

## Newly Issued Mandatory Advice Submissions List Reveals NLRB GC's Priorities

Peter Robb, confirmed last month as the general counsel of the National Labor Relations Board, issued a memorandum on December 1 that serves as a valuable heads up to both employers and unions as to what we might expect during his tenure with the agency. The memo, GC 18-02, presents a five-point roadmap to issues that will, and will not, be submitted to Advice.

- 1. No new theories on decided issues.** “We will base decision on extant law,” the memo states. In an effort to avoid delay, “no new theories will be presented on cases that have been fully briefed to the Board.”
- 2. The GC will not weigh in on pending cases.** Again in an effort to avoid delay, “the General Counsel will not be offering new views on cases pending in the courts, unless directed to by the Board or the courts.”
- 3. Cases involving “significant legal issues” should be submitted to Advice.** These are cases decided during President Obama’s time in office that “overruled precedent and involved one or more dissents, cases involving issues that the Board has not decided, and any other cases that the Region believes will be of importance to the GC.” Included in this category are cases in which a complaint would appropriately be issued “under current Board law, but where we might want to provide the Board with an alternative analysis.”

The memo then provides a long, and expressly non-exhaustive, list of such cases, including decisions centering on concerted activity for mutual aid and protection, employer handbook rules found to be unlawful, joint employer status under *Browning-Ferris*, *Purple Communications* issues, work stoppages under *Quietflex*, off-duty employee access to property, conflicts with other statutory requirements, *Weingarten* rights, disparate treatment of represented employees during contract negotiations, and unilateral changes consistent with past practice, among others. The breadth and significance of this list reveal a new GC ready to shake things up.

- 4. Several Obama-era general counsel memoranda are rescinded.** These memoranda include pronouncements by the outgoing GC that, for example, scholarship student-athletes have rights under the unfair labor practice section of the NLRA (GC 17-01, General Counsel’s Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context); that employers should not be able to withdraw recognition absent an election (GC 16-03, Seeking Board Reconsideration of the Levitz Framework); that many employer policies on confidentiality and social media usage violate the NLRA (GC 15-04, Report of the General Counsel Concerning Employer Rules); that front pay be included in Board settlements in lieu of reinstatement (GC 13-02, Inclusion of Front Pay in Board Settlements); and others relating to deferral standards, intermittent and partial strikes, and the use of default language in informal settlement agreements (GC 12-01, Guideline Memorandum Concerning Collyer Deferral; GC 11-04, Default Language; and OM 17-02, Model Brief Regarding Intermittent and Partial Strikes).

- 5. Say goodbye to several Obama-era initiatives.** The jettisoned initiatives include seeking to extend *Purple Communications* to other electronic systems, seeking to overturn the *Tri-cast* doctrine regarding certain employer statements to employees during organizing campaigns, arguing that misclassification of employees as independent contractors in and of itself violates Section 8(a)(1), seeking to apply *Weingarten* in non-union settings, and seeking to overturn *Oil Capital* regarding the burden of proof in salt cases.

The general counsel memorandum ([available here](#)) comes as a long-awaited signal to many employers that new agency officials will take a more employer-friendly approach to a number of



Anna Wermuth

Vice Chair,  
Labor &  
Employment  
Department

awermuth@cozen.com  
Phone: (312) 474-7876  
Fax: (312) 878-2023

Alex Barbour

Of Counsel

abarbour@cozen.com  
Phone: (312) 474-7886  
Fax: (312) 462-1808



Barry J. Kearney

Of Counsel

bjkearney@cozen.com  
Phone: (202) 912-4819  
Fax: (202) 861-1905

### Related Practice Areas

- Labor & Employment

areas where the Obama-era Board stretched its reach in unforeseen ways.

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**Cozen O'Connor's Labor & Employment attorneys are available to provide counsel and guidance on the issues discussed in this Alert.**