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COZEN O'CONNOR

Memo from NLRB General Counsel Reveals New Priorities, with Encouraging Signs for Universities

Less than one month after his confirmation as the National Labor Relations Board's new general counsel, Peter Robb issued a memo that signals a significant shift in the aggressively pro-labor positions taken by his predecessor, Richard Griffin, whose term expired in October.

Several of the shifts announced in the memo (General Counsel Memo 18-02, issued December 1, 2017) are of particular interest to universities, including the rescission of General Counsel Memo 17-01, issued less than a year ago. Memo 17-01 reframed, in sweeping fashion, the general counsel's positions on the applicability of a number of federal labor law doctrines to university faculty and students in the context of the NLRA's provisions regarding employee rights to engage in protected, concerted activities. Specifically, the general counsel announced that because the NLRB had reversed precedent and granted collective bargaining rights to university students previously classified as non-employees and some faculty previously classified as managers, he would begin to prosecute unfair labor practice cases on behalf of these newly minted "employees." In the now-rescinded Memo 17-01, the general counsel stated that in determining whether to prosecute unfair labor practice complaints, he would follow NLRB rulings that expanded the scope of the agency's jurisdiction and broadened the definition of employees covered by the NLRA. These rulings include cases in which the NLRB:

1. Asserted jurisdiction over religious institutions that previously fell outside the NLRB's jurisdiction (*Pacific Lutheran*);
2. Narrowed the definition of which faculty members qualify as managers under federal labor law (*Pacific Lutheran*); and
3. Classified graduate assistants and undergraduate students employed at universities as employees under federal labor law (*Columbia University*);

In addition, in Memo 17-01 the general counsel went one step beyond the NLRB by asserting that he considers NCAA Division I Football Bowl Subdivision (FBS) scholarship players to be employees, even though the NLRB declined to rule in *Northwestern University* whether such college football players are employees under the NLRA. By pronouncing FBS scholarship players employees, he opened the door to prosecuting unfair labor practice cases on their behalf.

In addition, General Counsel Robb informed the regions that "cases which involve significant legal issues" — which he defined as "cases over the last eight years that overruled precedent and involved one or more dissents" — should be submitted to Advice (the NLRB's Division of Advice, the arm of the NLRB that provides guidance to regional offices regarding difficult and novel issues arising in unfair labor practice cases). While he did not specifically say that cases involving application of *Columbia University* (holding that graduate assistants are employees under the NLRA) should be submitted to Advice, that case would meet his definition of a case involving a significant legal issue.

Although General Counsel Robb said in Memo 18-02 that he will make prosecutorial decisions based on existing NLRB law, the rescission of Memo 17-01 is an encouraging sign that he may apply the NLRA to universities in a manner that comports more with historical NLRB and court precedent. As a practical matter, this means that it is unlikely that the general counsel will issue unfair labor practice complaints on behalf of FBS scholarship football players. It also means that if cases arise that implicate novel issue of the NLRB's jurisdiction over religious institutions, the managerial status of faculty, or the status of university students as employees, he will submit such cases to the Division of Advice before deciding how to proceed.

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