What Did National Labor Relations Board General Counsel Richard Griffin's Term Mean for Employers?

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Richard F. Griffin, Jr.'s term as National Labor Relations Board (NLRB) General Counsel (GC) was marked by a dogged defense and pursuit of bolstering the rights of unions and employees under the National Labor Relations Act (NLRA).

Griffin, a former general counsel for the International Union of Operating Engineers, was the NLRB GC for four years and he was tenacious to the end. Indeed, although the U.S. Solicitor General decided to side with employers at the U.S. Supreme Court in connection with consolidated cases on class action waivers, Griffin separately argued the Board's position in favor of employees. (See our article, Supreme Court Hears Argument on Validity of Class Action Waivers in Employment Arbitration Agreements.)

Griffin did not accomplish all he set out to do, but he succeeded in a number of areas, including greatly expanding "joint employer" liability.

Board Member or General Counsel?

Republican lawmakers and business leaders probably did some high-fiving when, during the summer of 2013, Republican Senators negotiated for the withdrawal of then-President Barack Obama's nomination of Griffin to be a Member of the NLRB.

Griffin was one of three controversial "recess appointments" as a Board Member by Obama in January 2012 that were invalidated by a decision of the U.S. Court of Appeals for the District of Columbia. (The U.S. Supreme Court in *National Labor Relations Board v. Noel Canning,* 134 S. Ct. 2550 (2014), subsequently affirmed the Circuit Court of Appeal's decision. See our article, Supreme Court Issues Historic Decision on President's Recess Appointment Power.) Griffin later was re-nominated by Obama. Republican lawmakers protested. As part of a deal struck with the lawmakers, Obama withdrew Griffin's nomination (and the nomination of Sharon Block, also an invalid recess appointment).

After withdrawing Griffin's nomination to the Board, Obama nominated him to be the NLRB's GC. The Senate confirmed Griffin's nomination on October 29, 2013, and he was sworn in to serve a four-year term on November 4, 2013.

Griffin likely will be replaced by Republican Peter Robb, President Donald Trump's choice for NLRB GC. Until Robb is confirmed, Jennifer Abruzzo, who has served as Deputy GC since November 4, 2013, will be Acting GC.

Although the GC's position is different than a Board Member's (the former is "prosecutorial" in nature, while the latter is "judicial"), the GC enjoys significant power to direct, among other things, whether and when unfair labor practice (ULP) charges are pursued to resolution by the five-member NLRB. The GC also decides the issues on which his office will focus its resources (including what legal theories to pursue or abandon), directly affecting how his and local NLRB offices scrutinize certain issues.

In retrospect, Griffin likely had a far greater impact on the Board's jurisprudence as GC than he would have had as one of several Board Members.

Griffin's First Wish List

As the newly confirmed GC, Griffin was expected to try to further the labor-friendly agenda of his predecessor, Acting General Counsel Lafe Solomon. He did not disappoint.

On February 25, 2014, in Memorandum GC 14-01 to Regional Office leaders, Griffin wrote about how "centralized consideration of certain issues can enhance our ability to provide a clear and consistent interpretation of the Act." Section A of the Memorandum set forth cases that "involve the General

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Counsel's initiatives or policy concerns" — that is, Griffin's personal "wish list." That list contained 12 issues that, if raised by a case presented to a Regional Office, Griffin wanted submitted to his office's Division of Advice for review.

Griffin's ambitious list of priorities included, among others, cases involving:

1. Whether employees have a Section 7 right under the NLRA to use an employer's email system, contrary to the standard in *Register Guard,* 351 NLRB 1110 (2007);
2. An allegation that the employer's permanent replacement of economic strikers had an unlawful motive under *Hot Shoppes,* 146 NLRB 802 (1964);
3. Whether a perfectly clear successor should have an obligation to bargain with the union before setting initial terms of employment, as opposed to only when the narrow exceptions enunciated in *Spruce Up,* 209 NLRB 194 (1974), apply; and
4. The applicability of *Weingarten* principles in non-unionized settings as set forth in *IBM Corp.,* 341 NLRB 1288 (2004).

