The Agency

Peter Robb Appointed General Counsel

GC 18-02 (12/1/17)

Decisions will be based on existing law, regardless of his personal views.

GC will not offer views on existing cases unless required

“Significant legal issues” referred to advice

Obama second term decisions

For example (1-15):

Concerted activity – one employee/profanity Pier 60


Access to ER’s email system - Purple Communications

Intermittent strikes - Quietflex

Joint Employer – Browning Ferris

Successorship – “perfectly clear” doctrine

Duty to bargain discipline prior to 1st CBA - Total Security –

Dues checkoff post-expiration

Rescission of GC Griffin Initiatives

Misclassification of employees as 8(a)(1) - Velox

Extension of Weingarten to non-Union settings (overturn IBM)

GC 16-01 Griffin Mandatory Submissions to Advice (3/22/16)

McDonalds settlement – Franchisor liability

10(j) enforcement
GC 15-03 – Immigration hold

Structural Agenda – Ideology or Budgetary?

Reorganization of regional offices?

Case Processing? Offers of proof/evidence with ULP filing

RD Authority to issue complaints/District Directors?

Case Processing Memo “Draft Summary of Suggestions”

Agency staff response

RD Committee letter to Robb

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Emmanuel (9/25/17) and Kaplan (8/10/17) join Board

Joint Employer Status - BFI and the Hy-Brand Debacle

*Hy-Brand* reinstates “direct and immediate” “joint control” over essential employment terms

Inspector General report re: recusal

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Inclusion of additional employees – distinct interest

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Categories of rules replaces “reasonably construed” standard

Proskauer Law Firm: “More precedent correction can be expected in the coming months”

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Request for Information regarding 2014 election rules

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Ring confirmed to replace Miscimarra and replacing Kaplan as Chair (4/11)

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Anne Frank Center
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OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 18-02

TO: All Regional Directors, Officers-in-Charge, and Resident Officers
FROM: Peter B. Robb, General Counsel
SUBJECT: Mandatory Submissions to Advice

As some of you know, I have worked as a field attorney in Region 5, a supervisor for the FLRA, and Chief Counsel to a Board Member where I also worked on budget and labor relations issues. My many years in private practice dealt primarily with NLRA issues. I have sat where many of you now sit. I have not forgotten what that was like, and I remember the lessons learned. It is great to be back. My primary objective will be to assist you in fulfilling the mission of the Agency.

As you know, the last eight years have seen many changes in precedent, often with vigorous dissents. The Board has two new members who have not yet revealed their views on many issues. Over the years, I have developed some of my own thoughts. I think it is our responsibility to make sure that the Board has our best analysis of the issues. To that end, I have developed the following guidelines which will serve as my mandatory Advice submission list, in the tradition of my predecessors as General Counsel. For convenience, I have tried to group the issues. If you have further questions, please contact Advice.

First, we will base decisions on extant law, regardless of whether I may agree with the legal principles. Cases should be processed and complaints issued according to existing law. No new theories will be presented on cases that have been fully briefed to the Board in order to avoid delay.

Second, again in order to avoid delay, the General Counsel will not be offering new views on cases pending in the courts, unless directed to by the Board or courts.

Third, cases that involve significant legal issues should be submitted to Advice. Significant legal issues include cases over the last eight years that overruled precedent and involved one or more dissents, cases involving issues that the Board has not decided, and any other cases that the Region believes will be of importance to the General Counsel. Regions should submit these cases through brief memoranda that provide the key procedural dates, the relevant facts, a synopsis of the significant legal issue(s), and a list of other allegations in the case. Cases where complaint issuance is appropriate under current Board law, but where we might want to provide the Board with an alternative analysis, may be submitted at any time after the complaint issues, but must be submitted prior to the Region filing a brief or other statement of position to the Board on that issue. Advice will then provide appropriate guidance on how to present the issue to the Board. Examples of
these kinds of issues are set forth below. These examples do not represent all such legal issues and also do not imply how the General Counsel will ultimately argue the case.

Examples of Board decisions that might support issuance of complaint, but where we also might want to provide the Board with an alternative analysis, include:

- **Concerted activity for mutual aid and protection**
  - Finding conduct was for mutual aid and protection where only one employee had an immediate stake in the outcome (e.g., *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12 (2014) – individual sexual harassment claim)
  - Finding no loss of protection despite obscene, vulgar, or other highly inappropriate conduct (e.g., *Pier Sixty, LLC*, 362 NLRB No. 59 (2015))

- **Common employer handbook rules found unlawful**
  - Rules prohibiting “disrespectful” conduct (e.g., *Casino San Pablo*, 361 NLRB No. 148 (2014))
  - Rules prohibiting use of employer trademarks and logos (e.g., *Boch Honda*, 362 NLRB No. 83 (2015))
  - No camera/recording rules (e.g., *Rio-All Suites Hotel & Casino*, 362 NLRB No. 190 (2015); *Whole Foods Market*, 363 NLRB No. 87 (2015))
  - Rules requiring employees to maintain the confidentiality of workplace investigations (e.g., *Banner Estrella Medical Center*, 362 NLRB No. 137 (2015))
  - Other rules where the outcome would be different if Chairman Miscimarra’s proposed substitution for the *Lutheran Heritage* test was applied (see dissent in *William Beaumont Hospital*, 363 NLRB No. 162 (2016))

- **Purple Communications**
  - Finding that employees have a presumptive right to use their employer’s email system to engage in Section 7 activities (361 NLRB No. 126 2014)

