NLRB GC Memos Complicate Labor Law Compliance

By **Daniel Johns** (May 10, 2023)

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Recent years have seen various general counsel of the National Labor Relations Board increasingly issue memoranda that outline their views on significant labor law issues, as well as their enforcement priorities for their time in office.

While these memos do not hold the force of law, they do present a conundrum for lawyers practicing in this area. It can be difficult enough to give advice based on nuanced factual scenarios when the laws are known, but difficulties compound when the laws are projected to change based on NLRB prognostication of what the law should be or is likely to become.

The actions of current NLRB General Counsel Jennifer Abruzzo raise just that concern.

Abruzzo has issued memos covering a wide range of issues, both settled and unsettled, related to employee and employer rights under the National Labor Relations Act. She issued her first memo outlining such issues in August 2021.[1] After explicitly stating that the list of issues mentioned in the memo was not exhaustive, Abruzzo went on to outline more than 60 areas where she potentially was looking to overturn board precedent or change the direction of NLRB law.

The memo addressed a variety of issues important to employers, including employee handbooks, employee use of employer email systems to solicit on behalf of unions, union access to employer property, independent contractor misclassification and deferral of board issues to arbitration. It is not an exaggeration to state that the 2021 memo left almost no area of NLRB law untouched, from the standpoint of what Abruzzo sought to change and address during her tenure.

Abruzzo updated the memo this March.[2] In her update, she identified 15 issues for the NLRB regional offices to submit to the Division of Advice for further guidance on how to proceed regarding each of those issues.

Some subjects are significant enough that Abruzzo issued a full memorandum addressing only that particular matter. For example, on Oct. 31, 2022, Abruzzo issued a memo, "Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights."[3] In it, Abruzzo stated her intention to

> urge the Board to apply the Act to protect employees, to the greatest extent possible, from intrusive or abusive electronic monitoring and automated management practices that would have a tendency to interfere with Section 7 rights.[4]

Abruzzo then went on to identify a number of technological issues that she would regard as violating the NLRA, even if the NLRB has yet to rule accordingly. Examples include using artificial intelligence to screen job applicants, constant electronic surveillance and management of employees, and disciplining "employees who concertedly protest workplace surveillance or the pace of work set by algorithmic management."[5]

Again, these statements represent Abruzzo's views of where the law should go, not where it

currently resides.

Some areas in which Abruzzo has stated her intention to change the law are not based upon new technological advances. In an April 2022 memo, "The Right to Refrain from Captive Audience and Other Mandatory Meetings," Abruzzo announced her intention to reverse approximately 75 years of law that allowed employers to hold captive audience employee meetings to address unionization campaigns.[6]

As the memo acknowledges, the board's decisions allowing such meetings date back to 1948.[7] Thus, despite the implication of the memo's title, employees presently have no right to refrain from attending captive audience meetings. Instead, Abruzzo clearly seeks to review the legality of an employer practice that has been legal for many years across multiple presidential administrations, regardless of party.

Abruzzo's position on captive audience meetings, as set forth in the April 2022 memo, places employers in the uncomfortable position of having to decide whether to hold lawful captive audience meetings — as 75 years of precedent would allow — or to refrain from doing so in order to comply with her statement of what the law should be and will become during her term. This is not an easy decision for employers and their counsel.

This employer dilemma over captive audience meetings is the basis for a lawsuit filed in the U.S. District Court for the Western District of Michigan on March 16. The case of Associated Builders and Contractors of Michigan v. Abruzzo challenges the memo on captive audience meetings as illegal jawboning, a practice whereby a government official attempts to influence behavior by threatening to use power they may not actually have.[8]

Regardless of the outcome, this litigation makes clear the dilemma that employers and their counsel face with labor law issues right now: The law you base decisions on may not be the law the NLRB uses to judge you.

Nor can an employer depend upon a change in NLRB law only applying prospectively. As Abruzzo stated recently in yet another memorandum, "Board cases are presumed to be applied retroactively."[9]

That retroactive application of the law came up in the Feb. 21 McLaren Macomb decision, in which the NLRB held that severance agreements containing confidentiality and nondisparagement provisions violate the NLRA.[10] Absent a thought experiment reminiscent of George Orwell's writing,[11] most employers would not have assumed at the beginning of 2023 that confidentiality and nondisparagement clauses in severance agreements were presumptively illegal under federal labor law.

Thus, in the age of the NLRB general counsel memo, employers and their labor counsel have to adjust their behavior not just to where the law is currently, but also to where it might go, given the substantial road map that Abruzzo has provided.

To that end, when making decisions related to labor law, employer counsel should review not only NLRB cases addressing and ruling on an issue, but also every memo issued by the current general counsel that may touch on the subject. These memos are the best way to determine the ultimate risk posed by particular actions if litigated before the board. Indeed, in the present, general counsel memos likely are more predictive of results than purportedly binding precedent.

Additionally, employers and their counsel should consider what the remedies might be if a

potential change in the law is applied retroactively to their conduct. These remedies should be weighed in making decisions in this area. Counsel should also review Abruzzo's memos about remedy issues, as she seeks to substantially expand the remedies employers face for labor law violations.

Finally, counsel for employers should vet labor decisions thoroughly with their clients. In the current uncertain time, when the NLRB has blurred the line between what the law is and what it is likely to be, employers need to consider all angles of a labor dispute before making any decisions likely to draw serious scrutiny from the NLRB.

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[1] See NLRB Memorandum GC 21-04, issued Aug. 12, 2021.

[2] See NLRB Memorandum GC 23-04, issued March 20, 2023.

[3] See NLRB Memorandum GC 23-02, issued Oct. 31, 2022.

[4] Id.

[5] Id.

[6] See NLRB Memorandum GC 22-04, issued April 7, 2022.

[7] Id.

[8] See "NLRB GC Overstepped in Captive Audience Memo, Suit Says," available at https://www.law360.com/articles/1587012.

[9] See NLRB Memorandum GC 23-05, issued March 22, 2023.

[10] 372 N.L.R.B. No. 58 (2023).

[11] "The past was alterable. The past never had been altered. Oceania was at war with Eastasia. Oceania had always been at war with Eastasia." —George Orwell, 1984.