Purple Communications, Inc.: Right to Use Employer's Email

One of Griffin's most significant "wins" involves the issue of whether employees have a Section 7 right to use their employer's email system for non-work purposes. Historically, employers have restricted employees' use of their assets and equipment, including computer and email systems, to work-related purposes.

In 2007, the Board ruled in *Register Guard* that employees do not have a Section 7 right to use their employer's email systems for non-work purposes.

In 2014, the Board agreed with Griffin that employers' property interests in their email systems must generally yield to employees' Section 7 rights to engage in statutorily protected communications (*e.g.,* union organizing activities) in *Purple Communications,* 361 NLRB No. 126, reversing *Register Guard.* According to the Board, if employees normally are provided access to email systems, absent special circumstances, they presumptively must be permitted access to those systems for non-work purposes as well.

Griffin also argued for the expansion of *Purple Communications* during his time as GC, finding limited success. One administrative law judge (ALJ) extended *Purple Communications* to third-parties' email systems. However, another ALJ found no right to unrestricted downloading, and still another ALJ ruled that employees need not be afforded absolute privacy in using employers' email systems. The NLRB has not expressed its view on any of these ALJ decisions and has not yet ruled on the full extent of *Purple Communications'* reach.

Replacement of Economic Strikers

Griffin also sought tougher application of the Board's *Hot Shoppes* decision, which recognized that it may be unlawful for an employer to permanently replace economic strikers, where the employer otherwise would have the right to replace them, if done for some independent unlawful purpose (*i.e.,* unrelated to the strike).

In *Piedmont Gardens,* 364 NLRB No. 13 (2016), the Board sided with Griffin and significantly expanded its *Hot Shoppes* doctrine, finding that an "independent unlawful purpose" under *Hot Shoppes* need not be "unrelated to or extraneous to the strike itself." The Board held that replacing strikers to "discourage union membership" constituted an "independent unlawful purpose" under *Hot Shoppes,* essentially eliminating the requirement that the unlawful purpose be independent of the strike.

Ungranted Wishes

Griffin did not obtain the expansion he sought of the perfectly clear exception which was discussed in *Spruce Up.*

In *NLRB v. Burns International Security Services, Inc.,* 406 U.S. 272 (1972), the U.S. Supreme Court wrote that, although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is "perfectly clear" that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have the new employer initially consult with the union before terms are set. In *Spruce Up,* the Board held that the Supreme Court's "perfectly clear" caveat should be restricted to circumstances in which the new employer has actively (or by tacit inference) misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment. Presumably, Griffin wanted the Board to broaden the applicability of the caveat.

Griffin did not include this as a priority in a subsequent wish-list memorandum.

Griffin also failed to obtain reversal of *IBM Corp.* and extend the *Weingarten* doctrine (which provides unionized employees the right to have a representative present during investigative interviews that may

result in discipline) to non-unionized employees. Indeed, the Board declined to create a rule that would extend *Weingarten* rights to non-union employees.

Griffin's Second Wish List

On March 22, 2016, Griffin set out a revised list of priority issues in Memorandum GC 16-01. The list included several "carry-over" priorities from his first wish list and some new issues.

Among the new priorities were cases involving:

1. Allegations that "English-only" policies violate Section 8(a)(1);
2. The employment status of workers in the on-demand economy and whether misclassification as independent contractors itself violates Section 8(a)(1); and
3. Application of *Tri-Cast,* 274 NLRB 377 (1985), and the lawfulness of employer statements that employee access to management will be limited if employees opt for union representation.

English-Only Policies

In *Spring Valley Hospital Medical Center,* 363 NLRB No. 178 (2016), Griffin successfully argued to the ALJ that "English-only" rules were unlawful. The ALJ wrote:

> [R]equiring employees to speak only English infringes on an employee's ability to exercise their Section 7 rights since concerted activity hinges upon effectively communicating with other employees about working conditions, wages and/or terms and conditions of employment. Thus, employees cannot be restricted from communicating in their native language in nonpatient *and* patient access areas where patient disruption would be minimized. In this case, Respondents' language restrictions are not sufficiently limited in time and location, and as such, employees, especially non-native English speaking employees, would reasonably believe that they could not engage in concerted activity.

