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NLRB Rules on Legality of NLRB General Counsel Peter Robb's Firing

David T. Vlink

On January 20, 2021, at 12:23 p.m.—23 minutes after he was sworn in—President Biden fired National Labor Relations Board ("NLRB") General Counsel Peter Robb. No matter what you thought of Robb or his priorities, it is fair to say that he was one of the more controversial General Counsels in the NLRB's history, which is saying something considering the agency's priorities are known to flip-flop depending on the political party of the President who appoints its decisionmakers. Nevertheless, Robb's firing before the end of his term was unprecedented in the history of the NLRB, causing some legal scholars to ask, "Can he do that?"

The National Labor Relations Act ("NLRA") says, "There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years." 29 U.S.C. § 153(d). Therefore, the argument goes, since Robb had been appointed by President Trump and confirmed by the Senate for a term of four years expiring on November 17, 2021, Robb was unlawfully terminated before the expiration of his U.S. Senate-confirmed four-year term, and there was no "vacancy" permitting President Biden to appoint a replacement before the expiration of Robb's term.

On the other hand, others argued, the NLRA is silent on the President's right to remove the General Counsel, and explicitly says that Board members "may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause." 29 U.S.C. 153(a). Therefore, the argument goes, since there are no express statutory requirements for the removal of the General Counsel like there are for Board members, the President's right to remove the General Counsel without cause is implied.

The Board had the occasion to weigh in on the legality of Robb's firing in *Aakash, Inc.,* 371 NLRB No. 46 (Dec. 30, 2021). There, the employer argued that the complaint issued by Acting General Counsel Peter Sung Ohr on September 30, 2021, and thereafter pursued by General Counsel Jennifer Abruzzo following her Senate confirmation on July 21, 2021, was void because Robb's firing was unlawful and Sung Ohr was not properly appointed. The Board unanimously rejected the employer's argument, though for different reasons.

The Board's three Democratic members—Lauren McFerran, Gwynne Wilcox, and David Prouty—relied on the Supreme Court's recent decision in *Collins v. Yellen,* 141 S. Ct. 1761 (2021), which held that when a statute does not limit the President's authority to remove an agency head, it is presumed that the agency head serves at the pleasure of the President; and this presumption is fortified where Congress includes limits on the President's removal power in one section of the statute but omits them in another. The Board's Republican members, Marvin Kaplan and John Ring, on the other hand, relied on the Board's earlier decision in *National Assn. of Broadcast Employees and Technicians, Local 51,* 370 NLRB No. 114 (April 30, 2021), where a Republican majority of the Board declined to address the validity of Robb's firing, calling it "a task for the federal courts."

It is true that the final answer to the question of "Can he do that?" will rest with the federal courts. Presumably, the legality of Robb's firing would not be subjected to the deferential review applied to other Board actions like bargaining unit determinations or unfair labor practice decisions and orders. Indeed, the employer in *Aakash, Inc.* has petitioned for review of the Board's decision to the Ninth Circuit Court of Appeals. That case remains pending as of the writing of this article. It remains to be seen what the Ninth Circuit will say, or whether the Supreme Court will take up the issue. And it is certainly possible that we will not get an answer and the courts will find, as the Board suggested in *Aakash, Inc.,* that the question is moot given the expiration of Robb's term and the valid

appointment and confirmation of General Counsel Abruzzo.

The more important issue, though, for practitioners is, "Should he have done that?" In other words, what does Robb's firing mean for the NLRB going forward? Will the immediate termination of General Counsels appointed by a President of the other party become routine upon the election of a new President? Will Robb's termination cause Presidents to nominate more moderate General Counsels so their premature removals cannot be justified as easily as Robb's was? If Robb's termination is upheld, will that give future Presidents the right to remove Board members before their term expires, or at least encourage them to consider doing so? Will Robb's firing come to be viewed, in hindsight, as a "be careful what you wish for" moment? I have neither the time nor the space to answer these questions in this article, but I will say that, as lawyers, we should all consider these questions carefully before lending our support, or voicing our opposition, the next time someone calls for the premature removal of an NLRB General Counsel.

Indiana Joins States Prohibiting Employers From Mandating Device Implantation in Employees

Craig W. Wiley and Zachary A. Ahonen

In 2020, Indiana joined the growing list of states taking legislative action to proactively curtail the risk of employer-driven implantation of devices, radio frequency identification devices (RFIDs), and microchips in employees, which some perceive as the next battleground over employee privacy rights.

Indiana Code § 22-5-8-1, et seq., prohibits employers from requiring employees to permit implantation of a device into their bodies as a condition of employment. It also prohibits employers from discriminating against non-consenting employees. Employers determined to have violated Indiana's statute may be enjoined from further violations and required to pay actual damages, costs, and attorneys' fees.

