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# Trump's NLRB Break-Up: A Valentine's Day Shake-Up For Employers

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The Trump administration just made a significant move in reshaping federal labor law by beginning the process of undoing the labor policies put in place under the Biden administration. On February 14, 2025, National Labor Relations Board (NLRB) Acting General Counsel William Cowen issued General Counsel Memorandum 25-05 (GC 25-05), which rescinded 31 general counsel memoranda previously issued during the Biden administration.

Most importantly, GC 25-05 creates a blueprint for employers of the expected policy shifts to take place at the NLRB under the Trump administration. Although General Counsel memoranda are not laws themselves, they serve as published guidelines that express the NLRB general counsel's stance on interpreting and enforcing federal labor law, detail the lens through which the NLRB's regional offices will investigate unfair labor practice charges, litigate cases, and process representation petitions, and signal a larger shift in the Agency's enforcement priorities.

Among other things, Cowen abandons the Biden administration's previously debatable policies, including its expansive reading of protected concerted activity, its position that student athletes constitute employees under the National Labor Relations Act (NLRA), the view that certain non-

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competes and stay-or-pay provisions violate the NLRA, and its attempt to seek remedies above and beyond the NLRB's traditional make whole remedies. To boot, employers can expect additional forthcoming guidance from the Acting GC detailing his changes in agency operations, including case handling, investigations, seeking remedies and compliance, and interagency coordination, as well as his litigation priorities, particularly in the areas of 10(j) injunctive relief, and remedies under *Thryv v. NLRB* and *CEMEX Construction Materials Pacific, LLC v. NLRB*. Below is an in-depth look at the most consequential rescinded memoranda and the implications of the rescissions for employers and their business operations.

## Key Rescinded Memos and Their Implications

**Cowen Reinstates Key GC Memos from the Previous Trump Administration**
*The Rescission of GC Memo 21-02*

In February 2021, by GC Memorandum 21-02 (GC Memo 21-02), Deputy GC Peter Ohr rescinded several memoranda issued during the previous Trump administration. By rescinding GC Memo 21-02, Cowen reinstates a series of general counsel memoranda previously rescinded by Ohr. The reinstated memoranda provide immediate guidance to the public on how the NLRB's General Counsel's office will view employer handbook policies, investigate employee complaints concerning a union's breach of its duties under the NLRA, and assess employer conduct during a union organizing campaign. These memoranda include:

- GC 18-04, Guidance on Handbook Rules Post-Boeing (June 6, 2018);
- GC 18-06, Responding to Motions to Intervene by Decertification Petitioners and Employees (Aug. 1, 2018);
- GC 19-01, General Counsel's Instructions Regarding Section 8(b)(1)(A) Duty of Fair Representation Charges (Oct. 24, 2018);

- GC 19-03, Deferral under *Dubo Manufacturing Company* (Dec. 28, 2018);
- 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);
- 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)* (Apr. 29, 2019);
- GC 20-08, Changes to Investigative Practices (June 17, 2020);
- GC 20-09, Guidance Memorandum on Make Whole Remedies in Duty of Fair Representation Cases (June 26, 2020); and
- GC 20-13, Guidance Memorandum on Employer Assistance in Union Organizing (Sept. 4, 2020).

**Cowen Ends the NLRB's Overly Broad Interpretation of the Mutual Aid or Protection and the Inherently Concerted Doctrines**

*The Rescission of GC Memo 21-03 Effectuation of the NLRA Through Vigorous Enforcement of the Mutual Aid or Protection and Inherently Concerted Doctrines*

The NLRA protects employees who engage in protected concerted activities. To receive the Act's protection however, the conduct must be both (1) concerted, where it is engaged in with or on the authority of other employees, and not solely for an individual employee, and (2) for the purposes of mutual aid or protection. GC Memorandum 21-03 (GC Memo 21-03) outlined a policy whereby the Biden Administration NLRB GC expanded the definition of protected concerted activity by more broadly interpreting when certain individual employee conduct meets the "inherently concerted" doctrine test for the purpose of finding the conduct

protected under the NLRA and when an employee meets the "mutual aid or protection" doctrine test for purposes of meeting the second prong of the protected concerted activity test. Examples of conduct that the GC found to be protected concerted activity under such tests included a hotel employee's interview with a journalist about how earning the minimum wage affected her and employees like her, or a "solo" strike by a pizza-shop employee to attend a convention and demonstrate where she and others advocated for a $15-per-hour minimum wage. Employers largely scrutinized this reading of the NLRA as outside of the scope of the Act's protection.

With the rescission of this memo, Cowen reduces the scope of what the NLRB will consider protected concerted activity. Employers will likely find it easier to challenge individual employee conduct as unprotected under the Act moving forward.