- **Quietflex**
  - Finding work stoppages protected under the *Quietflex* standard in a variety of contexts (including the retail sales floor) and giving heavier weight to those factors that tend to favor protection (e.g., *Los Angeles Airport Hilton Hotel & Towers*, 360 NLRB No. 128 (2014); *Nellis Cab Company*, 362 NLRB No. 185 (2015); *Wal-Mart Stores, Inc.*, 364 NLRB No. 118 (2016)).
- Off-duty employee access to property
  - Applying Republic Aviation to picketing by off-duty employees (e.g., Capital Medical Center, 364 NLRB No. 69 (2016), equating picketing with handbilling despite greater impact on legitimate employer interest (including patient care concerns))
  - Finding that access must be permitted under Tri-County unless employees are excluded for all purposes, including where supervisor expressly authorized access (e.g., Piedmont Gardens, 360 NLRB No. 100 (2014))

- Conflicts with other statutory requirements
  - Finding racist comments by picketers protected under Clear Pine Mouldings because they were not direct threats (Cooper Tire & Rubber Co., 363 NLRB No. 194 (2016))
  - Finding social media postings protected even though employee's conduct could violate EEO principles (e.g., Pier Sixty, LLC, 362 NLRB No. 59 (2015))

- Weingarten
  - Expanding range of permissible conduct by union representatives in Weingarten interviews (e.g., Fry's Food Stores, 361 NLRB No. 140 (2015); Howard Industries, 362 NLRB No. 35 (2015))
  - Application of Weingarten in the drug testing context (e.g., Manhattan Beer Distributors, 362 NLRB No. 192 (2015))

- Disparate treatment of represented employees during contract negotiations
  - Finding unlawful the failure to give a company-wide wage increase to newly represented employees during initial contract bargaining, even though there was no regular, established annual increase and the employer was concerned that it would violate the Act if it unilaterally provided the increase to represented employees (Arc Bridges, Inc., 362 NLRB No. 56 (2015))

- Joint Employer
  - Finding joint employer status based on evidence of indirect or potential control over the working conditions of another employer's employees (Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, 362 NLRB No. 186 (2015))

- Successorship
  - Finding Burns successorship based on the hiring of predecessor employees that was required by local statute (e.g., GVS Properties, 362 NLRB No. 194 (2015))
Finding "perfectly clear" successorship where employer had effectively communicated its intent to set new terms prior to inviting existing employees to accept employment (e.g., Creative Vision Resources, 364 NLRB No. 91 (2016))

Finding "perfectly clear" successorship where predecessor employer (but not successor) had communicated to employees that they would receive comparable wages and benefits from successor (Nezeo Solutions, 364 NLRB No. 44 (2016))

- Unilateral changes consistent with past practice
  - Finding unlawful unilateral changes after contract expiration where changes were similar to employer's earlier practice (e.g., E.I. Dupont de Nemours, 364 NLRB No. 113 (2016), overruling Courier-Journal, 342 NLRB 1093, 342 NLRB 1148 (2004))

- Total Security
  - Establishing duty to bargain before imposing discretionary discipline where parties have not executed initial collective bargaining agreement (364 NLRB No. 106 (2016))

- Duty to provide witness statements to union
  - Finding that witness statements must be disclosed if that would be appropriate under the Detroit Edison balancing test (Piedmont Gardens, 362 NLRB No. 139 (2015), overruling Anheuser-Busch, 237 NLRB 982 (1984))

- Dues check-off
  - Establishing that the dues check-off obligation survives expiration of the collective-bargaining agreement (Lincoln Lutheran of Racine, 362 NLRB No. 188 (2015))

- Remedies
  - Search for work and interim employment expenses recoverable regardless of whether discriminatee had interim earnings (King Soopers, 364 NLRB No. 93 (2016))
  - Employer required to remit dues unlawfully withheld without being able to recoup them from employees (Alamo Rent-a-Car, 362 NLRB No. 135 (2015))

Fourth, new General Counsels have often identified novel legal theories that they want explored through mandatory submissions to Advice. I have not yet identified any such initiatives, but I have decided that the following memos shall be rescinded:
GC 17-01 (General Counsel's Report on the Statutory Rights of University Faculty
And Students in the Unfair Labor Practice Context)

GC 16-03 (Seeking Board Reconsideration of the Levitz Framework)

GC 15-04 (Report of the General Counsel Concerning Employer Rules)

GC 13-02 (Inclusion of Front Pay in Board Settlements)

GC 12-01 (Guideline Memorandum Concerning Collyer Deferral)

GC 11-04 (Default Language)

OM 17-02 (Model Brief Regarding Intermittent and Partial Strikes) (Regions should submit cases involving intermittent strikes to Advice)

Likewise, the following initiatives set out in Advice memoranda are no longer in effect:

- seeking to extend Purple Communications to other electronic systems (e.g., internet, phones, instant messaging) if employees use those regularly in the course of their work

- seeking to overturn the Board’s Tri-cast doctrine regarding the legality of employer statements to employees, during organizing campaigns, that they will not be able to discuss matters directly with management if they select union representation

- seeking to overturn Oil Capitol and put the burden of proof on respondent to demonstrate that a salt would not have remained with the employer for the duration of the claimed backpay period

- arguing that an employer's misclassification of employees as independent contractors, in and of itself, violates Section 8[a](1) (but Regions should submit to Advice any case where there is evidence that the employer actively used the misclassification of employees to interfere with Section 7 activity)

- seeking to overturn IBM and apply Weingarten in non-union settings

I hope this guidance is helpful, and I look forward to working with you.

/s/
P. B. R.

MEMORANDUM GC 18-02
Please see the attached Case Processing Memo. The content was developed almost entirely from suggestions from all levels of the organization in both the field and headquarters including Field Attorneys, Field Examiners, supervisors, managers as well as the RD, FMA, RAG and ARD Committees, Operations Management, the Front Office and the NLRBU. The General Counsel is grateful to all who participated directly or indirectly in this effort.

