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The NLRB: A Farewell to Many Trump Administration Policies

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As anticipated Acting General Counsel Peter Sung Ohr took no time to rescind a significant number of General Counsel Memoranda issued by former General Counsel Peter Robb during the Trump Administration.

In a February 1, 2021, Memorandum (GC 21-02), Acting General Counsel Peter Sung Ohr reiterated the purpose of the National Labor Relations Act stating, "[s]ection 1 of the Act makes clear that the policy of the United States is to encourage the practice and procedure of collective bargaining and to protect the exercise by workers of their full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment."

With that purpose in mind, the Acting General Counsel found that many of the current General Counsel Memoranda were either inconsistent with the aforementioned policy and/or NLRB law, or that they were no longer necessary.

The following General Counsel Memoranda were rescinded:

- GC 18-04, *Guidance on Handbook Rules Post-Boeing* (June 6, 2018) (instructing Regions on the placement of various types of employer rules into the three categories set out in the then-recent Board decision in *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017)). Note that this Memorandum is being rescinded as it is no longer necessary, given the number of Board cases interpreting *Boeing* that have since issued.

- GC 18-06, *Responding to Motions to Intervene by Decertification Petitioners and Employees* (Aug. 1, 2018) (requiring Regions to no longer oppose intervention in ULP hearings by proposed Intervenors such as individuals who have filed a decertification petition or circulated a document upon which the employer has unlawfully withdrawn recognition of the collective-bargaining representative). Note that the approach reflected in GC 18-06 is inconsistent with prior practice.

- GC 19-01, *General Counsel's Instructions Regarding Section 8(b)(1)(A) Duty of Fair Representation Charges* (Oct. 24, 2018) (seeking change in Board law to require unions raising a "mere negligence" defense to a DFR allegation concerning a union's grievance handling to establish the existence of established, reasonable procedures or systems in place to track grievances; classifying a union's failure to communicate grievance decisions and/or respond to a grievant's inquiries as arbitrary conduct rather than "mere negligence").

- GC 19-03, *Deferral under Dubo Manufacturing Company* (Dec. 28, 2018) (instructing Regions to defer under *Dubo* [142 NLRB 431 (1963)], or consider deferral thereunder, of all Section 8(a)(1), (3), (5) and

8(b)(1)(A), and (3) cases in which a grievance was filed and not to apply *Babcock & Wilcox Construction Co*. 361 NLRB 1127 (2014) ("Babcock") to cases that could be deferred under *Dubo*). Since *Babcock* was overruled by *United Parcel Services. Corp*., 369 NLRB No. 1 (Dec. 23, 2019), GC 19-03 is outdated. To the extent the memorandum made changes to case handling procedures relating to the deferral of cases under *Dubo*, Regions should follow Section 10118.1(c) of the Unfair Labor Practice Casehandling Manual and the memoranda cited therein.

- GC 19-04, *Unions' Duty to Properly Notify Employees of Their General Motors/Beck Rights and to Accept Dues Checkoff Revocations after Contract Expiration* (Feb. 22, 2019) (requiring Regions to urge the Board to overturn *Food & Commercial Workers Local 700 (Kroger Limited Partnership)*, 361 NLRB 420 (2014) and to adopt the D.C. Circuit's holding in *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000) requiring unions to provide the reduced amount of dues and fees for dues objectors in the initial Beck notice; requiring Regions to urge the Board to overturn *Frito-Lay*, 243 NLRB 137 (1979) and limit dues authorization window periods; finding unions' certified mail requirements unlawful; and mandating certain union communications with employees concerning untimely revocation requests).

- GC 19-05, General Counsel's *Clarification Regarding Section 8(b)(1)(A) Duty of Fair Representation Charges* (Mar. 26, 2019) (relating to GC 19-01).

- GC 19-06, *Beck Case Handling and Chargeability Issues in Light of United Nurses & Allied Professionals (Kent Hospital)* [367 NLRB No. 94 (Mar. 1, 2019)] (Apr. 29, 2019) (instructing Regions investigating agency fee objector cases to require unions to provide detailed explanations of the union's chargeability decisions for each major category of expenses and the method used to determine the portion of expenses chargeable in mixed expenditure categories instead of requiring objectors to explain why an expenditure is nonchargeable; requiring unions to categorize lobbying expenses as nonchargeable and to account for any other secondary costs used to support its lobbying activities; finding no amount *de minimis*).

- GC 20-08, *Changes to Investigative Practices* (June 17, 2020) (instructing Regions on how to proceed during investigations in connection with securing the testimony of former supervisors and former agents, and how audio records should be dealt with during investigations). Note that this Memorandum is being rescinded because portions are inconsistent with prior practices. Regions should continue to not accept recordings that violate the Federal Wiretap Act and to apprise individuals who proffer recorded evidence when it may violate state law.

- GC 20-09, *Guidance Memorandum on Make Whole Remedies in Duty of Fair Representation Cases* (June 26, 2020) (instructing Regions to urge the Board to overrule *Ironworkers Local Union 377* (Alamillo Steel), 326 NLRB 375 (1998) and adopt an "arguable merit" standard that reverses the burdens of proof and imposes full liability on a union for its grievance-handling absent the union establishing that the grievance lacked merit).

- GC 20-13, *Guidance Memorandum on Employer Assistance in Union Organizing* (Sept. 4, 2020) (requiring Regions to urge the Board in charges involving union neutrality agreements to adopt the "more than ministerial aid" standard used in union decertification cases).

Consistent with Acting General Counsel Ohr's February 1, 2021, promise that additional new policies would be issued soon, on February 2, 2021 the NLRB rolled back two Operations-Management

Memoranda issued by the Trump-era NLRB. (OM 21-04) The following OM Memoranda have been rescinded:

- OM 19-05 *Noting Respondents Failure to Cooperate with ULP Investigations in Subsequently Issued Complaints* (Mar. 13, 2019). Regions should continue to solicit and encourage charged party cooperation with unfair labor practice investigations, including use of investigative subpoenas when appropriate. Going forward, charged party cooperation or lack thereof should not be included in complaints. Regional Directors maintain full discretion to issue pre-complaint investigative subpoenas consistent with Case Handling Manual Section 11770.

- OM 20-06 *Outreach, Speaking Engagements, and Recruiting Activities* (Jan. 16, 2020). (Creating certain approval requirements for field staff members to engage in certain activities). Outreach, speaking engagements, and recruiting activities continue to be priorities. Going forward, Regional Directors or their designees will make determinations as to which staff members will perform each of these functions. An updated OM memorandum will issue in the near future addressing the need for more vigorous outreach, especially to the non-traditional labor communities.

Employers should be prepared for the significant changes resulting from these rescinded directives and the ones surely to follow.

Roetzel will continue to monitor developments in this area. For more information and insight on this matter, please contact one of the listed Roetzel attorneys.

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