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Recent Developments Under the National Labor Relations Act

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I. UPDATES TO THE NLRB'S MEMBERSHIP AND GENERAL COUNSEL

A. Current Board Members

The current Board members are newly appointed Chairman Lauren McFerran, previous Chairman John F. Ring, Marvin E. Kaplan, and William J. Emanuel. Both Kaplan and McFerran were re-confirmed by the Senate on July 29, 2020. President Biden named Lauren McFerran Chairman of the Board on January 20, 2021. Kaplan's new term runs through August 27, 2025. McFerran's term runs through December 16, 2024.

The Board has three Republican members—Ring, Emanuel, and Kaplan. McFerran is the only Democrat, and the vacant seat remaining is reserved for a Democrat. President Donald Trump in 2018 nominated former Chairman Mark G. Pearce for the other Democratic seat on the five-member board, but the Senate did not confirm his nomination, and Pearce withdrew his name from consideration in 2019. Trump did not nominate anyone else for the seat, which has been vacant since August 2018, when Pearce's term ended.

The NLRB can issue decisions notwithstanding the vacancy so long as it has a quorum of at least three members. The Republican-majority Board has been swiftly overturning many Obama-era decisions and regulations, which largely benefits employers.

Moreover, Member Emmanuel's term ends on August 27, 2021, so the composition of the Board could change significantly with a filled seat and a potential replacement. In the meantime, observers should continue expecting volatility in the Board.

B. General Counsel Shakeup

As expected, the Presidential election in November 2020 marked a shift in the priorities and views of the NLRB. On the campaign trail, President Biden vowed to be the most "pro-union" president in U.S. history. He issued his support for the recently introduced Protecting the Right to Organize Act (PRO Act) and his platform contains numerous union-friendly policies including promises to enact financial penalties on companies that interfere with organizing efforts and to provide public sector employees a federal guarantee to organize.

Delivering on that promise, within mere hours of taking office, President Biden fired the Trump-appointed National Labor Relations Board General Counsel Peter Robb after he refused the administration's call for him to resign. The general counsel investigates unfair labor practice charges, brings administrative complaints before the Board, and represents the agency before federal courts.

Robb had less than 10 months left in his four-year term, but unions had been urging President Biden to break with precedent by forcing him out immediately. Under Robb's management-oriented leadership, the Board had rendered countless aggressively pro-business decisions and memorandums. Robb is the first Board general counsel to be forced out in more than half a century—and the first to be fired in Board history.

Deputy General Counsel Alice Stock briefly assumed the role of acting general counsel the following day, but she was also terminated at the end of the day. President Biden then named Peter Sung Ohr, a career employee of the Board, as Acting General Counsel, who quickly worked to undo many of Robb's policies, stating he did not plan on being a "potted plant" while serving his temporary post.

President Biden announced in February that he would nominate Jennifer Abruzzo, a lawyer for Communication Workers of America, to serve as permanent general counsel for the Board. Abruzzo previously served as deputy general counsel and acting general counsel at the Board. Her nomination was sent to the Senate on February 17, but a confirmation hearing has not yet been scheduled. Management-side lawyers are already preparing to fight her nomination, likely arguing an act taken before Robb's term would have expired in November is unenforceable. Management lawyers are similarly challenging Biden's removal of Robb.

C. Rescission of General Counsel Robb's Memorandums

On February 1 and 2, 2021, Acting General Counsel Peter Sung Ohr swiftly rescinded 10 General Counsel Memorandums and two Operations-Management Memorandums issues by Former General Counsel Peter Robb.

In Memorandum GC 21-02¹, Ohr emphasized the policy of the Act is to encourage collective bargaining and protect workers' rights. Thus, he determined "that a number of outstanding General Counsel Memoranda are either inconsistent with the above-described policies and/or Board law or are no longer necessary."

The memorandums rescinded by GC 21-02 are as follows:

- *GC 18-04, Guidance on Handbook Rules Post-Boeing* (June 6, 2018)
 - Instructed Regions on the placement of various types of employer rules into the three categories set out in *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017)
 - Rescinded as no longer necessary, which critics contend is a first step toward overturning *Boeing*
- *GC 18-06, Responding to Motions to Intervene by Decertification Petitioners and Employees* (Aug. 1, 2018)
 - Required Regions to no longer oppose intervention in ULP hearings by proposed Intervenors who have filed a decertification petition or circulated a document upon which the employer has unlawfully withdrawn recognition
 - Rescinded as inconsistent with prior practice

¹ Available at: www.nlr.gov/guidance/memos-research/general-counsel-memos.

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