The Memo is a draft summary of suggestions. Many of the suggestions will need further refinement including addition of specific steps, deadlines, extensions of deadlines and further review of decisions. Therefore, please include your suggestions on implementation details with your comments. Above all, please keep in mind that this is a draft which can, and likely will have many changes before implementation. Ideas that are unworkable or inappropriate can be removed.

For convenience, please refer to the numbered items when making comments. You may provide input to myself, or directly to Deputy General Counsel John Kyle or General Counsel Peter Robb. Peter and now John will keep the origins of the comments confidential unless the author indicates otherwise. Finally, in order to keep the process moving, please provide your comments by Friday, February 9, 2018. To help manage the responses, please put “Case Processing Suggestions” in the subject line.

We thank you in advance. Your input is important.

Beth Tursell
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Concepts

1. Regions should be given the discretion and responsibility to tailor investigations to the nature of the case, with a primary goal of promoting efficient case processing where the resources devoted to an investigation are commensurate with the likelihood that the investigation materials will be useful at a later stage and the likelihood that the case will result in formal proceedings. Early resolution of cases, through withdrawal, dismissal or bi-lateral settlement will be emphasized in all respects. RDs, ARDs, and RAs should spend most of their time dealing with potential merit cases, and cede some decision-making authority to supervisors.

2. Settlement, in lieu of litigation, should remain an important objective in all cases, including merit cases, and should receive appropriate emphasis in regional case considerations,

3. There have been many suggestions to change time targets and/or re-classify cases. In order to help evaluate the impact of our case processing changes, there will be no change for 2018. However, the impact of the changes will be considered in individual evaluations [or in light of the changes described below, the time targets for Category 1 and 2 cases will be reduced by two weeks, while the time target for Category 3 cases will be extended by one week].

4. Investigations should be handled with dispatch, with a focus on early communication to promote efficiency and early resolution, when possible.

5. Resolution through bi-lateral settlement is preferred as long as the settlement is not inconsistent with the Act.

Filing of Charge:

6. Institutional Charging Parties, such as unions, employers, other organizations, and employees who have a personal representative shall be required to file with the charge.

7. A detailed position statement or affidavit including:

8. recitation of facts

9. identification of relevant witnesses

10. names of all alleged discriminatees

11. names and titles of relevant managers/supervisors/employer agents

12. remedy sought

13. Relevant documents such as:

14. collective-bargaining agreement (mandatory)
15. relevant grievances (mandatory) all communications regarding information requests (mandatory)

16. Unrepresented Individual Charging Parties should provide the same information when the charge is filed.

17. Regional personnel shall assist unrepresented individual Charging Parties in drafting a position statement which should be done in affidavit form and identifying relevant evidence.

18. Unrepresented Individual Charging Parties may be given additional time to provide documentary evidence.

Docketing the Charge:

19. All charges will be sent to a District docketing center for initial processing and assignment according to criteria to be developed.

20. All communication will be by email unless a party has no email address.

21. Docketing procedures will be reviewed to insure the docketed charge gets to the Board Agent as soon as possible.

22. By email, or letter if no email address, a communication shall go out to the Charged Party prominently noting that absent extenuating circumstances, which include possible 10(b) issues, the charge is subject to dismissal if the Charging Party fails to respond to any request from the Region within two business days.

23. Institutional Charged Parties and individual Charging Parties with email addresses will be immediately sent a copy of the Charge and a communication stating that all communication shall be through email.

Investigation

24. Charging Parties will be given two business days to cure any defect in the charges and/or other information to be filed with the charge under threat of dismissal, but the Regions should not dismiss until the Charging Party has failed to comply with a second two-day letter.

25. The general rule is that all affidavits can, and should, be taken by telephone.

26. Attestation should be by email where possible with a short deadline, typically two days.

27. Failure to attest within a deadline will be grounds for dismissal.

28. A field agent will have discretion to take an affidavit in person in complex cases, but Operations must approve any travel by the Board Agent.
29. All communications and the provision of evidence should be by email where possible.
30. Investigative subpoenas should be used sparingly and must be approved by Operations.
31. Jurisdiction information should be obtained by email, where possible and should recite only the facts that would be alleged in a complaint.
32. Within two business days after contacting the Charging Party, the Board Agent should contact the Charged Party.
33. The Board Agent should go over the allegations.
34. The Board Agent should seek resolution – bilateral resolutions that are not inconsistent with the Act should be accepted absent extraordinary circumstances.
35. Non-Board resolutions may be memorialized by email.
36. Within ten business days of receiving the charge, the Board Agent and supervisor shall meet to determine how the investigation can proceed.
37. The supervisor and Board Agent may dismiss clear non-merit cases without further review (Team Dismissal).
38. The supervisor and Board Agent may approve bi-lateral non-Board and informal settlement agreements that are not inconsistent with the Act (Team Settlement).
39. The supervisor and Board Agent may approve requests for withdrawal of unfair labor practice charges (Team Withdrawal).
40. If the supervisor and Board Agent decide to pursue the investigation, they should set a deadline for ultimate disposition of the charge.
41. A brief summary of the case processing team meeting should be placed in the electronic file and copied to the Regional Attorney.