Employers nationwide have increasingly introduced employee monitoring technology into the workplace. Frequently, the aim is to track an employee's physical location, to measure productivity, or, most recently, to track close contacts for COVID-19-related contact tracing purposes. These measures bring up questions about proper protection for employee privacy rights. Several states have taken legislative action to prohibit an employer from requiring an employee to permit implantation of a device or microchip as a condition of employment or continued employment.

What is a Device?

A "device" under the Indiana statute includes "any acoustic, optical, mechanical, electronic, medical, or molecular device." The statutory language offers no further guidance or interpretation, which leaves the precise breadth of coverage unclear.

What is an Employer?

To clarify the statute's application, the legislature added a definition of the term "employer" in 2021. An employer under this chapter means "the state or any individual, partnership, association, limited liability company, corporation, business trust, or other governmental entity or political subdivision" with one or more employee.

Prohibited Employer Conduct

The Indiana law applies to current employees and applicants or prospective employees. The employer prohibition is not limited to implantation of devices. Employers are prohibited from requiring an employee to undergo an injection of a device, ingest a device, inhale a device, or incorporate a device in some other manner.

An opinion from the U.S. District Court for the Northern District of Indiana provides some guidance as to what constitutes injection, ingestion, inhalation, or incorporation of a device. *See Muckenfuss v. Tyson Fresh Meats, Inc.,* CAUSE NO. 3:109-CV-536 DRL-MGG, 2022 U.S. Dist. LEXIS 11239, at *4-8 (N.D. Ind. Jan. 21, 2022). In *Muckenfuss*, the plaintiff claimed his employer requiring him to wear a face mask violated the statute. In finding the plaintiff had failed to state a viable claim, the court in *Muckenfuss* emphasized the statute's prohibition on making an employee put a device "into" his or her body. Wearing a face mask, reasoned the court, requires the placement of the device *against* the body rather than *into* the body. Ultimately, the *Muckenfuss* Court determined the legislature did not intend an employer requiring employees to wear a device such as a face mask in its list of prohibited conduct.

The law also bars an employer from conditioning employment on an employee's willingness to accept a device. Likewise, it prevents requiring an employee to accept a device as a condition of employment in a particular position in the company or as a condition of receiving additional compensation or other benefits.

Finally, employers may not discriminate against an employee for refusing to permit a device to be implanted, injected, ingested, inhaled, or otherwise incorporated into the body. The lone statutory exception to the employer prohibitions is if a court has ordered or directed an employee or prospective employee to undergo any of the specified device-receiving actions.

States Enacting Similar Legislation Continues to Grow

In addition to Indiana, at least 10 states have enacted similar legislation:

Arkansas, California, Missouri, Montana, Nevada, New Hampshire, North Dakota, Oklahoma, Utah, and Wisconsin

Arkansas and California maintain many of the same restrictions as Indiana on employers attempting to require implantation. See Ark. Code Ann. § 11-5-501; see also Cal. Civ. Code § 52.7. However, their restrictions are more limited and apply to microchips and identification devices. Other jurisdictions passing legislation in this area are less exhaustive in restricting employers attempting to require implantation. While the Indiana law contains a prohibition against retaliation for refusing to voluntarily receive a device implant, the Missouri law only prohibits an employer from actually requiring implantation.

In response to the growing concerns of privacy violations of microchip implants, several states have also introduced bills in recent years looking to tackle compulsory microchipping of employees. Although unsuccessful in their passage, legislatures in Iowa, West Virginia, Michigan, and Tennessee have proposed bills within the past couple of years seeking to address the issue. Currently, there are pending bills in New Jersey and Rhode Island that would ban the compulsory microchip implants for employees.

Key Takeaways

Employers using or interested in using implanted devices, RFIDs, microchips, or other technology to collect employee information must remain vigilant, monitoring an ever-changing landscape of state laws and regulations. As this patchwork of employee privacy laws continues to develop, Jackson Lewis attorneys can assist employers attempting to navigate this complex area of the law.

Employers Take Notice: Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

By Christopher C. Murray and Kate Trinkle

On March 3, 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021," which amended the Federal Arbitration Act and has an immediate impact on employers that utilize arbitration agreements. The new law, H.R. 4445, was passed by the U.S. House of Representatives on February 7, 2022, and the U.S. Senate days on February 10, 2022. With President Biden's signature, Indiana employers should consider the effect of the Bill on their current and future arbitration programs and practices.

