Biden Administration Labor Policy

7th District Progress Meeting
October 7, 2021

Jon Newman
Sherman Dunn, P.C.

Biden Labor Policy: "Personnel is Policy"

- "Biden is the most pro-labor President since FDR"
- How do we know? Personnel is policy
  - Who has President Biden appointed?
  - What have they done?
  - What are they planning to do?
- NLRB
- DOL
- Presidential Executive Orders

NLRB Overview

The Board

- Appellate court – reviews ALJ decisions
- 5 seats – 5 year terms
- Nominated by President, confirmed by Senate – **party holding the White House appoints the majority**

The General Counsel

- Prosecutes unfair labor practices
- Oversees Regional offices
- Conducts representation election cases
- 4-year term
- **Nominated by President**, confirmed by Senate

The Biden Board

- **Lauren McFarren** – Democrat. Chairwomen of NLRB. Was on the Board under Obama. Term expires Dec. 2024.

- **Gwynne Wilcox** - Democrat. Former union-side labor attorney with a law firm. Was deputy General Counsel of SEIU Local 1199. Term expires Aug. 2023.

- **David Prouty** – Democrat. Former UNITE-HERE GC, former MLBPA GC, and most recently GC of SEIU Local 32-BJ. Term expires August 2026.

The Biden Board

- **John Ring** – Republican. Term ends December 2022. Former management-side attorney.

- **Marvin Kaplan** – Republican. Term ends August 2025. Worked on Capitol Hill and OSHA.

The Biden NLRB General Counsel

NLRB General Counsel

- **Jennifer Abruzzo** – Democrat. Replaced Peter Robb, who President Biden fired.
  - Began work on July 22, 2021.
  - Previously worked for the NLRB for over two decades
    - Was Deputy General Counsel and Acting General Counsel in Obama Administration
  - Immediately prior to her appointment as General Counsel, served as Special Counsel for CWA

The Biden NLRB General Counsel

NLRB General Counsel Abruzzo's Actions so far

- July 22, 2021: Takes office.
- August 12, 2021: Outlines changes to law General Counsel will be seeking.
- August 19, 2021: Issues memo supporting use of injunctions.
- September 8, 2021: Directs Regions to seek full remedies.
- September 15, 2021: Directs Regions to seek full remedies in settlement cases.
- September 29, 2021: Issues memo on rights of scholarship athletes and discusses deliberate misclassification.

Mandatory Submissions to Advice

- Every new NLRB GC issues “Mandatory Submission” Memo.
- August 12, 2021.
- Outlines issues that should be sent to Div. of Advice.
- Outlines changes new General Counsel will seek.

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 21-04 **August 12, 2021**

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Mandatory Submissions to Advice

Thanks to the strength of Regional staffs across the country, the vast majority of cases can and should be processed without guidance or excessive oversight from Headquarters. Ensuring that Regions have all the necessary resources to process their cases and provide the public with the highest quality service is something I hope to make a hallmark of my term as General Counsel. However, there are some areas that I believe compel centralized consideration.

In this regard, over the past several years, the Board has made numerous adjustments to the law, including a wide array of doctrinal shifts. These shifts include overruling many legal precedents which struck an appropriate balance between the rights of workers and the obligations of unions and employers. At the same time, there are many other issues that also should be carefully considered to determine whether current law ensures that employees have the right to exercise their fundamental Section 7 rights both fully and freely. Submissions of these topics to Advice will allow the Regional Advice Branch to reexamine these areas and counsel the General Counsel's office on whether change is necessary to fulfill the Act's mission.

This memo is divided into three sections. The first section identifies cases and subject matter areas where, in the last several years, the Board overruled legal precedent; the second section identifies other initiatives and areas that, while not necessarily the subject of a more recent Board decision, are nevertheless ones I would like to carefully examine; and the third section identifies other casehandling matters traditionally submitted to Advice.

No list such as this will be exhaustive.[1] The Board's issuance of decisions often raises new questions. In addition, other yet-to-be-considered policy issues will undoubtedly arise. Regions should be sensitive to the need to submit such issues to Advice. Regions should seek clearance from Advice before taking controversial positions, e.g., before seeking to overturn Board precedent. Regions should also continue to make Operations aware of cases that are the subject of attention outside of their local area, or that have a high profile in the local area. If such cases involve Advice issues, Regions should also notify Advice.

[1] I am aware that there are many important cases and issues not included in this initial memo; I fully expect that this memo will be supplemented at some point in the future to include other important issues, as well as refinements.

Mandatory Submissions to Advice

- Ten pages long – Part A and Part B.
- Part A discusses over 35 Trump Board cases – right the ship back to pre-Trump.
- Part B discusses areas where GC may expand rights under the NLRA.