Settlements

42. Prior to the opening of a hearing, Regions may take settlements of any kind that are not inconsistent with the Act.
43. After a hearing opens, Regions must seek approval from Operations for settlements that are non-Board or include back pay at less than 80%.
44. Templates shall be followed (assuming a system for quickly updating templates can be established).
45. Where all necessary evidence can be found in the FIR or Agenda Minute, Advice submissions should be submitted in summary form with appropriate references to the FIR or Agenda Minute.
46. Advice shall develop general guidance for recurring issues.
47. Legal ethics guidance memos of general applicability and tips of the month are posted on SharePoint, and can be accessed by subject matter.
48. When positions become vacant, explore the possibility of filling the vacancy with details in lieu of permanent positions.
49. Telework opportunities will be expanded.
50. Office sharing will be reviewed for those teleworking.
51. Travel to Regions will be minimized.
52. Centralization will be explored for:
53. Docketing
54. Case assignments
55. R-Case decision writing
56. Information Officer duties
57. Legal research
58. Investigation will not seek EIN numbers or manuals, policies, handbooks etc. unless directly related to alleged violations.
59. Six months after implementation of these changes, time targets will be reviewed.
Memorandum

February 9, 2018

To: Chairman Marvin E. Kaplan  
    Member Lauren McFerran  
    Member Mark Gaston Pearce

From: David P. Berry  
       Inspector General

Subject: Notification of a Serious and Flagrant Problem and/or Deficiency in the Board’s Administration of its Deliberative Process and the National Labor Relations Act with Respect to the Deliberation of a Particular Matter

I have determined that there is a serious and flagrant problem and/or deficiency in the Board’s administration of its deliberative process and the National Labor Relations Act with respect to the deliberation of a particular matter involving specific parties. In accordance with section 5(d) of the Inspector General Act, as amended, I am immediately providing this report to the Board. Section 5(d) requires that within seven calendar days of the date of this report, the Board shall transmit it to National Labor Relations Board’s Congressional oversight committees, together with any report by the Board containing any comments that the Board deems appropriate.

Issue

During the course of investigating OIG-I-541, a matter involving the President’s ethics pledge found in Executive Order 13770, it was necessary to determine if the Board’s decision in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (*Hy-Brand*), is the same “particular matter” as the “particular matter” in *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB No 186 (*Browning-Ferris* or *BFI*). The necessity arises because Leadpoint, a party in *Browning-Ferris*, is represented by Member Emanuel’s former law firm.

Executive Order 13770, the President’s ethics pledge, prohibits an appointee from participating in a “particular matter involving specific parties” when the appointee’s former employer or client is a party or represents a party. The ethics pledge defines “particular matter involving specific parties” as having the same definition found in 5 C.F.R. 2641.201(h)(1). That regulation is part of the regulatory guidance regarding post-employment restrictions found in 18 U.S.C. § 207. The pertinent part of the definition is as follows:
Particular Matter involving a specific party or parties . . . include[s] any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest or judicial or other proceedings, . . . only those particular matters that involve a specific party or parties fall within the prohibition . . . Such a matter typically includes a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.

The U.S. Office of Government Ethics provided guidance for the determination of whether two proceedings are in fact the same “particular matter:”

The same particular matter may continue in another form or in part. In determining whether two particular matters are the same, the agency should consider the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest.

This guidance is also found in 5 C.F.R. 2641.201(h)(5) and is used by the courts in analyzing facts when determining if 18 U.S.C. § 207 was violated. See United States v. Montemayor, 2017 WL 2493906 (U.S. District Court, N.D. Georgia, Atlanta Division).

Analysis

Using the guidance provided by the U.S. Office of Government Ethics and the courts, I determined that, given the totality of the circumstances, the Hy-Brand and Browning-Ferris matters are the same “particular matter involving specific parties.”

Although the two cases started out as two distinct and separate matters, the manner in which the former Chairman marshaled Hy-Brand through the Board’s deliberative process effectively resulted in a consolidation of the two matters into one “particular matter involving specific parties.” In short, the practical effect of the Hy-Brand deliberative process was a “do over” for the Browning-Ferris parties.

On October 18, 2017, the former Chairman sent an email message with an attached majority decision draft to the Members who joined in the decision stating the following:¹

Redacted pursuant to FOIA Exemption

¹ The email text is deliberative information. I am including a summarization of the text because I determined that it is essential to show how the consolidation of the deliberative process occurred at the inception of the Hy-Brand deliberations and the tone that was set.
The wholesale incorporation of the dissent in *Browning-Ferris* into the *Hy-Brand* majority decision consolidated the two cases into the same "particular matter involving specific parties." The dissent in *Browning-Ferris* resulted from the Board's deliberative process following the adjudication of the facts and determination of law at the Regional level and the submission of briefs by the parties, including Member Emanuel's former law firm, and amici providing legal arguments for the Board's consideration. Because of the level of the incorporation of the *Browning-Ferris* dissent into what became the Board's decision in *Hy-Brand*, it is now impossible to separate the two deliberative processes. Rather, the Board's deliberation in *Hy-Brand*, for all intents and purposes, was a continuation of the Board's deliberative process in *Browning-Ferris*.

Because of this level of consolidation and the fact that the *Browning-Ferris* parties were engaged in an enforcement proceeding, the deliberations of the *Hy-Brand* case involved and affected the legal rights of the parties of *Browning-Ferris*. This is illustrated by the majority decision's factual analysis and application of the law found at pages 18 and 19 of the *Hy-Brand* decision that included the following statements:

The evidence relied on by the *Browning-Ferris* majority amounted to a collection of general contract terms and business practices common to most contracting entities . . ., plus a few actions by BFI that had some routine impact on Leadpoint employees;

*Browning-Ferris* effected a sweeping change in the law without any substantive discussion of significant adverse consequences raised by the parties and amici in the case;

The *Browning-Ferris* majority nevertheless attempted to distinguish the facts of *Browning-Ferris* based on an "apparent requirement of BFI approval over . . . pay increases" for the supplier employer's employees;

The expansive nature of the *Browning-Ferris* test was demonstrated by the evidence the *Browning-Ferris* majority relied on to find joint-employer status in that case, which involved a "cost-plus" arrangement common in user-supplier contracts [followed by a list of nine factual statements regarding the *Browning-Ferris* parties]; and
[T]he Regional Director correctly decided under then-extant law that it was not enough to show BFI was the joint employer of Leadpoint’s employees.

