A recent memorandum released by National Labor Relations Board (Board) General Counsel Jennifer Abruzzo previews a Biden-appointed Board’s agenda and priorities. In the August 12, 2021 “Mandatory Submission to Advice” memorandum, General Counsel Abruzzo identifies three types of cases and subject matter areas that the General Counsel would like to “carefully examine.” These three types of cases and subject matter areas include: (1) cases where the Trump-appointed Board overruled past Board precedent, (2) “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,” and (3) “case handling matters traditionally submitted to Advice.” Accordingly, General Counsel Abruzzo has instructed the Board’s Regional Directors to seek advice for cases that fall into these three categories.
The below summarizes a portion of the cases and/or subject matter areas that General Counsel Abruzzo has instructed must be submitted to Advice. This list is telling because it not only identifies what decisions a Biden-appointed Board is likely to overturn from the previous administration, but also telegraphs what aspects of Board law a Biden-appointed Board may seek to change.

Cases Involving Board Doctrinal Shifts:

- Employer work rule cases – General Counsel Abruzzo wishes to reassess the Trump-appointed Board’s decision in *The Boeing Co.*, 365 NLRB No. 154 (2017), which set forth a new and more employer-friendly test for analyzing whether an employer’s facially neutral work rules violate the NLRA.

- Confidentiality/separation agreement cases – General Counsel Abruzzo also indicated the Board wishes to reexamine several decisions under the previous administration concerning an employer’s instruction to employees regarding confidentiality in investigations and including confidentiality provisions in separation agreements.

- Employees’ rights to use employer’s e-mail system – The Board’s decision to overturn *Purple Communications*, 361 NLRB 1050 (2014), which governed the rights of employees’ to use their employer’s email systems to engage in protected activity, will also be reexamined by General Counsel Abruzzo.

- Employer’s right to discipline for abusive conduct – General Counsel Abruzzo also wishes to reexamine the Board’s decision in *General Motors*, 369 NLRB No. 127 (2020), which overturned previous Board decisions concerning the right of employers to discipline employees for engaging in abusive, racist, and inappropriate workplace conduct.

Other Areas/Initiatives of a Biden-appointed Board

- *Weingarten* – General Counsel Abruzzo wishes to examine the Board’s decision in *Weingarten* and whether non-unionized employees should be entitled to *Weingarten*

- Employee classification – General Counsel Abruzzo wishes to reassess the Board’s decision in *Velox Express, Inc.*, 368 NLRB No. 61 (2017), which held the misclassification of employees as independent contractors does not violate the NLRA.

- Strike/picket issues – Various issues concerning employees’ rights to strike, picket, and an employer’s right to replace employees who strike.

General Counsel Abruzzo’s memo makes clear that employers should be prepared for a dramatic change to Board precedent over the coming years. We will continue to update you with new developments as these changes are implemented.