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Mandatory Submissions to Advice

- Part B: Areas where GC may expand rights under the NLRA
  - One area where Regions are required to send to the Div. of Advice:
  - "Cases in which an employer refuses to recognize and bargain with a union where the union presents evidence of a card majority, but where the employer is unable to establish a good faith doubt as to majority status; specifically, where the employer refusing to recognize has either engaged in unfair labor practices or where the employer is unable to explain its reason for doubting majority status in rejecting the union's demand. See Joy Silk Mills, Inc., 85 NLRB 1263 (1949)."

Joy Silk Doctrine

- Joy Silk Mills, Inc., 85 NLRB 1263 (1949) – Non-construction
  - If a union presents an employer with proof of majority and requests recognition.
  - The employer commits a ULP if:
    - It denies recognition without a good faith doubt of lack of majority status, and
    - because it wants to delay the process and undermine the union.
  - Under *Joy Silk*, an employer had to voluntarily recognize unless it has a good faith doubt about majority status.
    - Lack of good faith is a fact question, but any ULP was evidence of lack of good faith.

Board Moves Away from Joy Silk

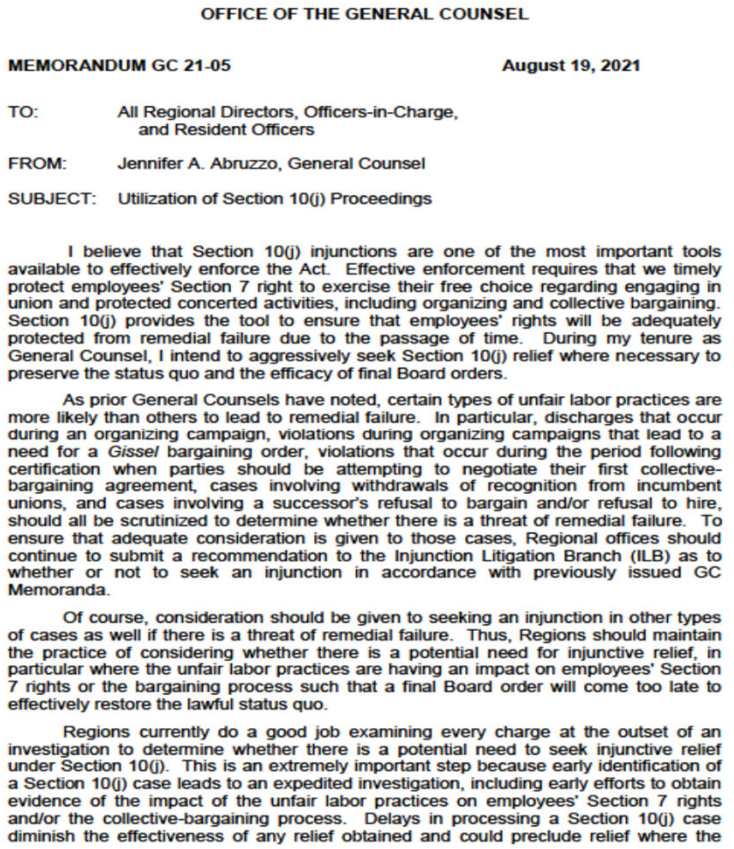
- 1954: If union seeks election after employer denies recognition and election held, union cannot seek a bargaining order under Joy Silk.
- 1964: Bargaining order can issue if union participates in election, but only if election is set aside due to employer misconduct.
- 1966: Good faith doubt of majority status is irrelevant. Employer can insist upon an election, unless the employer has committed serious ULPs calculated to do away with union support.
- 1969: Supreme Court accepts NLRB standard requiring serious ULPs before bargaining order based on cards may issue.

What Would Return of Joy Silk Mean?

- If a union presents an employer with proof of majority and requests recognition, employer acts at its peril if it denies recognition and commits any ULP
- Could see many, many more bargaining orders issue.
- General Counsel is looking for a case.
  - Contact IVP if facts fit this pattern:
    - Outside of construction
    - Cards presented
    - Employer denies recognition
    - Employer commits/has committed ULP

Memo on Use of Injunctions

- August 19, 2021.
- “I believe that Section 10(j) injunctions are one of the most important tools available to effectively enforce the Act.”
- What is a 10(j) injunction?
- “During my tenure as General Counsel, I intend to aggressively seek Section 10(j) relief where necessary to preserve the status quo and the efficacy of final Board orders.”



OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 21-05 **August 19, 2021**

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Utilization of Section 10(j) Proceedings

I believe that Section 10(j) injunctions are one of the most important tools available to effectively enforce the Act. Effective enforcement requires that we timely protect employees' Section 7 right to exercise their free choice regarding engaging in union and protected concerted activities, including organizing and collective bargaining. Section 10(j) provides the tool to ensure that employees' rights will be adequately protected from remedial failure due to the passage of time. During my tenure as General Counsel, I intend to aggressively seek Section 10(j) relief where necessary to preserve the status quo and the efficacy of final Board orders.