When analysis at pages 18 and 19 of the Hy-Brand decision is paired with the statement “we overrule Browning-Ferris and return to the principles governing joint-employer status that existed prior to that decision” at page 2, it is apparent that the majority considered the facts and arguments of the Browning-Ferris parties and amici and used those facts and arguments to reissue a Browning-Ferris majority decision that stated a new outcome for the parties of Browning-Ferris under the re-established principles governing joint-employer status. Additionally, there is no material discussion of the Hy-Brand matter in the part of the decision that overrules Browning-Ferris. For all intents and purposes, Hy-Brand was merely the vehicle to continue the deliberations of Browning-Ferris.

After the Board issued the decision, the majority Members immediately directed the General Counsel to request that the circuit court remand the Browning-Ferris case. The direction was later rescinded after the Board was informed that the General Counsel had an ethical obligation to notify the court that the Browning-Ferris decision was overruled by Hy-Brand. Thereafter, the court did in fact remand the case and then denied a motion for reconsideration of the remand. Now that the Browning-Ferris matter has been remanded to the Board, there is literally no reason for further deliberations before issuing a decision because the law is settled and a determination of the law to facts for the Browning-Ferris parties was established in the Hy-Brand decision. Alternatively, if the court had not granted the request for remand, the General Counsel would have been precluded from taking a position before the court in the Browning-Ferris enforcement preceding that was contrary to Hy-Brand decision.

The Hy-Brand majority decision also acknowledges that the two deliberative processes are consolidated. In response to the dissent’s criticism of not seeking amicus briefing, the majority included the following:

Additionally, the issue we decided today was the subject of amicus briefing when the Board decided Browning-Ferris.

That sentence was included to specifically address the issue of whether the prior deliberative material was available to the majority Members who were not Members when the Browning-Ferris decision was issued. This was necessary because the Hy-Brand parties did not seek to overturn Browning-Ferris, a further illustration that the Board was in fact not deciding Hy-Brand on the merits of that case, but was continuing the deliberative proceedings of the Browning-Ferris decision.

Because the Hy-Brand deliberation was a continuation of the Browning-Ferris deliberative proceedings and involved the application of the Browning-Ferris facts to the law for the Browning-Ferris parties, Member Emanuel should have been recused from participation in deliberations leading to the decision to overturn Browning-Ferris. This determination is limited to very specific facts as to what actually occurred in the deliberative process of Hy-Brand, and it is the totality of those specific facts that drives the decision.
Our determination that the *Hy-Brand* and *Browning-Ferris* matters are the same “particular matter involving specific parties” for the purpose of Executive Order 13770 is not a determination that Member Emanuel engaged in misconduct. The issue of whether misconduct occurred involves a number of considerations, and the resolution of those issues is not appropriate in this type of notification.

**Effect**

Member Emanuel’s participation in the *Hy-Brand/Browning-Ferris* matter when he otherwise should have been recused exposes a serious and flagrant problem and/or deficiency in the Board’s administration of its deliberative process and the National Labor Relations Act with respect to the deliberation of a particular matter that should be immediately brought to the attention of Congress and addressed by the Board.

In order to maintain industrial peace, the Board’s decisions must be issued in a manner consistent with due process that ensures that those engaged in interstate commerce can rely upon them. In part, that reliance is obtained when the Members perform their duties in a manner that is free of conflicts of interest or the appearance of such, and is accomplished in accordance with all of the Government’s ethics requirements. When the Board falls short of that standard, the whole of the Board’s deliberative process is called into question.

**Corrective Action**

To remedy the serious and flagrant problem and/or deficiency in the Board’s administration of its deliberative process and the National Labor Relations Act with respect to the deliberation of a particular matter, I recommend the following corrective action:

Member Emanuel’s participation in the *Hy-Brand* decision, when he otherwise should have been recused as outlined above, calls into question the validity of that decision and the confidence that the Board is performing its statutory duties. I recommend that the Board consult with the Designated Agency Ethics Official to determine the appropriate action to take to resolve that issue and restore confidence in the Board’s deliberative process; and

Member Emanuel’s participation in the *Hy-Brand* decision demonstrates that the Board’s current practice of highlighting and addressing recusal issues should be reviewed to determine if it is adequate to protect the Board’s deliberative process from actual conflicts of interest and the appearance of such. I recommend that the Board consult with the Designated Agency Ethics Official to conduct that review and resolve any issues.

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2 In reaching that determination we have taken into account Member Emanuel’s response to a Congressional inquiry that is related to his participation in the *Hy-Brand* decision and other written matters that he provided to the Office of Inspector General. We have also consulted with the Board’s Designated Agency Ethics Official.
News

January 17, 2018

Labor Board Shakeup Could Centralize Control Over Cases

From Labor & Employment on Bloomberg Law

From labor disputes cases to labor and employment publications, for your research, you’ll find solutions on Bloomberg Law®. Protect your clients by developing strategies based on Litigation...

By Lawrence E. Dubé

https://www.bna.com/labor-board-shakeup-n73014474236/
NLRB General Counsel Peter Robb (R) wants to launch a major restructuring of the National Labor Relations Board’s field office operations, sources familiar with the matter told Bloomberg Law.

Robb, a Trump appointee who became general counsel late last year, held a conference call with regional directors Jan. 11. He told the directors he is considering reorganizing the agency’s 26 regional offices into a smaller number of districts or regions supervised by officials who would report directly to the general counsel, several sources said.

