

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 11-11

April 12, 2011

TO: All Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Mandatory Submissions to Advice

In view of new Board and circuit court decisions issued since GC 07-11, and the emergence of new policy issues in the past several years, it is time to update the list of matters that must be submitted to the Division of Advice.

The following list is divided into groups of issues. The first group identifies matters that should be submitted because there is no governing precedent or that involve a policy issue in which I am particularly interested. The second group involve issues as to which the law is in flux as the result of Board or court decisions. The third group identifies particularly difficult issues that are relatively rare in any individual Region. The fourth group includes updates to substantive casehandling matters that have traditionally been submitted to Advice.

No list such as this can be exhaustive: policy issues will arise that we have not contemplated and Regions should be sensitive to the need to submit such issues as they arise. Further, Regions may seek assistance on a particular case even though it does not concern a matter identified here. Regions should also continue to make Operations-Management aware of cases that are the subject of attention outside their local area, or which have a high profile in the local area, and if such cases involve Advice issues, should also notify Advice.

**A. Cases requiring a decision by the General Counsel because of the absence of precedent or because they involve identified policy priorities:**

1. Cases covered by GC Memorandum 11-01 (Effective Remedies in Organization Campaigns) where the following remedies might be appropriate: (1) access to employer electronic communications systems, (2) access to nonwork areas, (3) equal time to respond to captive audience speeches.
2. Cases covered by GC Memorandum 11-06 (First Contract Bargaining Cases: Regional Authorization to Seek Additional Remedies and Submissions to Division of Advice) where reimbursement of bargaining expenses or of litigation expenses might be appropriate.

3. Cases involving novel legal theories or remedies not covered by OM or GC memoranda.
4. Cases where a Region wishes to overturn Board precedent.
5. Cases involving the legality of any aspect of a "neutrality" or card check agreement or other pre-recognition agreement that is not answered by the Board's decision in Dana Corp., 356 NLRB No. 49 (2010).
6. *Beck* issues regarding:
  - a. the chargeability of organizing expenses.
  - b. the chargeability of job targeting program expenses.
  - c. the type and level of audit unions must give *Beck* objectors.
  - d. the chargeability of litigation expenses beyond those incurred in defending or prosecuting rights of unit employees.
  - e. whether *Beck* objectors are entitled to audits along with the notice of their *Beck* rights.
7. Cases involving assertion of jurisdiction over Native American enterprises or over other enterprises on tribal land. See San Manuel Casino, 341 NLRB 1055, 475 4.3d 1306 (D.C. Circuit, Feb. 2007); Chukchansi Gold Resort and Casino, Cases 32-CA-22081 et al. Advice Memorandum dated December 22, 2005.
8. Issues identified in GC Memorandum 07-05, Guideline Memorandum concerning Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006):
  - a. whether, in the healthcare industry, a charge nurse's consideration of factors other than the training or skills of the healthcare provider and the acuity of the patient demonstrates the use of independent judgment.
  - b. cases involving the supervisory status of rotating supervisors.
9. Cases involving employer rules prohibiting, or discipline of employees for engaging in, protected concerted activity using social media, such as Facebook or Twitter.
10. Cases where the Region believes that employees are being deprived of their statutory rights because of a lengthy period of Collyer deferral.

**B. Cases requiring development of a litigation strategy in light of adverse circuit court law or new Board precedent:**

1. Cases in which the Board invites parties to file position statements following a remand from the Court of Appeals or on the Board's own motion; and cases where the Region wants to seek to file a brief notwithstanding lack of a Board invitation.

