of political advocacy and social justice issues that may have, at most, an attenuated connection to employees’ workplace issues. The initiatives and changes of direction now outlined in GC Memo 21-04 and the 10(j) Utilization Memo build upon those initiatives.

- **The General Counsel Will Pursue Greater Employee Rights to Use Workplace Email and Communications Systems.** The General Counsel also seeks to review cases involving employees’ use of employer-sponsored e-mail
and other electronic platforms in the workplace systems to require employers to open up their systems to union organizing and employee communications. Additionally, the General Counsel wants to make it harder for employers to restrict employee conversations about unions while working. While the rules governing what is permissible employee solicitation on behalf of unions is generally well established, the General Counsel seeks to reexamine Board cases involving the distinction between what is considered union “solicitation”—e.g., convincing co-workers to sign union authorization cards—and “mere union talk,” which should not be distinguished from other permissible employee conversations while working.

- **The General Counsel Will Seek to Ease the *Wright Line*/General Counsel’s Burden in ULP Litigation.** In cases where an employer’s motivation for an employee’s discipline or discharge is at issue, the Board utilizes its long-established test under *Wright Line*. Under *Wright Line*, in a ULP hearing, the NLRB’s General Counsel must initially show that an employer imposed discipline or otherwise took an adverse action against an employee because of their Section 7 activity. If that threshold is met, an employer can defend its actions by showing that it would have taken the same action even in the absence of the Section 7 activity. In *Tschiaggfrie Properties, Ltd.*, the Board held that the General Counsel must show a connection or line between the employer’s alleged animus and the discipline involved. The General Counsel has now announced her intention to ask the Board to reexamine *Tschiaggfrie* and replace it with a new standard that would make it easier for the General Counsel to prove anti-union animus and pretext and more difficult for employers to defend against such claims.

- **The General Counsel Will Pursue Less Restriction on Abusive Language and Conduct.** The General Counsel has also now announced her intention to ask the Board to reexamine its decision in *General Motors LLC*, 369 NLRB No. 127 (2020), which rejected the notion that abusive language must be tolerated in furtherance of Section 7 rights. The Obama Board previously allowed employees substantial leeway and protected so-called intemperate employee outbursts and other abusive conduct if they occurred in the context of an employee exercising their Section 7 rights, such as during a strike or on a picket line.

- **The General Counsel Intends to Seek Greater Remedial Authority in ULP Cases.** Another area where the new General Counsel seeks to makes changes concerns the settlement of ULP charge complaints. GC Memo 21-04 indicates employers may no longer be able to settle Board cases where the employee is willing to waive reinstatement in exchange for a cash settlement.

- **The General Counsel Will Pursue Greater Union Access to Employer Property for Unions.** The General Counsel proposes to expand the access rights of outside unions to an employer’s private property for organizing and other purposes. For example, employers that permit nonprofit groups, such as Girl Scouts selling cookies on their property, would no longer be exclude non-employee union organizers from their property.

- **The General Counsel Will Seek to Reduce Management Rights When**
Contracts Expire. Under long-standing Board precedent, dues check off are solely a creature of a union contract, meaning that once a collective bargaining agreement has expired, typically while an employer and union are negotiating a new contract or an extensions, employers have the legal right to cease withholding dues from employees’ paychecks and remitting them to the union. This right can be a powerful tool for an employer seeking to negotiate terms. GC Memo 21-04 indicates that the new General Counsel will seek an appropriate case to present to the Board to ask it to reverse this and to hold that an employer must continue to withhold and remit dues even after a contract has expired. This is just one of a number of ways in which the General Counsel will seek to shift the balance in collective bargaining in favor of unions.

• The General Counsel Will Seek a Broader Definition of Employee Status. Independent contractors are in the General Counsel’s crosshairs. GC Memo 21-04 indicates that the General Counsel will ask the Board to adopt a new definition of independent contractor that would result in many workers who are now not considered employees for purposes of the Act to be deemed employees. Notably, during the Obama administration, the General Counsel’s office argued that classification of a worker who it believed to be an “employee” as an independent contractor was itself a ULP.

• The General Counsel Will Seek to Exercise Broader Jurisdiction Over Religious Institutions as Employers. The General Counsel intends to seek to review and expand instances where religious institutions are subject to NLRB jurisdiction. Under existing precedents, the Board has long held that such institutions are not employers for purposes of the Act and their employees are not entitled to the Act’s protections.

• The General Counsel Plans to Seek to Expand Employer Duty to Recognize and/or Bargain with Unions. The General Counsel broadly wants to examine a host of Board cases addressing the duty to recognize and bargain with a labor union. Specifically, the General Counsel plans to examine whether an employer (i) is permitted to act unilaterally concerning matters that fall within the compass or scope of a management rights clause, or other contract provision; (ii) can withdraw recognition from a union when a majority of employees no longer desire representation; (iii) has taken an action consistent with a management rights clause after a collective bargaining agreement has expired; (iv) has claimed an “inability to pay,” thus triggering an obligation to provide the union with access to the employer’s financial records; (v) is required to make increased contributions to medical and other benefits funds after a collective bargaining agreement has expired; (vi) is required to bargain over disciplinary action against newly represented employees before a collective bargaining agreement has been negotiated; (vii) refuses to provide the union with information related to customer complaints. The General Counsel also seeks to review when to impose the affirmative remedy of a bargaining order as a remedy for ULPs where a union has not won a representation election.

• The General Counsel Intends to Cut Back on Deferral to Arbitration. The General Counsel seeks to make it harder to defer to the arbitration process
where the case involves an alleged ULP.