Also available on Daily Labor Report

Daily Labor Report® is the premier resource that the nation’s foremost labor and employment professionals rely on for authoritative, analytical coverage of top labor and employment news.

Sources told Bloomberg Law they’re concerned that the general counsel wants to limit regional directors’ authority and possibly reduce the rank of at least some regional office officials. Regional directors currently have the authority to issue complaints and dismissals of unfair labor practice cases, and they render decisions in union representation cases.

A reorganization could mean that local office decisions in NLRB cases would get final approval from agency officials located hundreds of miles away from the employers, unions, and employees involved in labor disputes. NLRB stakeholders and labor lawyers have
often valued the opportunity to meet and communicate with regional directors in nearby offices, but reorganizing the board's offices could make such interactions more difficult.

Required Board Approval
The National Labor Relations Act and labor board regulations give the general counsel broad authority over regional office operations, but board approval may be required for office restructuring and personnel actions. NLRB memoranda describing delegations of authority from the agency's board to the general counsel have for years required board approval for an appointment, transfer, demotion, or discharge of a regional director to become effective. Federal personnel law and regulations could also affect the agency's ability to downgrade or demote regional directors.

The delegation memoranda require board approval for the establishment, transfer, or elimination of any NLRB regional office. One attorney familiar with NLRB operations told Bloomberg Law that even if the general counsel and board agree on a plan to reorganize field offices, the agency may have to publish a formal notice in the Federal Register and allow public comment on any reorganization proposal.

Two former NLRB officials told Bloomberg Law that they had heard conflicting reports about the details of Robb's remarks to the regional directors, but both said they would be concerned if the general counsel plans to add another layer to the field office
structure, especially if it would mean moving the decisionmaker farther away from the employers, unions, and employees involved in NLRB cases.

Both former officials said the NLRB's regional offices handle the bulk of the agency's casehandling work and they have handled it efficiently. They said moving decisionmaking officials or authority away from local offices could impair, rather than improve, the agency's efficient performance in unfair labor practice proceedings and union representation cases.

"At this time, no plan involving the restructuring of our Regional Offices system has been developed," an NLRB spokesperson told Bloomberg Law Jan. 17.

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Trump Appointee Is Trying to Squelch Us, Labor Board Staff Says

By NOAM SCHEIBER  JAN. 25, 2018

The Trump administration’s efforts to reverse the direction of federal labor policy appear to have accelerated with a proposal to demote the senior civil servants who resolve most labor cases.

Under the proposal, those civil servants — considered by many conservatives and employers to be biased toward labor — would answer to a small cadre of officials installed above them in the National Labor Relations Board’s hierarchy.

The proposal could pave the way for a pronounced shift in the day-to-day workings of the agency, making it friendlier to employers named in complaints of unfair labor practices or facing unionization drives.

Peter B. Robb, the agency’s general counsel and a Trump appointee, outlined the proposal this month in a conference call with the civil servants, known as regional directors, according to a letter sent by the directors to Mr. Robb.

The regional directors and their staffs typically resolve more than 85 percent of the roughly 20,000 cases filed with the agency each year over disputed labor practices without involving the general counsel, the top enforcement official.
The proposal follows a series of aggressive changes in posture at the agency since last fall, when Republicans gained a majority on the five-member board.

In early December, a mere two weeks into his tenure, Mr. Robb released a memo announcing the end of many of his predecessors’ initiatives, including a campaign against employers who improperly classify workers as contractors, and featuring a long a list of hot-button issues on which regional directors were required to seek input from his office.

“New general counsels will at some point signal cases they want to look at,” said Wilma B. Liebman, a former chairwoman of the labor board. “But this was so sweeping and so fast that it was just kind of startling.”

That same month, the agency overturned a key Obama-era ruling that had made it easier to hold companies responsible for labor-law violations at companies they do business with, such as franchisees and contractors.

Mr. Robb came to his position after a career largely spent representing management, including handling part of the Reagan administration’s litigation against the air traffic controllers’ union that waged an illegal strike in 1981. Most labor historians say the government’s hard line in firing the controllers contributed to organized labor’s decline in subsequent decades, said Joseph A. McCartin, a history professor at Georgetown University.

The labor board’s general counsel is confirmed by the Senate. The counsel has independent authority as a prosecutor, derived from the National Labor Relations Act, and performs other duties on behalf of the agency’s board, which acts as its highest court of appeals.

Demoting the regional directors — there are 26, including two vacancies — and inserting a new group above them would most likely require board approval. The regional directors’ account suggested that the new officials would probably be civil servants as well, rather than political appointees.

Michael J. Lotito, a lawyer with the management-side firm Littler Mendelson, who has discussed the proposal with officials at the agency, said they had assured
him that it was largely a response to budget cuts reflecting a significant decline over several decades in the number of labor charges filed.

He said some of the savings could come from staff reductions among managers and supervisors at the regional offices, achieved in part through attrition.

The agency itself said that “given budgetary issues, the general counsel is assessing the current organizational structure for possible changes,” but added, “No specific plan involving the restructuring of our organization has been developed.”

Mr. Robb’s proposal was reported earlier by Bloomberg Law.

Labor advocates and even management-side lawyers often praise the professionalism of the regional directors, but critics consider them too sympathetic to workers and unions.

“Some are way more ideologically pro-union than others, but they all tend to be fairly ideological,” Mr. Lotito said. “The agency tends to promote — I think that it should — individuals who want to protect the rights of employees. But if you’ve been doing that all your life, you can miss the rights of the employer.”

The proposed changes appear consistent with a broader Trump administration suspicion of longtime civil servants. President Trump’s former chief strategist, Steve Bannon, called for the “deconstruction of the administrative state.”

