OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 14-01 February 25, 2014

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

FROM: Richard F. Griffin, Jr., General Counsel

SUBJECT: Mandatory Submissions to Advice

As a result of our Agency's strong leadership in the Regions, the vast majority of cases can be processed without guidance from headquarters. In rare instances, however, a centralized consideration of certain issues can enhance our ability to provide a clear and consistent interpretation of the Act. In light of Board and circuit court decisions issued since GC 11-11, and the emergence of new policy issues in the past several years, this updated list of matters that should be submitted to the Division of Advice has been prepared.

The list is divided into three groups. The first group includes matters that involve General Counsel initiatives or areas of the law and labor policy that are of particular concern to me. The second group includes difficult legal issues that are relatively rare in any individual Region and issues where there is no governing precedent or the law is in flux. The third group includes updates regarding casehandling matters that have traditionally been submitted to Advice.

No list such as this will be exhaustive: the Board's issuance of decisions often raises new questions, and policy issues will arise that we have not contemplated. Regions should be sensitive to the need to submit such issues and should check for updates to the Headquarters Submission Chart, which is posted on both the Operations and Advice webpages. Regions should not act without clearance from Advice before taking controversial positions, e.g., before seeking to overturn Board precedent. 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; if such cases involve Advice issues, Regions should also notify Advice.

A. Cases that involve the General Counsel's initiatives or policy concerns:

- Cases involving the issue of whether a perfectly clear successor should have an obligation to bargain with the union before setting initial terms of employment, as opposed to only narrow exceptions as enunciated in Spruce Up, 209 NLRB 194 (1974), enforced, 529 F.2d 516 (4th Cir. 1975). (see dissenting Members Fanning and Panello in Spruce Up, 209 NLRB at 199-210, as further explicated in the concurrence by former Chairman Gould in Canteen Co., 317 NRLB 1052, 1054 (1995)).

- Cases involving an allegation that the employer's permanent replacement of economic strikers had an unlawful motive under Hot Shoppes, 146 NLRB 802 (1964).

- Cases that involve 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).

- Cases involving the duty to furnish financial information in bargaining where the employer has arguably asserted an "inability to pay" or where the employer has made more specific financial assertions and refused to provide information in support of those assertions (see GC 11-13 and SAM ADV 13-18).

- Cases involving the applicability of Weingarten principles in non-unionized settings as enunciated in IBM Corp., 341 NLRB 1288 (2004).

- Cases involving make-whole remedies for construction industry applicants or employees who sought or obtained employment as part of an organizing effort as enunciated in Oil Capitol Sheet Metal, Inc., 349 NLRB 1348 (2007).

- Cases involving pre-recognition bargaining by a prospective successor with an incumbent union.

- Cases involving a refusal to furnish information related to a relocation or other decision subject to a Dubuque Packing analysis (see Liebman dissent in Embarq Corp., 356 NLRB No. 125 (2011) and OM 11-58).

- Cases where Collyer deferral may not be appropriate because an arbitration has not/will not be conducted within a year (see GC 12-01 and Collyer deferral chart on Advice/Operations webpages).

- Pre-arbitral settled and post-arbitral deferred cases involving 8(a)(1) and (3) violations (see GC 11-05 and pre-arbitral settlement chart and post-arbitral deferral chart on Advice/Operations webpages).

- 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, and (3) equal time to respond to captive audience speeches.

- 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.

B. Cases that involve difficult legal issues or the absence of clear precedent:

- Cases involving novel issues arising from the application of the Board's decision in Alan Ritchey, 359 NLRB No. 40 (2012), specifically: (1) whether the employer has demonstrated "exigent circumstances" that permitted unilateral discipline, (2) what is the appropriate remedy for a failure to engage in pre-discipline bargaining, and (3) what suffices for purposes of good faith bargaining in these circumstances.

