

Unions Beware: NLRB General Counsel Robb Issues New Rule Vastly Expanding DFR Charges

It is imperative for private sector unions to be aware of the changes regarding duty of fair representation charges after NLRB General Counsel Robb's internal memo to the Regions. The memo and directive to the Regions greatly expands the behavior which may cause a union to be charged with a DFR violation.

Under the new directive from Robb, Regions are instructed to pursue charges against unions where, for example, employees complain of the union failing to return phone calls or losing an employee's complaint. In cases where a union has lost track, misplaced or otherwise forgotten about a grievance, the memo states, "the union should be required to show the existence of established, reasonable procedures or systems in place to track grievances, without which, the defense should ordinarily fail." This is regardless of whether or not the union agreed to pursue the grievance.

As to a union's failure to communicate with its grievants, the memo states, "a union's failure to communicate decisions related to a grievance or to respond to inquiries for information or documents by the charging party, in the General Counsel's view, constitutes more than mere negligence and, instead, rises to the level of arbitrary conduct unless there is a reasonable excuse or meaningful explanation." The Regions are instructed to argue that such instances constitute "more than mere negligence and, instead, [are] willful and arbitrary conduct." In addition, if a union is charged with an 8(b)(1)(A) under this new standard, communication after the complaint has issued will not cure the issue, according to the new memo.

While the actions addressed in the memo have historically been considered by the Board to be harmless error due to mere negligence, General Counsel Robb's memo instructs the Region to consider such charges as raising the level of as gross negligence constituting arbitrary conduct." This is a complete departure from Board precedent on the issue. General Counsel Robb even admits in the memo that this new standard is "inconsistent with the way they Board and the Regional Directors have historically interpreted duty of fair representation law." Despite this significant change in how the Board has historically handled charges of this nature, the Board and General Counsel have issued no memorandum or advice document with guidance to unions on how to comply with the new standards.

While the exact parameters of the change in enforcement are unknown, the language of the memo is incredibly broad. The immediate impact of this change is that unions should be prepared for an increase in duty of fair representation charges filed against them. Considering how active anti-union groups are in recruiting members for legal challenges, the chance to attack unions on this front as well will not go unmissed. It will be imperative that unions, if they do not already have it, set up a reliable grievance tracking system and provide workers will regular updates about their grievances. Another area of grievance processing that maybe impacted by the memo is the union and employer's ability to settle grievances, possibly over the objection of the

grievant. It is unclear what impact the memo will have on that process, but unions should be sure to keep all grievants regularly apprised of what is happening with their grievances.

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