During the administration’s first year, dozens of senior career officials resigned or retired from the State Department and the Environmental Protection Agency as many complained of being sidelined or ignored by political overseers.

The Interior Department reassigned a few dozen senior civil servants to posts that often made little use of their expertise. In one case, a top climate policy official was reassigned to the office that collects royalty payments from oil and gas companies. He quit not long after.

According to the N.L.R.B. regional directors’ letter, Mr. Robb said on the conference call on Jan. 11 that the changes were necessary and independent of
budget considerations — implying a lack of confidence in the directors’ ability to investigate and adjudicate allegations of labor-rights violations.

Mr. Robb, according to the letter, said the agency might hire a handful of district directors, each with authority over a portion of its 26 regions, and proposed lowering the regional directors’ rank within the Civil Service.

The letter expressed concerns that Mr. Robb was intent on “removing many of the core responsibilities of the sitting regional directors,” though it acknowledged that it was unclear how much authority he intended to shift to district directors, how many there would be, and whether any regional offices would be closed or consolidated.

Mr. Lotito, the management lawyer who has discussed the concept with agency officials, said the idea was to keep most or all of the regional offices in place and allow management and labor to appeal decisions to the district directors.

“The regional directors are their own fiefdoms,” he said. “If there was an ability to go to a district director, who oversees eight regions, chances are that would drive consistency.”

Like the civil servants who were reassigned at the Interior Department, the regional directors at the labor board are members of the Senior Executive Service, which was established by Congress in the late 1970s as an elite corps of executives who could be deployed to tackle the government’s thorniest challenges.

Conservatives and some nonpartisan experts have complained that members of the Senior Executive Service are far less mobile than Congress envisioned, burrowing into particular agencies.

By proposing to downgrade the regional director positions into the ranks of standard government workers, where they would make less money and have narrower authority, Mr. Robb in some respects proposed going further than Interior Secretary Ryan Zinke, who reassigned Senior Executive Service members but preserved their status.
The changes proposed by Mr. Robb “would have a severe and negative impact on our agency and our stakeholders,” the directors wrote.

William Valdez, president of the association representing the senior executives, said the labor board could eliminate such positions, making the regional directors eligible for comparable jobs elsewhere in government, but could not demote them en masse. As a practical matter, he said, many of the regional directors may choose to reapply for their jobs at lower rank.

Even many management-side lawyers consider the regional directors effective. “Some people are better than other others, but I think the standards are pretty high,” said Steven M. Swirsky, a former field lawyer for the labor board who has spent decades representing employers.

At a Jan. 19 meeting with an American Bar Association committee whose members represent both management and labor, Mr. Robb argued that the reaction to his proposal was overblown.

According to someone familiar with the discussion, Mr. Robb acknowledged that he would need the approval of the agency’s board for any changes, and he said he would seek public comment as well as input from the regional directors.

In the meantime, the letter from the regional directors indicates that many may take Mr. Robb’s proposal as a cue to resign or retire, as some of their counterparts at the State Department, the Environmental Protection Agency and the Interior Department did.

“We believe the changes you suggest, including the removal of directors from the Senior Executive Service, will cause senior directors and managers, whose institutional knowledge is a valuable asset to the agency, to retire sooner than they otherwise intended,” the directors wrote to Mr. Robb. “As you can imagine, the information you provided to the regional directors has created much uncertainty and has disheartened us.”

A version of this article appears in print on January 26, 2018, on Page B1 of the New York edition with the headline: Plan to Demote Directors Rolls Labor Agency.
Alternative Facts at the NLRB

Published March 28th, 2018 - Sharon Block

Peter Robb, the NLRB General Counsel appointed by President Trump, has a change agenda for the agency. He recently took two actions that have garnered a great deal of attention among Board watchers. His announcements regarding a significant reorganization of the Board’s structure and processes and his intent to settle the McDonald’s case mark significant departures from his predecessor’s approach to these issues. But the attention they have attracted is due not only to the nature of his proposals, but also because of questions about the reasons that he is taking these actions.

First, he has proposed to fundamentally change the way that field operations are organized and how unfair labor practice charges are processed. Shortly after he was sworn in, Robb told NLRB staff that he was considering demoting the Board’s regional directors – the career civil servants who oversee the Board’s field offices – and subjecting their decision-making to the supervision of a small number of new appointees in headquarters who would report directly to the General Counsel’s office. In addition, Robb circulated a memo outlining a number of possible changes that would impose significant new obstacles for workers and unions seeking to have the Board investigate their charges that their rights under the Act had been violated.

Why does Robb say such dramatic changes are necessary? Although he hasn’t put his justification in writing, he is reported on several occasions to have justified these proposals as cost-cutting measures necessitated by cuts included in the Trump Administration’s budget request. Robb’s rationale, however, raises significant questions. In the modern era, almost all Presidential budget requests are dead on arrival on Capitol Hill. Trump’s 2019 budget request was even more dead than usual, if it is possible to have a state more inert than death. The baseline numbers in Trump’s 2019 budget request were inconsistent with the numbers included in legislation Congress had passed and Trump had signed several days earlier. Thus, the Associated Press deemed the budget “dead before arrival”. The budget request seems unlikely to be the compelling reason for Robb’s radical plans. To the extent that Robb’s budget concerns also encompassed the uncertainty around the Board’s 2018 funding, those concerns also would ring false. Just last week, President Trump signed into law an omnibus appropriations bill that gives the Board level funding for the rest of this fiscal year, providing no basis for draconian cost saving measures.