As its name indicates, the new law seeks to end *mandatory* arbitration where a case involves a sexual assault or sexual harassment dispute. It also bars the enforcement of class action waivers in such cases. Specifically, the new law renders predispute arbitration agreements invalid and unenforceable "with respect to a case which is filed" that "relates to" a sexual assault or sexual harassment dispute, "at the election of the person alleging" the misconduct. Pursuant to the new law, whether this prohibition applies in a particular case must be "determined by a court," not an arbitrator.

Key Terms

The new law defines the key terms as follows:

- "Predispute arbitration agreement" refers to "any agreement to arbitrate a dispute that had not yet arisen at the time" the agreement was made.
- "Predispute joint-action waiver" refers to "an agreement, whether or not part of a predispute arbitration agreement, that would prohibit, or waive

the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time" the agreement was made.

- A "sexual assault dispute" is "a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 or similar applicable Tribal or State law, including when the victim lacks capacity to consent."
- A "sexual harassment dispute" is "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."

The new law (i) does *not* prohibit an employer and an employee from agreeing to arbitrate a sexual assault dispute or sexual harassment dispute *after* the dispute arises; and (ii) does not apply to claims of sex discrimination and of other types of discrimination prohibited under Federal, state, or local law.

Moving Forward

Following President Biden's signature, the new law's provisions take immediate effect. This means that the law's prohibitions apply to all existing arbitration agreements and class-action waivers.

As a result, employers may wish to review existing arbitration agreements to determine if the new law requires revisions. Employers should also contemplate how they will address cases in which some asserted claims are subject to arbitration or class-action waiver and others are not, such as when a claim of sexual harassment is raised alongside a claim for other forms of discrimination under Title VII of the Civil Rights Act of 1964.

Don't Get Smoked: Helping Indiana Employers Navigate Evolving Marijuana Laws

Shelley M. Jackson and Elizabeth M. Roberson

Over the past decade, three of Indiana's four neighboring states have taken steps to legalize marijuana, including conferring limited employment-related protections, while federal law has remained relatively consistent. This has the potential to create confusion, leaving employers in Indiana wondering how they can avoid getting smoked by these varied marijuana laws.

Know Your Jurisdiction(s)

While there is complexity surrounding government regulation of cannabis-derived products throughout the country, Indiana's current landscape is straightforward. The definition of controlled substance in the Indiana Controlled Substance Act includes tetrahydrocannabinols[1] ("THC"), which is a Schedule I controlled substance, but excludes "low THC hemp extract,[2] " commonly called CBD oil. Marijuana is defined to include any part of the cannabis plant, with limited exceptions such as hemp and low THC hemp extract.[3] Possession, use, or sale of marijuana in Indiana is unlawful.

Neighboring states have taken varying approaches. In 2008, Michigan was the first neighbor to legalize medical marijuana,[4] and certain recreational uses followed in December 2019.[5] Employers are not required to permit or accommodate marijuana use in the workplace or on employer property.[6] Michigan employers may refuse to hire, discharge, discipline, or take other adverse action against an employee due to violation of a workplace drug policy or working under the influence.[7]

Illinois legalized medical marijuana in August 2013[8] and certain recreational uses in January 2020.[9] The law provides limited employment-related protections, such as prohibiting adverse employment action based "solely on the lawful possession or consumption of cannabis or cannabis-infused substances by members of the employee's household."[10] The law does not prohibit an employer from adopting a zero tolerance or drug free workplace policy or from disciplining an employee, including termination, for violating such a policy.[11]

Ohio legalized medical marijuana in 2016.[12] It does not, however, require employers to permit or accommodate an employee's use, possession, or distribution of medical marijuana.[13] Employers may refuse to hire, discharge, or discipline because of possession or distribution of medical marijuana, and can establish a drug testing policy, drug-free workplace policy, or zero tolerance policy.[14]

Federal law on marijuana and other cannabis-derived products remains relatively straightforward for employers. Marijuana and most cannabis-derived products other than hemp are Schedule I controlled substances.[15] Hemp-derived products containing no more than .3% THC, including certain CBD products, were descheduled by the Agriculture Improvement Act of 2018 and are regulated by the U.S. Food and Drug Administration.[16] The FDA has approved only one product containing CBD, Epidiolex, and just a few other cannabis-derived or cannabis-related products.[17]

While complexity can sow confusion, Indiana-based employers should first determine which marijuana laws apply to the employment relationship. Employees who work outside of Indiana, in more than one state, or who transfer from one state to another, may trigger varying laws, but where an employee lives typically will not.

