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Blog Post

# Prepare Now for Anticipated Labor Law Changes in 2022

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General Counsel Jennifer Abruzzo of the National Labor Relations Board continues to make waves as she shares with employers, unions, and workers alike, her views on hot button issues at the NLRB. During Abruzzo's remarks at the American Bar Association Section of Labor and Employment Law Conference last month, Abruzzo went beyond the guidance provided by her office in GC Memo 21-03 (concerning what constitutes protected activity under the National Labor Relations Act (the Act)), GC Memo 21-07 (concerning full remedies in settlement agreements), and GC Memo 12-08 (concerning whether student athletes enjoy statutory rights under the Act), and delineated in greater detail her expansive views on employee rights under the Act, and her prosecutorial agenda. Abruzzo's broad interpretation of what the Act protects and prohibits, coupled with her intent to impose harsher remedies for unfair labor practice violations, mark trouble for private sector employers. Below is Akerman's list of the top ten anticipated labor law changes in 2022 and steps employers can take to mitigate risk of appearing before the NLRB.

**1. Educate/Train Your Managerial Workforce on How to Identify Protected Concerted Activity**

Section 7 of the Act grants employees the right to engage in "protected concerted activities," which is

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defined as concerted activities engaged in for the purpose of collective bargaining or other mutual aid or protection. Abruzzo has signaled that she will apply a very expansive view on what activities the Act will protect, particularly in areas involving common concerns like the COVID-19 vaccine, social justice issues, and political protests. It is more important than ever to empower your supervisors and managers to appropriately identify and respond to potential protected concerted activity episodes within the workplace.

**2. Conduct a Vulnerability Audit for Union Organizing Activity**

Union organizing efforts often arise after employees, in secret, share their workplace complaints with one another and solicit the assistance of a union to collectively address their complaints. With many employees still working and communicating remotely, along with increased discord among employees over employers' health and safety protocols related to COVID-19 and responses to social justice issues, employees and the unions have a prime opportunity and incentive to organize. Therefore, employers should proactively seek counsel's assessment of their vulnerabilities to organizing activity and dispel any unknown risks.

**3. Prepare Responses to Card Check/Voluntary Recognition Requests by a Union**

Abruzzo has signaled her desire to return to a previous line of Board cases that, if adopted by the Board, would require employers to recognize and collectively bargain with a union that has produced authorization cards that demonstrate a majority of the employees the union wishes to represent support the union unless the employer can produce evidence that casts a good faith doubt on the union's majority support. This extraordinary requirement would obliterate employees' rights to a NLRB conducted election to accurately determine whether a majority of employees the union seeks to represent

support the union. Further, Abruzzo has directed the regional offices to assess the facts of these cases, and where appropriate, seek to remedy an employer's failure to recognize a collective bargaining representative and bargain by imposing a bargaining order and/or making an employer pay employees the value of the representative's lost opportunity to bargain with the employer over terms and conditions of employment, using comparator evidence to monetize the cost of the lost opportunity. This concept marks an extraordinary departure from current Board law and places employers in a Catch-22 where they are either presented with a collective bargaining order or an obligation to preemptively engage in collective bargaining with a union that may not represent a majority of the bargaining unit employees. Employers experiencing any organizing activity should consult with counsel regarding the implications of a union request for recognition based on a card check.

**4. Have Labor Counsel Review Your Handbook Rules**

Abruzzo recently expressed her intention to seek a doctrinal shift related to the Board's jurisprudence concerning employer handbook rules, including confidentiality, non-disparagement, social media, media, communication, civility, respectful and professional manner, offensive language, and no camera rules. A labor counsel's review of your handbook policies can help employers work to circumvent potential conflict with the ever-changing NLRB view on lawful employer policies.

For example, while the current Board law allows employers to lawfully limit union and independent contractor access to employer properties, Abruzzo announced that she intended to seek a reversal of the current Board law. Employers interested in preserving their right to control access to their property should consult with counsel about measures they can put in place now.

### 5. Retain Counsel for Increased NLRB Litigation

Abruzzo continues to take an aggressive stance towards settlement that will inevitably result in increased litigation before the NLRB. Among other things, Abruzzo takes the following positions on settlement:

- The NLRB ***will not settle*** outstanding unfair labor practice charges ***for less than 100% of the backpay award*** an employee is owed.
- The NLRB ***will not include non-admissions clauses*** in Board settlement agreements, absent extraordinary circumstances.
- Board settlements ***may include admissions clauses*** where facts of case warrant inclusion.
- Board settlements ***may include a letter of apology*** from the wrongdoer.
- Board settlements may ***require employers to post a Notice of Rights*** in its workplace in addition to the traditional NLRB notice posting. The Notice of Rights informs employees of their rights under the Act to organize and bargain collectively with their employers and to engage in other protected concerted activity.
- The NLRB ***may require reinstatement of a qualified candidate of the Union's choosing*** if the subject of discrimination or retaliation is unable or unwilling to return to work for the employer.