- Cases that involve an assertion of 9(a) status in the construction industry based on contractual language (per Central Illinois/Staunton Fuel, 335 NLRB 717 (2001)) that implicate the D.C. Circuit's decision in Nova Plumbing, Inc. v. NLRB, 330 F.3d 531 (D.C. Cir. 2003) (see OM 14-23).

- 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.

- Cases involving the validity of partial lockouts.

- 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).

- 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.

- Cases involving "at-will" provisions in employer handbooks that are not resolved by extant Advice memoranda.

- 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.

- Cases involving the need to harmonize the NLRA with local, state, or other federal statutes.

- Cases of potential or actual overlapping jurisdiction with other Federal agencies, except where there is an inter-agency memorandum of understanding.

- Cases presenting unresolved issues concerning undocumented workers, including remedial questions left open in Mezonos Maven Bakery, 357 NLRB No. 47 (2011).

- Cases involving the legality of a pending or completed lawsuit or grievance where the Region recommends issuing complaint.

- 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).

- Cases involving the rights of contractor employees, who 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).

- Cases involving mandatory arbitration agreements with a class action prohibition that are not resolved by D.R. Horton or subsequent Advice memoranda.

- Beck issues regarding:

  - the chargeability of job targeting program expenses.
  - the chargeability of legislative expenses (see United Nurses, 359 NLRB No. 42 (2012)).
  - the chargeability of organizing expenses in complex cases.

C. Other case-handling matters to be submitted:

- Injunction Litigation matters:

- Requests for authorization to file a 10(j) petition.

- 10(j) recommendations in all cases involving: (1) complaints seeking a Gissel bargaining order; (2) discharges during organizing campaigns (GC 10-07); (3) first contract bargaining (GC 11-06); and (4) successorship cases.

- Requests for authority to seek contempt of a 10(j) or 10(l) order.

- Recommendations regarding appeal in 10(j) or 10(l) cases in which a district court denied injunctive relief.

- Notice of any Notice of Appeal filed in a 10(j) or 10(l) case.

- Subpoena authorization issues:

- Requests to issue investigative subpoenas post-complaint.

- Requests for an investigative subpoena to identify an employer that placed a "blind" newspaper advertisement seeking job applications (see OM 98-65).

- 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 CHM (ULP) Sec. 11770.4).

- Cases where, following issuance of any subpoena, intervening circumstances present enforcement problems.

- Cases where the Region is considering denying the request of a private party for enforcement of subpoena.

- Cases where the Region lost an ALJD on an Advice-authorized legal theory and the Region does not want to take exceptions; cases where new evidence was introduced at the hearing that could call into question the continued validity of the Advice-authorized legal theory; and cases where an ALJD raises novel or complex questions even if the case was not previously submitted to Advice.

- Formal Settlement Agreements that the Region recommends accepting unilaterally (see CHM Sec. 10164.8).

- EAJA cases where the Region wishes to pay a claim.

- Other case-handling matters requiring Advice approval that are referenced in the case-handling manual (see CHM Sec. 10264.5 (naming an attorney as respondent or agent); CHM Sec. 11731.3 (St. Gobain blocking charges); CHM Sec. 10123.1 (reinstating charges outside the 10(b) period); CHM Sec. 10164.3 (attempts by respondents to withdraw from formal settlements); CHM Sec. 10240 (CD cases where parties have not utilized an agreed-upon method of resolution); CHM Sec. 11753.2 (motions for reconsideration); CHM 10132.1 (settlement notices posted for less than 60 days); CHM Sec. 10132.4 (issues regarding the extent of electronic notice-posting); CHM Sec. 10124.4 (settlements with novel remedies); CHM Sec. 10280.2 (GC's attorneys fees); CHM Sec. 10394.10 (novel situations regarding the production of witness statements); CHM Sec. 10120.1 (approval of withdrawals in Advice-authorized cases)).

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

R.F.G.

Distribution:
Washington – Special
Regional – Special
Release to the Public