As prior General Counsels have noted, certain types of unfair labor practices are more likely than others to lead to remedial failure. In particular, discharges that occur during an organizing campaign, violations during organizing campaigns that lead to a need for a *Gissel* bargaining order, violations that occur during the period following certification when parties should be attempting to negotiate their first collective-bargaining agreement, cases involving withdrawals of recognition from incumbent unions, and cases involving a successor's refusal to bargain and/or refusal to hire, should all be scrutinized to determine whether there is a threat of remedial failure. To ensure that adequate consideration is given to those cases, Regional offices should continue to submit a recommendation to the Injunction Litigation Branch (ILB) as to whether or not to seek an injunction in accordance with previously issued GC Memoranda.

Of course, consideration should be given to seeking an injunction in other types of cases as well if there is a threat of remedial failure. Thus, Regions should maintain the practice of considering whether there is a potential need for injunctive relief, in particular where the unfair labor practices are having an impact on employees' Section 7 rights or the bargaining process such that a final Board order will come too late to effectively restore the lawful status quo.

Regions currently do a good job examining every charge at the outset of an investigation to determine whether there is a potential need to seek injunctive relief under Section 10(j). This is an extremely important step because early identification of a Section 10(j) case leads to an expedited investigation, including early efforts to obtain evidence of the impact of the unfair labor practices on employees' Section 7 rights and/or the collective-bargaining process. Delays in processing a Section 10(j) case diminish the effectiveness of any relief obtained and could preclude relief where the

GC Memos on Remedies

- **GC Abruzzo issued two memos directing Regional Directors to expand remedies**
- September 8, 2021:
  - Instructs NLRB Regions to seek full remedies in unfair labor practice cases.
- September 15, 2021:
  - Instructs Regions to seek full remedies in settlement agreements too.

GC Memos on Remedies

- **Unlawful Firings:**
  - Instructs Regions to seek **consequential damages**. Damages for things that happen as a consequence of the unlawful firing **in addition to** lost wages and benefits. For example:
  - Penalties incurred from tapping a retirement account early to cover living expenses.
  - Late fees on credit cards used to cover living expenses.
  - Even the loss of a home or car suffered as a result of not being able to keep up with loan payments because the employee was unlawfully fired.

GC Memos on Remedies

- **Unlawful Firings (cont'd):**
  - Front pay if the employee does not want his/her job back.
  - If settlement requires reinstate, instructs Regions to seek a letter of apology from the employer.
  - In settlement cases, the Regions used to only insist upon 80% of backpay owed to the discriminate to settle a case. GC 21-07 makes clear that "no less than 100 percent of the backpay and benefits owed" should be sought by the Region.

GC Memos on Remedies

- **Unlawful Conduct During Organizing Campaigns:** Where the employer commits unfair labor practices during an organizing drive, Abruzzo instructs the Regions to seek broader remedies.
  - Giving union equal time and access to employees.
  - Requiring employer to reimburse the union for organizing costs associated with a re-run election conducted because of the employer's unlawful conduct
  - Requiring the employer to read the remedial notice to employees or recording and distributing a video of such reading.
  - Requiring the employer to train employees, including supervisors and managers, on employees' rights under the Act and/or compliance with the order in the unfair labor practice case.

GC Memos on Remedies

- **Unlawful Failures to Bargain:**
  - Requiring the employer to bargain on a regular schedule, such as at least twice per week, at least six hours per session.
  - Requiring the submission of periodic progress reports on the status of bargaining.
  - Extending the time when the union's exclusive bargaining status may not be challenged.
  - Reimbursement of the opposing side's collective bargaining expenses when the party fails to bargain in good faith.

GC Memos on Remedies

- All Cases:
  - Notice must be distributed electronically, in addition to being posted on the company's bulletin board.
    - Could include distribution via text to each employee, and/or posting on the employer's website and social media platforms.

Memo on College Athletes

- September 29, 2021
- States that scholarship athletes at private colleges and universities are “employees” under NLRA.
- “In appropriate cases, I will pursue and independent violation of Section 8(a)(1) of the Act where an employer misclassifies Players . . . as student-athletes.”
- Emphasizes that misclassification is itself an unfair labor practice.

