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APRIL 8, 2021

Meet the new (acting) boss — NLRB's Acting General Counsel issues a memorandum outlining broad enforcement priorities

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As the first 100 days of the Biden administration winds to a conclusion, one area that has received considerable presidential focus has been the operations of the National Labor Relations Board (the "Board"). Indeed, the Biden administration has taken an aggressive approach toward the Board since the president's first day in office, when he broke with historical precedent by terminating General Counsel Peter Robb after Mr. Robb refused a request for his resignation. As noted in our alert discussing the decision, President Biden's termination of Mr. Robb signaled the probability of major shifts in national labor policy.

Sure enough, on the same day that the Biden administration terminated Mr. Robb, President Biden named Peter Sung Ohr, a longtime Board employee, as Acting General Counsel. It did not take Mr. Ohr long to begin changing the Board's approach to various matters; indeed, on February 1, 2021, Mr. Ohr issued a memorandum rescinding ten memoranda that Mr. Robb had issued on a variety of subjects. In that same memorandum, Mr. Ohr noted that "[f]uture memoranda setting forth additional new policies will issue in the near future."

On March 31, 2021, Mr. Ohr issued the first such memorandum, Memorandum GC 21-03, entitled "Effectuation of the National Labor Relations Act Through Vigorous Enforcement of the Mutual Aid or Protection and Inherently Concerted Doctrines." The memorandum began with some historical analysis of the National Labor Relations Act (the "NLRA"), and what Mr. Ohr referred to as the "fundamental right [of employees] to self-organize at the workplace." From there, Mr. Ohr outlined an aggressive new policy toward cases that require an analysis of whether employee conduct is engaged in for the "mutual aid and protection" of the workforce for the purpose of determining whether employees have engaged in protected, concerted activity under Section 7 of the NLRA ("Section 7"). In the process, Mr. Ohr criticized the Trump-era Board's approach to the "mutual aid and protection" doctrine, noting that he felt the Board applied the doctrine too "narrowly" and "restricted those protections," while also taking the opportunity to signal his intention to expand the types of conduct considered "inherently concerted" by the Board and therefore protected under Section 7.

Mr. Ohr's criticism of the Trump-era Board's decisions addressing "mutual aid and protection"

Mr. Ohr's discussion of the mutual aid and protection doctrine focused primarily on the Trump-era Board decisions in *Alstate Maintenance*, 367 NLRB No. 68 (2019), and *Quicken Loans*, 367 NLRB No. 112 (2019). In *Alstate*, the Board found that an airport skycap's comment that he did not want to perform certain work because he did not receive tips for that work previously was not engaged in for "mutual aid and protection." But the Board noted that the employee's comments would be for "mutual aid and protection" if they were aimed at changing employer policies and practices. In *Quicken Loans*, the Board found that a conversation between two employees was not undertaken for "mutual aid and protection" where one employee complained about having a potential customer placed in his "pipeline" and further stated that having to call the potential customer was a "waste of time." However, while the Board found that this conversation did not amount to protected, concerted activity, it noted that similar conversations could meet the "mutual aid and protection" requirement if they "involved a goal of improving the working conditions shared by them or with coworkers."

While Mr. Ohr was critical of the decisions in *Alstate*, *Quicken Loans*, and their progeny, he stopped short of stating that he would aim to have those decisions overturned. Rather, Mr. Ohr noted that *Alstate* and *Quicken Loans* "left avenues for demonstrating mutual aid or protection that should be fully utilized." Specifically, Mr. Ohr noted that "under the framework of the law as presently articulated, cases involving retaliation against concerted employee conduct will be vigorously pursued, where these and other factors exist to tie workers' protests to their interests as employees." Mr. Ohr elaborated that "[g]oing forward, employee activity regarding a variety of societal issues will be reviewed to determine if those actions constitute mutual aid or protection under Section 7 of the Act." As an example, Mr. Ohr hinted that he could take the position that "employees' political and social justice advocacy" is protected by Section 7 "when the subject matter has a direct nexus to employees' 'interests as employees.'"

Expanding categories of "inherently concerted" and protected conduct

After critiquing the *Alstate* and *Quicken Loans* decisions, Mr. Ohr then proceeded to discuss his view that the notion of "inherently concerted" activity should be expanded and therefore protected from employer retaliation. By way of background, the Board has long held that employees may engage in certain types of activities or discussions related to terms and conditions of employment which constitute protected, concerted activity. One factor applied by the Board in determining if conduct constitutes protected, concerted activity is whether the action involves other employees or incites group action. However, the Board has deemed certain conduct inherently concerted and protected regardless of whether the conduct has the goal of inducing group action. Employee discussions or other forms of sharing information that focus on fundamental elements of employment and workplace life such as wages, work schedules, and job security qualify under current Board law as inherently concerted.

Mr. Ohr declared that he will focus on expanding what qualifies as inherently concerted activity. For example, Mr. Ohr favors labelling discussions about workplace health and safety and racial discrimination in the workplace as inherently concerted. In effect, Mr. Ohr stressed that the doctrine of inherently concerted activity is flexible, inasmuch as it requires no "magic words" or even necessarily evidence that other employees agree with the complaint being voiced. Mr. Ohr also noted that he felt an expansion of the doctrine would "afford the Agency the means by which to better serve the policies of the United States" as described in the NLRA. Accordingly, while Mr.

Robb's tenure as General Counsel was marked by pursuing matters in which the Board narrowed the circumstances under which activity is deemed to be concerted, through presentation and pursuance of cases such as *Alstate* to the Board, Mr. Ohr has essentially made it clear that he intends on doing the exact opposite by focusing on cases that will serve to expand the doctrine.

Mr. Ohr's memorandum does not have binding legal effect. However, the memorandum represents a clear statement of his enforcement priorities during the Biden administration. We expect to see a more expansive interpretation of Section 7. Once the Board majority becomes Democrat appointees, Mr. Ohr will have a receptive audience in cases that present opportunities to broaden Section 7 protections. Nixon Peabody will continue to monitor Board decisions and memoranda, and report on further statements of intent from Mr. Ohr or others expressing the Biden administration's labor policies. However, given the aggressive approach signaled by this memorandum, employers should consult with counsel regularly when addressing arguably concerted activity in the workplace.

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