

August 17, 2021

## New NLRB Leader Identifies Possible Changes

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Employers who have watched the National Labor Relations Board — the nation's primary enforcer of labor law — over the years [anticipate](#) that it will reshuffle its priorities soon after the White House changes parties. The agency swore in Jennifer Abruzzo as its new general counsel on July 22, 2021; and three weeks later, Abruzzo released an [internal memorandum](#) that is a blueprint for changes to the law she would like to see the agency implement.

The general counsel's memorandum is not binding, and it is not a perfect picture of how labor law will change. Instead, it is a list of issues that the general counsel wants to tee up for the other political appointees in the agency — the five members of the Board itself — who can change the law. In order to enact a change, the Board must either publish a new rule or decide a case on that topic. The general counsel usually cannot present all of his or her priority issues to the Board before it changes party control again; and even when the Board considers an issue, there is no guarantee it will agree with the general counsel's position, or that a federal court will enforce the Board's decision on appeal.

However, the general counsel usually is able to accomplish most of his or her priorities, and the Board often makes such changes retroactive to all pending cases, so employers should study the memorandum carefully and consider how they should prepare for changes like the following:

- **Employee handbook and technology rules.** The NLRB restricts what employers (union and non-union alike) can include in employee handbooks and other policies. In 2017 the NLRB released a [new framework](#) for evaluating handbooks that gave employers greater latitude and certainty. At the time the NLRB also required employers to allow employees to use work email for union organizing, but [ended that practice](#) in 2019. The new memorandum strongly suggests that the general counsel will ask the Board to tighten restrictions on

employers once again, which would have wide-ranging impacts on work rules, confidentiality agreements, employee speech in the workplace, and nondisparagement provisions. Further, the memorandum shows that the general counsel may seek to reopen work email to employees seeking to organize and expand that toolkit to include other platforms like Discord, Slack and Groupme. These changes could come at a time when employers are still recalibrating policies and technologies to accommodate more remote work and better protect health and safety.

- **Union organizer access to employer property.** Just as the pandemic prompted more remote work, it caused employers to restrict access to its physical locations. That issue was already in flux in labor law, which in 2019 shifted [to allow employers to exclude](#) union representatives from public areas of their property under certain circumstances. But the memorandum shows that the general counsel will call for the Board to reevaluate that interpretation.
- **Employer ability to make changes during the life of a union contract.** In 2019 the NLRB gave employers [more flexibility](#) to make changes during the life of a union contract, because it provided an alternative to showing that the union had “clearly and unmistakably” waived its right to bargain over such changes. Under that alternative, an employer need only show that the contract “covered” the topic at issue. The new memorandum signals that the general counsel will return to the prior standard, which makes it more difficult to make changes during the life of a union contract.
- **Arbitration agreements and class action waivers.** In 2019 the NLRB [ruled](#) that employers may discipline employees who refuse to sign a mandatory arbitration agreement and may promulgate class action waivers in response to union (or union-like) activity. The new memorandum calls for the NLRB to reevaluate this ruling.

Even employers who have closely followed recent changes to the National Labor Relations Act should review Section B of the memorandum, which targets areas of the law that have not changed in recent years, including extending *Weingarten* rights that allow employees to request representation in investigatory interviews and issues related to employee status and classifications.

Overall, employers can use the general counsel's new memorandum not only to predict what might change in labor law during the current administration, but also to get ahead of those changes.

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