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NLRB Releases Four Obama-Era Advice Memos

On October 15, 2018, the National Labor Relations Board (“NLRB”) released four Obama-era General Counsel advice memoranda, which resulted from requests of guidance by various NLRB Regional Directors on cases their offices were handling. Advice memos influence how laws are enforced as they provide direction on pending matters and thus have significant impact on legal issues facing employers. The current General Counsel has already rescinded numerous advice memoranda issued by his predecessor and is likely to revisit many of the changes to NLRB precedent from the Obama-era, such as the issues addressed in these four advice memos.

The released memos each deal with questions of potential employer violations of the National Labor Relations Act (“NLRA”) and are discussed in detail below.

The Boeing Memorandum

The April 4, 2013 Boeing advice memorandum dealt with two cases involving the following issues: 1) whether the Employer’s photographic surveillance of union solidarity marches on the Employer’s property was unlawful; and 2) whether the Employer’s rule limiting personal camera-enabled devices was overboard. The Boeing memorandum concluded that in both cases, the Employer violated Section 8 (a)(1) of the NLRA.

The General Counsel determined that the Employer engaged in unlawful surveillance when it photographed union solidarity marches taking place on the Employer’s property. The advice memorandum referred to the long-standing rule against employers videotaping or photographing employees because of its tendency to intimidate employees. The Employer’s reasoning for surveilling employees was that it wanted to document anticipated disruption and interference with operations and egress as well as pedestrian and traffic safety violations. The General Counsel determined that the Employer had not demonstrated a reasonable expectation of misconduct to justify its surveillance of the union marches and therefore violated Section 8(a)(1) of the NLRA.

The Boeing memorandum also found that it was not unlawful for the Employer to limit use of employer-issued cameras to business purposes and that it did not disparately enforce the rule limiting use of the employer issued cameras or personal camera-enabled devices. However, the Employer’s rule limiting photography taken by employee’s personal camera-enabled devices was determined to be overbroad because it precluded the use of personal camera-enable devices for all Section 7 activity and was not narrowly constructed to protect any legitimate Employer interests.

In its December 14, 2017 decision, the Board found Boeing's no camera rule, which prohibited employees from using camera-enabled devices, without a valid business purpose or approved camera permit, to be lawful. The Board established a new test: when evaluating a facially neutral policy, rule, or handbook provision that, when reasonably interpreted would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things—1) the nature and extent of the potential impact on NLRA rights and 2) legitimate justification associated with the rule.

The Star Fisheries Memorandum

The February 24, 2017 Star Fisheries advice memorandum dealt with whether the Employer's permanent replacements of employees during an economic strike had an independent unlawful purpose. The General Counsel concluded that the Employer's conduct was motivated by an independent unlawful purpose to punish the employees for striking and interfered with future protected activity by attempting to rid itself of bargaining obligations with the Union. The General Counsel concluded that the Employer violated Section 8(a)(3) when it refused to hire back striking employees. The Star Fisheries memorandum, relied on American Baptist Homes of the West d/b/a/ Piedmont Gardens, to conclude the Employer's actions violated the NLRA as it punished economic strikers. The memo also urged the Board to find that such conduct by an employer was inherently destructive of employee statutory rights.

The First Walmart Memorandum

The April 30, 2013 Walmart advice memorandum reviewed the case of an undercover security employee who was not permitted to wear a union shirt because it was "offensive" and could "hurt" the Employer. The Employer claimed that because the employee's identity as a Walmart employee could not be revealed, it was a special circumstance which justified not permitting the employee to wear a union shirt. However, the employee was told that he was not allowed to wear a union shirt because it promoted unionism and could hurt sales or the company. The employee was not told that his identity would be revealed and thus he could not wear the union shirt. The advice memorandum determined that even if the Employer established "special circumstances" to justify restricting an employee from wearing a union shirt while on duty, it violated Section 8 (a)(1) because of the statements made by assistant managers that the shirt was offensive and would hurt the Employer's sales and reputation.

The Second Walmart Memorandum

The second Walmart advice memorandum, dated August 1, 2013, dealt with Walmart's dress code policy, which barred night shift employees from wearing union insignia. Specifically, the General Counsel concluded that the Employer failed to establish a special circumstance because the employees did not interact with the public and were permitted to wear clothing other than those specifically permitted under the dress code policy. Thus, the dress code policy was not strictly enforced and applied inconsistently. The General Counsel concluded that the dress code policy violated employees Section 7 rights.

The Walmart memorandum also found that the Employer's discipline of six employees who engaged in work stoppage violated Section 8(a)(1) of the NLRA. The memorandum applied the ten-factor test as set forth in the Quietflex Mfg. Co., to determine if the employees' activity was protected. The Employer's conduct was deemed to be improper as it disciplined employees for going on strike immediately before the Grand Opening event and protesting during said event.

Takeaway for Employers

Each of the memos discussed above addressed controversial labor issues. It is likely that the current General Counsel will revisit the issues discussed in the four memos as well as many others. Employers should be prepared as the landscape of labor relations continues to change and should take steps to ensure that they remain in compliance with NLRB guidance. We are, of course, available to assist in ensuring such compliance.

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If you have any questions regarding this alert, or any other issue, please do not hesitate to contact us.

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