Similarly, Robb’s actions related to the highest profile case he inherited from his predecessor in the Obama Administration – the McDonald’s joint employer case – raise questions about his true motive. As I raised in OnLabor last month here, Robb justified his abrupt decision to seek a settlement in the McDonald’s case after more than three years of litigation in part because of the
change in the joint employer law established in the Board’s decision in \textit{Hy-Brand}. Shortly after Robb announced his intent to settle the case, however, the Board decided to vacate the \textit{Hy-Brand} decision following a finding by the Board’s Inspector General that Board Member Bill Emanuel should have recused himself from participation in the case. If the change in law embodied in \textit{Hy-Brand} was the true reason for Robb’s change in litigation strategy, one would expect that when the Board vacated the decision, Robb would rethink his dramatic action. Far from rethinking his direction in McDonald’s, Robb actually doubled down and quickly reached a settlement with McDonald’s without getting the approval of the charging party or the administrative law judge overseeing the trial.

Robb has repeatedly stepped into the spotlight on high profile issues and delivered shaky justifications for his conduct. In keeping with the independent nature of the Board’s authority, Board officials traditionally try to minimize the ideological tenor of their explanations for their actions. For example, during the Obama Administration, the Board described its motive for revising the election procedure rules as an effort to “modernize” and “streamline” the election process and to “better fulfill its duty to protect employees’ rights”. The Board majority did not say that their motive was to strengthen the labor movement – a more political-sounding rationale, but that could be easily extrapolated from the language that they did use. The revisions did, in fact, modernize and streamline the election process and so the stated rationale was not false; it was simply not the exclusive rationale. Robb’s rationales, however, do not seem like less political sounding versions of genuine reasons, but instead are false. The proof that they were not in fact the motivation for his actions is that now that they have fallen away, his intent to move forward has not changed.

There are many reasons to be disturbed by the questions surrounding the basis for Robb’s actions. If he is not sharing the true motives for his actions, he is depriving the public of the ability to assess the validity of the true reasons. We deserve to have an honest debate about whether his proposals are good ideas or not. In the face of questionable rationales, some in the public, including U.S. Senators and the NLRB’s own employees, are filling in the void with speculation about Robb’s real motivation, including whether it is ideological. The consequences of Robb’s actions could be significant for the rights of workers to act collectively and to have those rights effectively protected. The public would be best served by a more informed and transparent debate.

Trump Labor Board Backtracks on Recognition of Anne Frank Center

By Josh Eldelson

April 13, 2018, 3:23 PM EDT

→ NLRB tells staff that it was 'mistake' to mention NY group
→ Center has harshly criticized Trump for alleged bigotry

The National Labor Relations Board emailed its employees this week, marking Holocaust Days of Remembrance by highlighting the work of Washington’s Holocaust Memorial Museum, the Anne Frank House <http://www.annefrank.org/en/> in Amsterdam, and the Anne Frank Center in New York.

Two days later, the agency backtracked, saying the inclusion of the New York center had been a “mistake.”

The Anne Frank Center, a small non-profit organization that’s unaffiliated <https://www.theatlantic.com/politics/archive/2017/04/anne-frank-center/524055/> with the Amsterdam museum or the Swiss group <http://www.annefrank.ch/> that has rights to the teenage Holocaust victim’s letters, photographs and famous diary <http://www.annefrank.ch/diary.html>, has drawn national attention for its criticism of President Donald Trump.

In 2017, Steven Goldstein, at the time the center’s executive director, said the Trump administration was “infected” <https://www.facebook.com/AnneFrankCenterforMutualRespect/posts/10155151571429040> with “the cancer of anti-Semitism,” and accused then-White House Press Secretary Sean Spicer of denying <https://www.facebook.com/AnneFrankCenterforMutualRespect/posts/10155151571429040> that Hitler had gassed Jews. (Spicer later apologized. <https://www.bloomberg.com/politics/articles/2017-04-11/trump-spokesman-assailed-for-saying-hitler-didn-t-use-chemicals>)

On social media this year, the center has broadened its criticisms of the president. It called the Trump administration’s decision to end Temporary Protected Status for Salvadorans “abhorrent” <https://twitter.com/AnneFrankCenter/status/95039586390556280>; termed Trump’s alleged comments about “shithole” <https://twitter.com/AnneFrankCenter/status/95179523564278784> nations “bigotry”; and shared a Salon.com <https://twitter.com/AnneFrankCenter/status/97068704359135648> article about “Trump’s anti-Muslim agenda.”

Reference a ‘Mistake’

The April 10 memo to agency employees that referenced the Anne Frank Center was signed by NLRB Chairman Marvin Kaplan and General Counsel Peter Robb. “It is important not only to honor and remember the lives of the 6 million victims who perished, but also to exemplify how...
acts of discrimination can evolve into death and destruction," the Trump-appointed labor board leaders wrote.

In an internal email dated April 12, Brenda Harris, the NLRB's equal employment opportunity office director, informed employees that the reference to the Anne Frank Center had been "a mistake," and shouldn't be "regarded as an endorsement by the National Labor Relations Board, Chairman Kaplan, or General Counsel Robb of partisan views expressed by that group."

The NLRB didn't immediately respond to a request for comment.


A spokeswoman for the Anne Frank Center declined to comment on the NLRB emails, saying "it seems to be an internal matter." She said that the center has "long-established roots and a universal message," and that Anne Frank's father, Otto Frank, who died in 1980, was the first president of its predecessor organization.

The email distancing itself from the Anne Frank Center "would have been considered highly unusual during my tenure at the NLRB," said University of Wyoming law professor [Michael Duff](http://www.uwyo.edu/law/directory/mike-duff.html), an attorney at the agency under Presidents Bill Clinton and George W. Bush.

Messages like the NLRB's initial one from April 10 are generally vetted before being sent, to ensure their propriety. Duff said, "The million dollar question," Duff said in an email, "is whether the countermanding came from inside or outside the agency."