**Other Areas and Initiatives**

In addition to targeting the specific areas outlined above, the new General Counsel has indicated in the second section of GC Memo 21-04 that the areas listed below, while not necessarily the subject of a more recent Board decision, are nevertheless ones that she plans to “carefully examine.”

- **Misclassification as an Independent Contractor as a ULP and Other Issues Concerning Employee Status:** Cases addressing whether (i) employer misclassification of an employee as an independent contractor, standing alone, violates the Act; (ii) individuals with disabilities working in a rehabilitative setting are deemed employees; and (iii) union “salts” are employees because they are not truly interested in working for the employer.

- **An Expansion of “Weingarten Rights” to Unrepresented Employees:** The issue of whether “Weingarten Rights” applies in a non-union setting has significant implications for employers because it allows employees who are subject to discipline to introduce a union to an employer setting employer where the employees have not elected to have a union represent them for collective bargaining. The General Counsel also wants to review and extend the union’s right to obtain a pre-interview right to review information pertaining to a subsequent interview.

- **National Mediation Board vs. NLRB Jurisdiction:** The General Counsel wants to reexamine the jurisdictional standards and coverage between the NLRB and the National Mediation Board, which has jurisdiction over the airline and railroad industries;

- **Employer Duty to Recognize and Bargain with a Union:** The General Counsel has indicated an intent to target cases in which employers are alleged to have engaged in “surface bargaining” and/or a refusal to furnish information in the context of a plant relocation under *Dubuque Packing*, and overturning *Shaw’s Supermarkets, Inc.*, which permits mid-term withdrawals of recognition after the third-year of a contract.

- **Employees’ Section 7 Rights to Strike and/or Picket:** The General Counsel’s has her sights on limiting (i) an employer’s right to permanently replace economic strikers, (ii) what the Board considers an illegal intermittent strike, (iii) what is considered a strike with an unlawful secondary object, and (iv) an employer’s right to unilaterally set terms and conditions for strike replacements.

- **Remedies and Compliance:** The General Counsel has indicated that she will seek greater relief for employees terminated or disciplined in cases involving construction industry applicants and union salts, i.e., union employees who take jobs with the intent of “organizing from within” an employer’s workforce, by limiting such discriminatees’ obligation to conduct an “adequate search” for interim employment.
Employer Interference with Employee’s Rights: The General Counsel has indicated that she will ask the Board to hold statements by an employer during an organizing campaign that imply employees access to management will be limited if a union is voted in, involving an employer’s threat to close a plant where there is little evidence the threat was disseminated to other employees, and the promulgation of a mandatory arbitration agreement in response to employees engaging in collective action, to be ULPs.

Enhanced Use of Section 10(j) Injunctive Relief

Under Section 10(j) of the Act, the Board can seek authorize the General Counsel to seek injunctive relief as an interim remedy against an alleged ULP when the General Counsel, on behalf of the Board, convinces the court that (i) there is reasonable cause to believe that a ULP has been committed or there is a likelihood of success on the merits in a ULP proceeding, and (ii) issuing such an injunction is just and proper. Under the first prong of this standard, the courts give the NLRB considerable deference to its belief that a violation has occurred, and frequently rely on a very limited evidentiary record in finding reasonable cause/likely success on merits. The second prong of this test looks to see whether remedial failure is likely if the court does not grant the injunction. If ordered, injunctions can require employers and unions to refrain from certain actions (such as refraining from interfering with employees’ Section 7 rights) to take certain affirmative actions (such as requiring employers to reinstate employees or to bargain with a union even if the union did not win an NLRB representation election). In practice, the pursuit of Section 10(j) injunctive relief has been quite limited throughout the history of the NLRA.

The 10(j) Utilization Memo signals that the current General Counsel will seek to pursue injunctive relief on a much broader basis than has been the case to date. The memo suggests that the General Counsel intends to target the following types of cases as warranting consideration for Section 10 (j) relief: (i) cases involving discharges from employment during union organizing campaigns; (ii) charges alleging other ULP violations during organizing campaigns that lead to a need for a Gissel bargaining order, that is where the General Counsel alleges that the employer’s alleged ULP conduct will prevent the holding of an election in which employees can vote freely; (iii) charges alleging failure to bargain in good faith and other violations following a union’s certification as the bargaining representative, when parties should be negotiating an initial collective bargaining agreement; (iv) cases involving allegations of unlawful withdrawals of recognition from incumbent unions; and (v) cases involving a successor’s refusal to bargain and/or refusal to hire. According the 10(j) Utilization Memo, pursuit of Section 10(j) injunctions should all be considered when the Regional Offices believe there is a threat of remedial failure—that is, a Board Order after a ULP hearing and review by the Board will be too little or too late. According to the memo, the General Counsel is now urging the Board’s Regional Offices to examine all ULP charges as potential candidates for Section 10(j) relief at the earliest stages of the litigation.

The General Counsel’s stated intent to aggressively seek Section 10(j) relief is a stark departure from the Trump Board and a return to the approach of the Obama Board, which sought 10(j) relief on a more frequent basis than prior administrations. See the Board’s 10-year record in seeking Section 10(j) injunctive relief. (The Board
sought eight Section 10(j) authorizations in 2020 and 13 in 2019; the Board under Obama sought 37 Section 10(j) injunctions in 2017.

Conclusion

GC Memo 21-04 and the 10(j) Utilization Memo signal that substantial changes are taking place at the NLRB as the agency seeks to put teeth to President Biden’s promise to be the most pro-union President in history. Employers can no longer expect that the precedent established under the Trump Board will stand and will protect them from union organizing, strikes, or other concerted activities by employees or from ULP charges.

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