Develop (and Communicate!) A Cogent, Consistent Policy

Certain employers, including those with a federal contract of at least $100,000 and all federal grantees, must comply with the Drug Free Workplace Act (DFWA).[18] The DFWA requires such employers to, at a minimum: (a) prepare/distribute a formal policy statement; (b) establish an awareness program; (c) ensure employees are aware of their obligation to report drug convictions; (d) notify the contracting agency of any covered violation; (e) take action against an employee who commits a workplace drug violation, and (f) use good faith efforts to meet the requirements of DFWA.[19] Non-DFWA regulated employers may voluntarily establish a drug-free workplace using the DFWA framework. Regardless of approach, employers should clearly communicate policies with respect to marijuana use to employees and should implement such policies consistently.

Consider Testing Approaches

Private[20] employers in Indiana are not prohibited from conducting pre-employment, random, or post-incident drug tests, and in some DFWA-regulated industries testing is required. Testing for THC does not constitute a medical examination under the Americans With Disabilities Act[21] and is not prohibited in Indiana; however, employers should ensure that testing complies with employee privacy requirements and Occupational Safety and Health Administration standards.[22] Indiana's Employee Substance Abuse Treatment Law provides civil immunity for employers that voluntarily adopt a compliant "second chance" program for employees failing a drug test.[23] Employers tempted to implement a blanket no-testing approach should be cognizant of potential risks.[24]

Employers in DFWA-regulated industries or with voluntary programs must follow certain steps when an employee violates a workplace policy prohibiting marijuana use, though that does not necessarily mean immediate termination. Employers may utilize mandatory employee assistance program participation or require employees to participate in substance abuse treatment and recovery programs. In any event, consistency is key.

Conclusion

The wild ride will likely continue over the next several years as regulation of marijuana and other cannabis-derived products evolves, and employers should continue to monitor the horizon in all relevant jurisdictions.

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Footnotes

[1] IC § 35-48-2-4
[2] IC § 35-48-1-9
[3] IC § 35-48-1-19
[4] MCL § 333.26421–333.26430 ("Michigan Medical Marihuana Act").
[5] MCL § 333.27955 (allows up to 10 ounces in residences and may cultivate up to 12 plants for personal use).
[6] MCL § 333.27954.
[7] *Id.* An employee discharged solely for use of medical marijuana outside of work may be eligible for unemployment benefits. *See e.g., Braska v. Challenge Mfg. Co.,* 307 Mich. App. 340 (2014).
[8] 410 ILCS 130 (Compassionate Use of Medical

Cannabis Program).
[9] 410 ILCS 705 (Cannabis Regulation and Tax Act).
[10] 410 ILCS 705/10-35(a)(8).
[11] 410 ILCS 705/10-50.
[12] OH Stat. § 3796.01 *et seq.*
[13] OH Stat. § 3796.28.
[14] *Id.*
[15] *Drug Scheduling,* U.S. DRUG ENFORCEMENT ADMIN., https://www.dea.gov/drug-scheduling.
[15] *FDA Regulation of Cannabis and Cannabis Derived Products, Including Cannabidiol,* U.S. FOOD AND DRUG ADMIN., https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd.
17 *Id.*
[18] *Drug-Free Workplace Programs,* SAMHSA (April 16, 2020), https://www.samhsa.gov/workplace/legal/federal-laws/contractors-grantees.
[19] *Id.* Employers in safety-sensitive industries regulated by the Departments of Transportation or Defense or the Nuclear Regulatory Commission must comply with industry-specific DFWA requirements.
[20] Public employers may have additional considerations, such as Fourth Amendment protections.
[21] Testing for or inquiring about current illegal drug use is not a medical examination under ADA but inquiring about past illegal drug use is and may give rise to a duty to accommodate. *See Enforcement Guidance on Disability-Related Inquiring and Medical Examinations of Employees Under the ADA,* EEOC (July 27, 2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html. While an employee using lawful CBD oil in Indiana should not, in theory, test positive for THC, some CBD oil is adulterated or mislabeled. Johns Hopkins Medicine, Some CBD products may yield cannabis-positive urine drug tests, SCIENCEDAILY, Nov. 4, 2019.
[22] Occupational Safety and Health Admin., *Standard Interpretations,* U.S. DEP'T OF LABOR (Oct. 11, 2018), https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11.
[23] Ind. Code § 12-23-23-12.
[24] *See e.g., Frye v. Am. Painting Co.,* 642 N.E.2d 995, 999 (Ind. Ct. App. 1994) (negligent retention claim permitted to proceed where employer knew employee's performance was at least occasionally impaired by alcohol).

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The editors welcome your contributions. The Workplace Lawyer is a publication and benefit of membership to the Employment, Labor & Benefits Law Section of the Indiana State Bar Association.

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