Contact your labor counsel to assess your likelihood of prevailing in an unfair labor practice and better prepare the business and the leadership with current options in settlements if faced with NLRB litigation.

### 6. Develop a Response Plan to Employee Work Stoppages

The month of October 2021 in the labor world has been referred to as "Striketober," a time of year when over 100,000 workers from different industries

engaged in strike activity. Employees are increasingly engaging in workplace stoppages in forms of strikes, walkouts, and pickets to express their dissatisfaction with their terms and conditions of employment. The National Labor Relations Act protects certain strike activity of ***unionized and non-unionized workforces***, but employees' rights to strike have limits, and employers retain rights to continue their operations notwithstanding employee strikes. Developing a comprehensive strike response plan now will enable employers to limit the negative impact a work stoppage may have on business operations.

**7. Identify Whether/How Potential Labor Issues Will Affect Your Supply Chain**

We foresee a continued increase in employees in unionized and nonunionized workforces engaging in protected activities at the vendor level, which could mean disruptions. Businesses that rely on goods or services from vendors should consider identifying vendor alternatives in order to prepare for any potential vendor related labor issues that may affect business operations.

**8. Conduct an Internal Audit Regarding Employee Classifications/Review Your Independent Contractor Agreements**

The NLRB's General Counsel continues to seek to expand the definition of an employee entitled to NLRA rights and protection by seeking to restrict who is considered an independent contractor. She has taken the position that it is an independent violation of the NLRA for employers to misclassify their workers. Those employers with independent contractors or plans to incorporate independent contractors in their business models should have counsel review those agreements to increase their chance in upholding the initial business relationships in mind.

**9. Coordinate Your Legal Strategy Involving NLRB Issues that Overlap with the DOL, OSHA, FLSA, and/or EEOC**

The Biden Administration formed a White House Task Force on Worker Organizing and Empowerment, which is designed to use the weight of the entire federal government to protect and to encourage worker organizing and collective bargaining. The U.S. Department of Labor, Wage and Hour Division, Equal Employment Opportunity Commission, Occupational Safety and Health Administration, the Department of Homeland Security, and the NLRB, among others, are partnering with one another to protect the U.S. worker and immigrant population from discrimination, retaliation, and other workplace abuses. General Counsel Abruzzo also announced her belief that no tension exists between the NLRB and the EEOC, suggesting that certain controversial topics, such as an employee's use of racial epithets and slurs expressing a group complaint about perceived racially motivated hiring practices should remain protected by the Act, notwithstanding that such conduct arguably violates Title VII. Abruzzo also noted the NLRB's intolerance of employers that threaten to report immigrant workers to U.S. Immigration and Customs Enforcement in retaliation for their participation in NLRB proceedings and question employee witnesses about their work authorization or immigrant status during the course of an unfair labor practice hearing.

Employers should ask counsel for specific guidance on the potential interwoven implications between the NLRA and other laws enforced by other agencies.

**10. Educate University Leaders on the Evolving Legal Landscape of University Employees' Rights to NLRA Protection**

During the ABA conference, Abruzzo reiterated her view as expressed in GC Memo 21-08 that certain private sector university faculty, university students

and university student-athletes are employees under the NLRA entitled to enjoy the full panoply of rights afforded to employees under the Act, including the right to concertedly speak out about their terms and conditions of employment, or form, join or support a union. (See our blog post on GC Memo 21-08 here.) Specifically, Abruzzo referenced social justice activism among student-athletes and stated, "[a]ctivism concerning such racial justice issues, including openly supporting the Black Lives Matter movement, directly concerns terms and conditions of employment, and is protected concerted activity." Moreover, she reminded the audience of her position that she will consider pursuing a joint employer theory of liability to assert jurisdiction over the NCAA and an athletic conference, even if some of the member institutions are state institutions which are expressly excluded from the Board's jurisdictions.

To that end, Abruzzo expressed that the General Counsel's office will actively review cases in these specific areas, and if appropriate pursue changes to current Board law. If adopted, changes in these areas may impact private and public institutions. Therefore, universities should consult with counsel about how these developments can potentially shape their operations.

Contact your Akerman attorney for help with these and other labor law issues.

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