The employer did not appeal that holding, and as a result, the Board did not have to rule on it.

Independent Contractor/Employee Misclassifications Independently Unlawful

Griffin's pursuit of misclassification issues was focused on the "on-demand economy," but he also argued that every instance of misclassifying an employee as an independent contractor constitutes a separate ULP.

On August 26, 2016, Griffin issued an Advice Memorandum instructing a Regional Director to treat employee misclassifications as independent violations of the NLRA. Since only "employees" (and not "independent contractors"), as determined under the Board's 2014 analysis, are afforded rights under the NLRA, Griffin argued that the mere act of classifying an "employee" as an "independent contractor" inherently interfered with the employee's Section 7 rights. Therefore, the misclassification in and of itself is a ULP.

In 2017, in a case involving a different employer than the one that was the subject of the Advice Memorandum, an ALJ agreed with Griffin and ruled that an employer's misclassification of employees as independent contractors constituted separate violations of the NLRA. The employer has appealed, but the Board has not yet ruled on this issue.

Employers' Unlawful Campaign Threats

Griffin also made progress arguing that an employer's statement during a union organizing campaign that employees' access to management will be limited if employees opt for union representation is unlawful.

More than 30 years earlier, the Board in Tri-Cast had found such predictions lawful. But in *Sysco Grand Rapids, LLC,* 2017 NLRB LEXIS 57 (Mar. 2, 2017), Administrative Law Judge Michael A. Rosas appears to have declined to follow *Tri-Cast.* He found unlawful a "warning" to an employee that he would not be able to talk with management in the same manner if the union prevailed in the election. The employer has appealed the ruling.

Expansion of Joint Employment Doctrine

Although ostensibly not a "priority" in his two wish lists, no review of Griffin's time as NLRB GC would be complete without a discussion of his role in expanding the Board's "joint employer" doctrine.

Griffin consistently argued for the expanded application of the "joint employer" doctrine. The doctrine previously required a company using the employees of a third-party to actually exercise some direct control over the third-party's employees' terms and conditions of employment before the company could be liable for the third-party employer's legal obligations or violations of the NLRA as a "joint employer."

Griffin had urged the Board to redefine a joint employer as any company that exercises direct, *indirect,*

or potential control over employees' working conditions, or where "industrial realities" make the putative joint employer an entity essential for meaningful bargaining to occur.

The Board agreed with much of Griffin's approach in its sweeping decision in *Browning-Ferris Industries,* 362 NLRB No. 186 (2015). Now, in addition to direct control, even indirect, potential control may render a company a "joint employer." Franchisors, in particular, have faced significant scrutiny following that decision.

Browning-Ferris Industries is on appeal to the U.S. Court of Appeals for the District of Columbia Circuit. A decision is expected at any time.

Following *Browning-Ferris,* the Board further expanded its joint employer doctrine by holding that Board-conducted representation elections in bargaining units combining employees who are (a) jointly employed by a user employer and supplier employer and (b) solely employed by the user employer do not require the consent of either employer. *Miller & Anderson, Inc.,* 364 NLRB No. 39 (2016).

Withdrawal of Union Recognition

Griffin also sought to make it more difficult for employers to unilaterally withdraw recognition of existing unions. On May 9, 2016, Griffin issued Memorandum GC 16-03 explicitly arguing for the reversal of *Levitz Furniture,* 333 NLRB 717 (2001). He was unsuccessful.

