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Non-Union Employers Beware: The NLRB Pendulum is Pushed Pro-Union

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Employers that want to maintain non-union status must be aware of the significant and rapid shift of the NLRB toward pro-union positions. Everyone expected the NLRB pendulum to swing pro-union, but few observers expected the pendulum to be immediately and forcibly pushed as it has been. First was the prompt and unprecedented ousting of the General Counsel and Deputy General Counsel, and appointment of an extremely labor-friendly Acting General Counsel. Although the appointment of a pro-union General Counsel was expected, the speed with which the Acting General Counsel dispatched prior NLRB policy memoranda was the second surprise. The swift rescission of policy memoranda is likely just the tip of the iceberg.

NLRB policy memos are used to instruct Board investigators and lawyers on how to process certain cases, set enforcement priorities, and prepare cases to shape the Board's position on critical labor law interpretations. Acting General Counsel Peter Sung Ohr described the rescinded memos as either no longer necessary, or inconsistent with policies and/or Board law. It is important to note, however, that Ohr's actions do not alter existing Board precedent.

Some of the notable memos that were rescinded by Ohr are discussed below, but the primary takeaway

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is that the Biden Administration plans to scale back the Trump Administration's employer-friendly approach.

- GC 18-04, *Guidance on Handbook Rules Post-Boeing*, which provided instructions and guidance regarding the placement of various types of employment policies into three categories set forth in the Board's landmark *Boeing* decision. Ohr explained that this memo was being rescinded because it is no longer necessary given the number of Board cases interpreting *Boeing* that have been decided since the case was issued. The *Boeing* decision was much-lauded by employers. Ohr's rescission suggests the Biden Board will be more critical of employer policies that address employee workplace conduct.
- GC 18-06, *Responding to Motions to Intervene by Decertification Petitioners and Employees*, which instructed Regions to no longer oppose at or during unfair labor practice hearings timely motions to intervene filed by: (1) employees who have filed decertification petitions with a regional office and where the ULP proceedings may impact the validity of their petitions; and (2) employees who have circulated a document upon which the employer has unlawfully withdrawn recognition of the collective bargaining representative. The rescission of this Memo opens the door for Regions to oppose motions to intervene filed by employees at or during unfair labor practice hearings.
- GC 19-01, *General Counsel's Instructions Regarding Duty of Fair Representation Charges*, which required unions raising a "mere negligence" defense to a duty of fair representation charge to show they maintained reasonable procedures to track grievances, and classifying failure to respond to a grievant's inquiries as unlawful arbitrary conduct. Rescission of this memo makes it easier for

unions to defend charges that they failed to represent union members in their grievances.

- GC 20-08, *Changes to Investigative Practices*, which instructed the Regions on how to proceed during investigations in securing the testimony of former supervisors and agents and how audio records should be dealt with during investigations. Ohr stated that the guidance was rescinded because portions are inconsistent with prior practices, advising Regions to continue to not accept recordings that violate the Federal Wiretap Act and to apprise individuals who proffer recorded evidence when doing so may violate state law. We expect to see Regions resort back to prior practice, where Regions would likely not share information regarding the mere existence of a recording, much less play the recording for the charged party.
- GC 20-13, *Employer Assistance in Union Organizing*, which required Regions to urge the Board to adopt the "more than ministerial aid" standard in charges involving union neutrality agreements in order to harmonize this with other areas of Board law, clarify ambiguity, and better protect employee free choice. The rescission of this memo indicates that any employer assistance to employees in their decertification efforts beyond "ministerial aid" will likely be found unlawful.
- OM 19-05, *Respondents' Failure to Cooperate with ULP Investigations in Subsequently Issued Complaints*, which provided that Regions could include facts related to Charged Party cooperation in complaints. Ohr's rescission explains that going forward, Charged Party cooperation or lack thereof should not be mentioned in complaints issued by Regional Directors.

Employers should expect further guidance from Ohr, who has stated that he plans on issuing memoranda setting out new policies "in the near future." Employers will need to closely monitor new guidance and policies under the Biden

Administration, as changes will be swift and broad. As always, Akerman attorneys will continue to monitor changes in NLRB guidance and policies. For any labor or workforce concerns, contact your Akerman labor attorney for further information and guidance.