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 21-08 **September 29, 2021**

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Statutory Rights of Players at Academic Institutions (Student-Athletes)[1] Under the National Labor Relations Act

On January 31, 2017, the Office of the General Counsel issued GC 17-01, which addressed various issues regarding the statutory rights of university faculty and/or students under the National Labor Relations Act ("the Act" or "NLRA"). That memo summarized pertinent representation case decisions and was intended to serve as a guide for employers, labor unions, and employees regarding how the Office of the General Counsel intended to apply those cases in the unfair labor practice arena. GC 17-01 was later rescinded by GC 18-02. This memo reinstates GC 17-01, to the extent it is consistent with this memo, and, additionally, provides updated guidance regarding my prosecutorial position that certain Players at Academic Institutions are employees under the Act. Further, it explains that, where appropriate, I will allege that misclassifying such employees as mere "student-athletes", and leading them to believe that they do not have statutory protections is a violation of Section 8(a)(1) of the Act.

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[1] While Players at Academic Institutions are commonly referred to as "student-athletes," I have chosen not to use that term in this memorandum because the term was created to deprive those individuals of workplace protections. Molly Harry, *A Reckoning for the Term "Student-Athlete,"* Diverse (Aug. 26, 2020), https://www.diverseeducation.com/sports/article/15107633/a-reckoning-for-the-term-student-athlete (explaining that NCAA's president and lawyers coined term "student-athlete" in 1950s to avoid paying workers' compensation claims to injured athletes and NCAA continues to utilize it in litigation involving rights of college athletes); *Level Playing Field: Misclassified* (HBO documentary broadcast Sept. 21, 2021) (describing ongoing use of moniker "student-athlete" to deprive those employees of their workplace rights); Jay D. Lonick, Bargaining with the Real Boss: How Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer, 15 Va. Sports & Ent. L.J. 135, 139-42 (2015) (arguing that "student-athlete" is "used to deny athletes legal protection and to preserve the myth that today's student-athletes are amateurs pursuing sports as a mere hobby or avocation").

What to expect soon from a Biden NLRB?

NLRB Rulemaking

- **R-Case Rules: Revoking Part One and Part Two**
  - Part One: Procedural rules to speed the processing of election petitions.
  - Part Two:
    - No more blocking charges.
    - 45-day notice after voluntary recognition.
    - 9(a) established on language alone in construction won't block.

Case law

- Access cases
  - Organizers
  - Off-Duty Employees
- Concerted activity
  - Definition
  - Loss of protection

Case law

- Dues checkoff expiration at CBA expiration
- Unilateral Changes – waiver of rights
- Handbook rules – are neutral rules unlawful?
  - Return to common sense standard
    - View rule from employee perspective, and ask whether employees would think it prohibited them from engaging in protected activity.

Case law

- **Employer e-mail**
  - Return to right to use employer e-mail during non-work time to discuss union.
  - E-mail is “modern day gathering place”

Department of Labor

Labor Secretary

- Welcome Marty Walsh
  - Nominated by President Biden
  - Confirmed overwhelmingly by Senate
  - First Labor Secretary in almost 50 years who is a union member

DOL Anticipated Actions under Biden

- **Wage and Hour Administration**
  - Davis-Bacon Reform

Biden Executive Orders

- April 26, 2021: Executive Order on Worker Organizing and Empowerment
  - “It is the policy of my Administration to encourage worker organizing and collective bargaining.”
  - Creates cabinet level task force “to identify executive branch policies, practices, and programs that could be used . . . . to promote my Administration’s policy of support for worker power, worker organizing, and collective bargaining.”

Biden Executive Orders

- April 27, 2021: Executive Order on Increasing the Minimum Wage for Federal Contractors
  - Increases the minimum wage for workers performing work on or in connection with covered federal contracts to $15 per hour beginning Jan. 30, 2022.
  - Continues to index the federal contract minimum wage in future years to an inflation measure.
  - Eliminates the tipped minimum wage for federal contract workers by 2024.
  - Ensures a $15 minimum wage for workers with disabilities performing work on or in connection with covered contracts.
  - Restores minimum wage protections to outfitters and guides operating on federal lands.

Biden Executive Orders

- Executive Order on use of PLAs?

Punching In: White House Mulling Order on Contract Labor Pacts

June 28, 2021, 6:20 AM

Listen

Monday morning musings for workplace watchers

Rebooting Obama Order? | EBSA's Cyber Push | Maloney's Paid Leave Bill

Ben Penn and Ian Kullgren: The Biden administration has been reviewing the legality of issuing an executive order to expand federal agencies' use of project labor agreements, a mechanism that could ensure infrastructure legislation creates union construction jobs, according to six sources briefed on the matter.

The order would update and strengthen an Obama-era order from 2009 that encouraged federal agencies to voluntarily consider requiring project labor agreements when awarding contracts of at least $25 million, the sources said.

Ben Penn
Reporter

Ian Kullgren

Austin R. Ramsey
Reporter

Chris Marr

Questions?