2. Cases involving the rights of contractor employees, who regularly work on another employer's property, to have access to the premises to communicate with co-workers or the public, where the issues are not resolved by the Board's decision in New York New York Hotel and Casino, 356 NLRB No. 119 (2011).
3. Cases involving the issue of whether employees have a Section 7 right to use an employer's e-mail system or that require application of the discrimination standard enunciated in Register Guard, 351 NLRB 1110 (2007), enf. denied in part, 571 F.3d 53 (D.C. Cir. 2009).
4. Cases involving whether a novel form of conduct (e.g., coordinated "shopping," excessive use of loudspeakers, corporate campaigns) constitutes Section 8(b)(4)(i) or (ii) or 8(b)(7) conduct, and cases involving allegations that use of an inflated rat constitutes 8(b)(4)(i) conduct.
5. Cases involving claims of alter ego liability, or piercing the corporate veil, where there is no unlawful motive or effort to avoid a legal or contractual obligation.
6. Cases involving the issue of whether or not employees' conduct was so "disloyal" as to lose the protection of the Act. See TNT Logistics of North America, Inc., Cases 8-CA-33664 et al., General Counsel's Position Statement to the Board on Remand, dated July 24, 2008.
7. Cases involving withdrawal of recognition under Levitz, where the alleged loss of majority status is based on an ambiguously-worded petition; disputed unit composition; possibly stale evidence of disaffection; or hearsay evidence of employee sentiments, as considered in NLRB v. B.A. Mullican Lumber & Mfg Co., 535 F.3d 271 (4<sup>th</sup> Cir. 2008). See GC Memorandum 09-04.
8. Cases that present the issue of whether to defer to an arbitral award rather than issuing a Section 8(a)(1) or (3) complaint. See GC Memorandum 11-05.
9. Cases involving application of Toering Electric Company, 351 NLRB No. 18 (2007), where the evidence does not clearly resolve the issue of agency raised by an authorization to submit an application on someone else's behalf or where the evidence does not clearly resolve the question of whether an applicant was "genuinely interested" in employment.

**C. Cases presenting difficult legal issues:**

1. Cases involving the legality of a pending or completed lawsuit or grievance where the Region recommends issuing complaint.
2. Cases involving the need to harmonize the NLRA with local, state or other federal statutes.

3. Cases of potential or actual overlapping jurisdiction with other Federal agencies, except where there is an inter-agency memorandum of understanding.
4. Cases presenting unresolved issues concerning undocumented workers, including whether undocumented workers who presented no false documents to their employer and whose employer knew their status are entitled to backpay (see Mezonos Maven Bakery, JD(NY)-48-06 (Nov. 1, 2006)), and other issues left unanswered by GC Memorandum 02-06. See also CHM Section 10560.7.
5. Cases involving the validity of partial lockouts.
6. Cases in organizing situations raising the issue of union access to lists of employee names and addresses where those employees are widely dispersed or have no fixed duty location, under Technology Service Solutions, 324 NLRB 298 (1997).
7. Cases involving an allegation that the employer's permanent replacement of economic strikers had an unlawful motive under Hot Shoppes, 146 NLRB 802 (1964).
8. Cases in which the Region is considering issuing or has issued complaint against an entity that has purchased a bankrupt entity through a "free and clear" sale.

**D. Other casehandling matters to be submitted:**

1. Injunction Litigation matters
  - a. Requests for authorization to file a 10(j) petition.
  - b. Recommendations regarding 10(j) relief in all cases in which the complaint seek a *Gissel* bargaining order.
  - c. Consistent with GC Memorandum 10-07, 10(j) recommendations in all cases involving discharges during organizing campaigns.
  - d. Consistent with GC Memorandum 11-06, 10(j) recommendations in all first contract bargaining cases.
  - e. Requests for permission to file a §10(j) petition later than 48 hours after Board authorization, or in cases involving discharges in organizing campaigns, later than 48 hours after either Board authorization or review of court papers by Injunction Litigation Branch, whichever is later.
  - f. Requests for authority to seek contempt of a 10(j) or 10(l) order.
  - g. Recommendations regarding appeal in §10(j) or 10(l) cases in which a district court denied injunctive relief.
  - h. Notice of any Notice of Appeal filed in a §10(j) or 10(l) case.
2. All cases where the Region lost an ALJD on an Advice-authorized legal theory and the Region does not want to take exceptions.

3. Formal Settlement Agreements that the Region recommends accepting unilaterally. See Casehandling Manual (ULP) Sec. 10164.8.
4. EAJA cases where Region wishes to pay a claim.
5. Requests for subpoena authorizations not covered by prior delegations of authority:
  - a. Requests for an investigative subpoena to identify an employer that placed a "blind" newspaper advertisement seeking job applications. See OM 98-65 (August 7, 1998).
  - b. Requests to issue investigative subpoenas post complaint.
  - c. Requests to issue investigative subpoenas where a serious claim of privilege is likely to be raised (e.g., subpoenas to the press, witnesses whose chosen counsel the Region would exclude from the interview). See Casehandling Manual (ULP) Section 11770.4.
  - d. Cases where, following issuance of any subpoena, intervening circumstances present enforcement problems.
  - e. Cases where the Region is considering denying the request of a private party for enforcement of subpoena.

If you have any questions regarding this memorandum, please contact the Division of Advice.

/s/  
L. S.

Distribution:

Washington – Special  
Regional – Special  
Release to the Public