**More Policy Changes Are Coming**
*The Rescission of GC Memo 21-04 Mandatory Submissions to Advice and GC Memo 23-04 Status Update on Advice Submissions Pursuant to GC Memo 21-04*

GC 21-04 required regional offices to submit certain types of cases to the NLRB's Regional Advice Branch for review and guidance. These cases included topics such as union dues, confidentiality provisions/separation agreements, and employee status. Cowen's rescission of this memo, along with GC Memo 23-04 (which narrowed the list of cases requiring advice submission), signals Cowen's preparation to make his litigation priorities known.

Employers can expect the NLRB to release new guidance outlining which case categories Cowen will prioritize. In addition to revisiting the Board's decisions in *Thryv* and *CEMEX Construction Materials Pacific, LLC*,we anticipate the Acting GC may revisit some of the issues flagged for consideration during the previous Trump administration by Former General Counsel Peter

Rob in GC 18-02, including what strike misconduct may cause employees to lose the protection of the Act, the interplay between Title VII and the NLRA, limits to the application of the successorship doctrine and overturning the unilateral change standard after contract expiration.

**Students Athletes Are Not Employees Under the NLRA, Says Cowen**
*The Rescission of GC Memo 21-08 Statutory Rights of Players at Academic Institutions (Student- Athletes) Under the NLRA*

A highly debated memo, GC 21-08, determined that college student-athletes should be classified as employees under the NLRA, granting them the right to unionize and collectively bargain with their universities.

Since the changeover in administrations, unions have actively sought to withdraw cases on this issue pending before the Agency in seeming anticipation of this policy shift. The rescission of this memo confirms that the Acting GC does not believe in the theory of employee status for student-athletes for the purpose of collective bargaining. Employers can expect to see potential challenges from athlete advocacy groups and unions seeking to represent student-athletes as employee-classified workers diminish, if not end completely, and less risk of widespread unionization in collegiate sports.

**It Just Became Easier to Settle an Unfair Labor Practice Allegation With the NLRB**
*The Rescission of GC Memo 22-06 Update on Efforts to Secure Full Remedies in Settlements*

Previously, under GC 22-06, the NLRB required full remedies in settlement agreements for unfair labor practices, ensuring that employees were made whole for any violations. It further directed the regional offices to be proactive in ensuring compliance with settlement agreements, including

enforcing default judgment provisions in the event of non-compliance.

The rescission of this memo offers employers more flexibility, as they no longer face pressure to include comprehensive remedies in settlement agreements. Employers may find it easier to negotiate settlements without the risk of being compelled to include costly or expansive remedy provisions.

**Employers Receive More Autonomy in Implementing Productivity Technology in Operations**

*The Rescission of GC Memo 23-02 Electronic Monitoring and Algorithmic Management of Employees Interfering With the Exercise of Section 7 Rights*

GC 23-02 addressed concerns over the increasing use of electronic monitoring by employers, including GPS tracking, keystroke logging, and other data-driven management tools. The memo suggested that such practices could interfere with employees' rights to engage in protected activities like unionizing or discussing workplace issues without much regard for the legitimate business uses prompting employers to invest in new technologies to increase productivity in the workplace.

With the rescission of this memo, the NLRB is less likely to pursue cases against employers based on the use of electronic monitoring where an employer can demonstrate a legitimate business purpose for the technology that doesn't overly restrict employees' ability to engage in activity protected under the Act. This means that employers may have more leeway in adopting monitoring practices and technologies that are necessary for and improve business operations without generating as much legal risk related to potential interference with employees' rights under the NLRA.

**Non-Disparagement and Confidentiality Clauses Are Back in Style**

*The Rescission of GC Memo 23-05 Guidance in Response to Inquiries About the McLaren Macomb Decision*

GC 23-05 provided guidance on the decision in *NLRB v. McLaren Macomb*, which ruled that broad non-disparagement and confidentiality clauses in severance agreements could violate employees' rights under the NLRA. The memo provided specific instructions to regional offices on how to interpret and apply this decision when evaluating severance agreements.

By rescinding this guidance, employers now have more freedom to draft severance agreements that include broader non-disparagement and confidentiality provisions without the fear of NLRB interference. While this may ease the process for employers, it could lead to new legal challenges regarding the enforceability of such clauses, as different courts may interpret the *McLaren Macomb* decision differently.

**Non-Compete Clauses Can Remain in Agreements After All**
*The Rescission of GC Memo 23-08 Non-Compete Agreements That Violate the NLRA and GC Memo 25-01 Remedying the Harmful Effects of Non-Compete and "Stay-or-Pay" Provisions That Violate the NLRA*

GC 23-08 previously argued that the proffer, maintenance, and enforcement of most non-compete agreements were likely unlawful under the NLRA, as they could deter employees from engaging in protected activities, like seeking better working conditions with another employer. Likewise, GC 25-01 further stated that most "stay-or-pay" provisions are likely unlawful under the NLRA and required employers to remedy any harmful effects on employees by rescinding such clauses and potentially providing additional compensation if necessary. The prior administration believed the harm of restrictive covenants was that these

provisions are “self-enforcing,” meaning employees may decide to forgo other opportunities so that they are not viewed as breaching any contractual obligations.

