

LAMAR ALEXANDER, TENNESSEE, CHAIRMAN

MICHAEL B. ENZI, WYOMING
RICHARD BARR, NORTH CAROLINA
JOHNNY ISAKSON, GEORGIA
RAND PAUL, KENTUCKY
SUSAN M. COLLINS, MAINE
BILL CASSIDY, M.D., LOUISIANA
TODD YOUNG, INDIANA
ORRIN HATCH, UTAH
PAT ROBERTS, KANSAS
LISA MURKOWSKI, ALASKA
TIM SCOTT, SOUTH CAROLINA

PATTY MURRAY, WASHINGTON
BERNARD SANDERS (I), VERMONT
ROBERT P. CASEY, JR., PENNSYLVANIA
AL FRANKEN, MINNESOTA
MICHAEL F. BENNET, COLORADO
SHELDON WHITEHOUSE, RHODE ISLAND
TAMMY BALDWIN, WISCONSIN
CHRISTOPHER S. MURPHY, CONNECTICUT
ELIZABETH WARREN, MASSACHUSETTS
TIM Kaine, VIRGINIA
MARGARET WOOD HASSAN, NEW HAMPSHIRE

United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

WASHINGTON, DC 20510-6300

DAVID P. CLEARY, STAFF DIRECTOR
EVAN SCHATZ, DEMOCRATIC STAFF DIRECTOR

<http://help.senate.gov>

December 12, 2017

Hon. Peter B. Robb
General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Dear Mr. Robb:

We write to express serious concerns regarding Memorandum 18-02, which you issued to National Labor Relations Board (“Board”) Regional Directors on December 1, 2017. Because workers cannot independently hold companies accountable in court for violations of the National Labor Relations Act (NLRA), your office is the only place they can turn. As you know, one of your responsibilities as the sole enforcer of the NLRA is to adapt the statute to ever-changing economic conditions.¹ However, your memo, striking in its breadth, suggests that your office will scale back its efforts to discharge that responsibility. The Trump Administration has a troubling track record of undermining worker protections, and we are deeply concerned that your policy changes will ultimately enable bad actors to violate workers’ fundamental labor rights with impunity.

Memorandum 18-02 requires regional offices to submit to your office for review “significant legal issues,” specifically targeting doctrines developed “over the last eight years” for potential “alternative analysis.” It also terminates a number of policies which sought to ensure that the NLRA’s protections would continue in force as the economy changes. These changes signal a significant shift in the Board’s efforts to protect workers’ rights.

Additionally, in an interview with our staff before your confirmation, you stated that you had not developed any opinion regarding recent Board decisions and that you would not be entering your position with any particular legal or ideological agenda. Further, in response to questions for the record, you stated, “I have not prejudged any application of Board precedent,” and “I have not developed a list of priority issues or criteria for determining [mandatory submissions to Advice]”. However, it appears that in a mere nine workdays, you developed opinions on a dozen complex legal questions leading you to revoke seven General Counsel memos and terminate five initiatives. In Memorandum 18-02, you offer no rationale for doing so.² Each of these revoked

¹ *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (“The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.”).

² N.L.R.B. Gen. Couns. Mem. 18-02 (Dec. 1, 2017) (stating without explanation, “I have decided that the following memos shall be rescinded,” and “Likewise, the following initiatives set out in Advice memoranda are no longer in effect . . .”).

memos and terminated initiatives sought to expand – not limit – protections and remedies for statutory employees.

The abrupt issuance of Memorandum 18-02 and the efforts it chooses to target raise serious and troubling questions.

Accordingly, we request that you provide us the following information by December 22, 2017. Please refer to the attached Instructions and Definitions in construing this request.

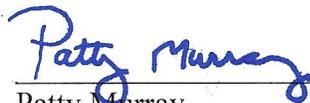
1. Please provide any communications that occurred after January 19, 2017 between you, or a member of your office, and any person or entity not employed by the National Labor Relations Board, concerning—
 - a. any Board decision implicated by Memorandum 18-02’s mandatory submission requirement;
 - b. GC 17-01, GC 16-03, GC 15-04, GC 12-02, GC 12-01, GC 11-04, or OM 17-02, or any doctrine, argument, or issue addressed by any of those memos; or
 - c. any of the “initiatives” listed on page 5 of Memorandum 18-02.
2. Please explain how you arrived at the timeframe of “over the last eight years” in targeting cases that overruled precedent.
3. Did you consult Regional Directors in developing Memorandum 18-02? If so, what were the recommendations of the Regional Directors?
4. Please provide your reasons for revoking each of the General Counsel memos and “initiatives” listed on page 5 of Memorandum 18-02. Please explain how revoking each memo and terminating each “initiative” furthers the policies and purposes of the NLRA.
5. In Memorandum 18-02, you state, “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.” This does not address cases in which a complaint has already issued, but the case has not been fully briefed to the Board and is not pending in the courts. How many already issued complaints rely on Board decisions implicated by Memorandum 18-02’s mandatory submission requirement? Please list all such complaints by their case names and numbers.
6. How will Memorandum 18-02 affect the complaints mentioned in the previous question?
7. Did you read about or consider any changes or trends in the economic realities facing workers in the course of developing Memorandum 18-02?
8. In announcing Memorandum 18-02’s mandatory submission requirement, you state, “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.”

- a. What “thoughts” are you referring to?
 - b. Why did you not disclose your “thoughts” on Board decisions implicated by Memorandum 18-02’s mandatory submission requirement in your interview with our staff in which you were specifically asked about your views on recent decisions of the Board and answered that you hadn’t developed any?
9. Why did you decide that you “might want to provide the Board with an alternative analysis” in complaints supported by the Board’s decision in *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12 (2014), which abrogated *Holling Press*, 343 NLRB 301 (2004)?
- a. Do you believe that workplace sexual harassment is a rare occurrence? Will you develop any “alternative analysis” asserting that sexual harassment claims “are not a common everyday occurrence,” as the 2004 Board majority concluded in *Holling Press*?
 - b. As the *Fresh & Easy* Board noted, “*Holling Press* effectively created an exception from Section 7 for claims of sexual harassment in circumstances where those claims, had they instead concerned discipline, safety, or many other matters similarly affecting working conditions, would have enjoyed the protection of the Act.” Do you believe such an exception is warranted?
 - c. Will you seek to create other exceptions from Section 7’s protections for specific kinds of workplace grievances?
 - d. Please explain your understanding of the “solidarity principle” articulated in *Fresh & Easy*.

We look forward to hearing from you. If you have any questions about this request, please do not hesitate to contact our staff at John_DElia@help.senate.gov and Lindsay_Owens@warren.senate.gov.

Sincerely,



Patty Murray
U.S. Senator
Ranking Member
Committee on Health, Education,
Labor and Pensions



Elizabeth Warren
U.S. Senator