Under *Levitz,* an employer may lawfully withdraw recognition of a union if the employer obtains objective evidence that the union has actually lost majority support. Griffin instructed Regional Offices to issue a ULP complaint every time a charge revealed an employer had relied on *Levitz* to withdraw union recognition. He wanted the Board to eliminate the *Levitz* doctrine completely, instead requiring that employers await the results of a Board-conducted election (the holding of which can be "blocked" by a union's filing of ULP charges) before it may withdraw recognition of a union that has clearly lost its majority support.

The Board has not reversed *Levitz.*

Electronic Signatures Initiative

In April 2015, the Board's "quickie election" rules became effective, making it easier for unions to organize workers. Griffin also attempted to play a role in increasing union concentration in the private sector.

On September 1, 2015, Griffin issued Memorandum GC 15-08, allowing unions to gather "electronic signatures" to demonstrate the required support for representation. Traditionally, authorization cards or another document containing actual written (and dated) signatures of employees expressing their desire for union representation were required to support a union's representation petition. Griffin determined that "the evidentiary standards the Board has traditionally applied to handwritten signatures apply equally to electronic signatures." Therefore, according to Griffin, "it is practicable to accept electronic signatures in support of a showing of interest if the Board's traditional evidentiary standards are satisfied." With Griffin's Memorandum, unions no longer had to obtain handwritten signatures; they could satisfy the "showing of interest" requirement by, for example, providing the NLRB with a declaration explaining that the submitted electronic signatures were collected through a website set up by the organizers and asserting that the organizers believe the employee signed the showing of interest.

The ability to garner a sufficient showing of interest by virtue of responses to a website is a dramatic potential benefit to unions. Surprisingly, however, it appears unions still largely prefer gathering their showing of interest the "old-fashioned" way.

Employer Work Rules

Griffin's term also was notable for his "educational" memorandum on employer work rules. For many employers, the Board's decisions on work rules and rationale for finding them unlawful were unclear and counterintuitive. Employers were frustrated that they could no longer ask their employees to act "professionally" or "be courteous" toward each other or impose common confidentiality rules.

On March 18, 2015, Griffin in Memorandum GC 15-04 attempted to clarify the Board's position on a wide variety of work rules, including those involving (a) confidentiality (both generally and as they relate to internal investigations), (b) codes of conduct (and other work rules that broadly require employees to work professionally or cooperatively, or prohibit offensive conduct), (c) employees' use of social media, and (d) prohibitions on recordings and photography in the workplace, among others. Until the new, Republican-controlled Board changes the law, that Memorandum is a go-to guide for employers and their labor and employment counsel.

Graduate Students, Student-Athletes as "Employees"

Griffin also has argued for expanding the Act's definition of "employee" to include a wide range of

private universities' students.

In *Northwestern University,* 362 NLRB No. 167 (2015), the NLRB expressly declined to resolve the issue of whether college scholarship football players are employees under the NLRA. Later, the Board in *Columbia University,* 364 NLRB No. 90 (2016), held that private universities' graduate students are "employees" under the NLRA (and reversing 12 years of precedent set by the Board's 2004 *Brown University*).

Griffin issued Memorandum 17-01 on January 31, 2017, on the "Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context." He attempted to fill the void left by *Northwestern University,* taking the "prosecutorial" position that scholarship football players in Division I FBS private sector colleges and universities are employees under the NLRA. Accordingly, he explained, the players have all of the rights and protections available to employees under the Act.

Griffin cast an even wider net in the Memorandum, also taking the position that "students performing non-academic work who meet the common law test of performing services for and under the control of universities, in exchange for compensation, fall within the broad ambit of [NLRA's definition of employee under] Section 2(3)." The GC's position covered any student who receives compensation from the institution and performs services under the direction of an agent of the institution. (See our article, NLRB General Counsel Concludes Division I Scholarship Football Players are Employees under Labor Law.)

Griffin's Legacy

Griffin's impact on the Board's jurisprudence was substantial. He will be remembered as having made dramatic strides toward accomplishing a progressive, labor-friendly agenda with the help of an employee-friendly NLRB. The new, Republican-majority NLRB is expected to undo much of that legacy.

Please contact a Jackson Lewis attorney with any questions.