With these rescissions, the NLRB is signaling that it won’t aggressively pursue cases against employers enforcing restrictive non-compete and/or “stay-or-pay” clauses. Employers now have more freedom in structuring contracts with these provisions, although they should still exercise caution in doing so, and ensure compliance with state law requirements.

**Return to the Traditional View of a Make-Whole Remedy Is on the Horizon**
*The Rescission of GC Memo 24-04 Securing Full Remedies for All Victims of Unlawful Conduct*

GC 24-04 instructed NLRB offices to pursue comprehensive remedies for all employees affected by an employer’s unlawful conduct, even if they were not directly named in the original complaint. Further, it aimed at requiring employers to compensate affected workers for any pecuniary harm they experienced after being subject to violations of the NLRA.

Its rescission marks an anticipated return to the traditional make whole remedy employers will be responsible for paying to cure unfair labor practice violations. This change will undoubtedly reduce the scope of liability for employers, essentially reducing the financial burden of broad-based remedial actions, and ease the pressure on employers to compensate workers beyond traditional backpay and reinstatement remedies identified in complaints.

**Pursuit of Injunctive Relief Taking a Back Seat in Agency Priority**
*The Rescission of GC Memo 24-05 Section 10(j) Injunctive Relief and the U.S. Supreme Court’s Decision in Starbucks Corp. v. McKinney*

In the high-profile 2024 ruling, *Starbucks Corp. v. McKinney*, the U.S. Supreme Court made it more difficult for the NLRB to secure preliminary injunctions under Section 10(j) of the NLRA. The ruling required the Agency to meet a more rigorous four-part test to obtain such temporary relief in federal district court while cases are pending for adjudication before the NLRB.

The rescission of the memo suggests that the NLRB is backing off its espoused plans to use agency resources to continue to vigorously seek injunctive relief as temporary fixes for cases that have yet to be adjudicated by agency judges. This policy change may provide employers with more breathing room from premature enforcement of remedies where the NLRB has not yet found a violation under the NLRA.

**Cowen Prioritizes Protecting the Private Education Records of Student Workers**
*The Rescission of GC Memo 24-06 Clarifying Universities' and Colleges' Disclosure Obligations Under the NLRA and the Family Educational Rights and Privacy Act; GC Memo 24-06 Attachment*

This memo clarified the disclosure obligations for private universities and colleges when unions request student-employee information. It aimed to strike a balance between the NLRA and the privacy protections afforded to student records under the Family Educational Rights and Privacy Act (FERPA). While institutions couldn't refuse to comply with union requests solely due to FERPA concerns, they were expected to find ways to comply with both laws.

However, with the rescission of this memo, the NLRB is seemingly backing away from encouraging higher ed institutions to navigate this complex tension. Employers can now expect new guidance on this issue, but with an emphasis of protecting FERPA rights over pushing unions' access to student information.

**The Public Interest Is No Longer Prioritized in Private Settlement Agreements**
*The Rescission of GC Memo 25-02 Ensuring Settlement Agreements Adequately Address the Public Rights at Issue in the Underlying Unfair Labor Practice Allegations*

Previously, the NLRB scrutinized private settlement agreements reached between the underlying parties in unfair labor practice cases to ensure that they addressed the public rights at issue — essentially, ensuring that the private settlements did not solely serve private interests, but also broader worker rights.

Now, with the rescission of GC 25-02, the NLRB is signaling a return to a more flexible private settlement approach. We anticipate that employers will find it easier to reach and finalize private settlement agreements with parties who have filed unfair labor practices against them without facing as much oversight by NLRB regional offices and administrative law judges, who are no longer urged to further scrutinize private settlement agreements under public rights considerations.

## Looking Ahead: What's Next for Employers?

The rescission of these memos marks the beginning of what is likely to be a significant shift in labor law under the Trump administration. As Cowen noted in GC 25-05, not only will there be additional rescissions of memos from the Biden administration, additional policy changes and new memos are on the horizon.

While these changes offer a more employer-friendly approach, with a greater focus on reducing union influence and expanding employer flexibility in managing their workforce, employers should stay up-to-date as agency priorities continue to evolve and shift the landscape on workplace regulations, union activities, and labor dispute resolutions. The coming months will be crucial as employers

navigate this shifting terrain. Whether it's revisiting settlement strategies or adapting to new rules around electronic monitoring with the constant changes in Artificial Intelligence (AI), employers will need to be prepared for the potential impact of these changes. For any questions or guidance on what to expect from these memos or from the NLRB, consult your Akerman Labor and Employment attorney.

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