

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 16-01

March 22, 2016

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

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

SUBJECT: Mandatory Submissions to the Division of Advice

I take great pride in the excellent work performed by Agency employees, particularly the Regional Offices. As I reflect upon your exemplary efforts, I continue to believe that the vast majority of cases can be processed without guidance from Headquarters. That being said, some types of cases and issues are of particular interest and would benefit from centralized consideration. Thus, I have had prepared this updated list of matters that should be submitted to the Division of Advice.

The list is divided into three groups. The first group includes matters that involve General Counsel initiatives and/or priority areas of the law and labor policy. 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 casehandling matters that have traditionally been submitted to the Division of Advice. To the extent these matters raise remedial issues, the Region should also contact the Compliance Unit.

No list such as this will be exhaustive as the Board's issuance of decisions often raises new questions, and policy issues may arise that have not been contemplated. Please continue to follow the protocol of obtaining clearance from the Division of 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 the Division of Advice.

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

1. Cases involving an allegation that the employer's permanent replacement of economic strikers had an unlawful motive under *Hot Shoppes*, 146 NLRB 802 (1964).
2. Cases that involve the application of *Purple Communications*, 361 NLRB No. 126 (2014), to electronic systems other than email, cases where the employer has provided specific evidence of special circumstances privileging a denial of access to its email system, and cases presenting the question of whether the employer engaged in unlawful surveillance of employee emails.
3. Cases involving the applicability of *Weingarten* principles in non-unionized settings as enunciated in *IBM Corp.*, 341 NLRB 1288 (2004).
4. 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).
5. 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).
6. Cases involving plant closure threats where there is little evidence of dissemination to other employees and where an argument could be made that such dissemination should be presumed. See *Springs Industries*, 332 NLRB 40 (2000), overturned by *Crown Bolt*, 343 NLRB 776 (2004).
7. Cases involving allegations that "English-only" policies violate Section 8(a)(1).
8. Cases that present the opportunity to argue that *St. George Warehouse*, 351 NLRB 961 (2007), should be overturned and that the employer should have the burden of showing that a discriminatee failed to make an adequate search for interim employment.
9. Cases involving the employment status of workers in the on-demand economy.
10. Cases involving the question of whether the misclassification of employees as independent contractors violates Section 8(a)(1).
11. Cases involving the application of *Tri-Cast*, 274 NLRB 377 (1985), to employer statements that employee access to management will be limited if employees opt for union representation.
12. Cases involving the question of whether an impasse over a single issue should constitute overall impasse because the issue is critical to one or both of the parties.
13. Cases covered by GC Memorandum 11-01 (Effective Remedies in Organization Campaigns) where the following remedies might be appropriate: (1) access by non-

employees to employer electronic communications systems, (2) access by non-employees to non-work areas, and (3) providing a union with equal time to respond to captive audience speeches.

14. 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:

1. Cases involving novel issues arising from the application of the Board's decision in *Alan Ritchey*, 359 NLRB No. 40 (2012) (invalidated by *Noel Canning*, but General Counsel has argued for its re-adoption), e.g., what suffices for purposes of good faith bargaining in these circumstances.
2. 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.
3. Cases involving the validity of partial lockouts.
4. Cases in which the Region recommends alleging the *Golden State* liability of an entity that has purchased a bankrupt entity through a "free and clear" sale.
5. Cases involving the legality of a pending or completed lawsuit, or the legality of allegedly overbroad discovery requests, where the Region recommends issuing complaint.
6. 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).
7. Cases involving difficult *Beck* issues such as the chargeability of legislative expenses (see *United Nurses*, 359 NLRB No. 42 (2012)), and the chargeability of organizing expenses in complex cases.
8. 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.
9. Cases involving the need to harmonize the NLRA with local, state, or other federal statutes.
10. Cases of potential or actual overlapping jurisdiction with other Federal agencies, except where there is an inter-agency memorandum of understanding.

C. Other case-handling matters to be submitted:

1. Injunction Litigation matters:

- a. Requests for authorization to file a 10(j) petition.
- b. 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.
- c. Requests for authority to seek contempt of a 10(j) or 10(l) order.
- d. Recommendations regarding appeal in 10(j) or 10(l) cases in which a district court denied injunctive relief.
- e. Notice of any Notice of Appeal filed in a 10(j) or 10(l) case.

2. Subpoena authorization issues:

- a. Requests to issue investigative subpoenas post-complaint.¹
- b. Requests for an investigative subpoena to identify an employer that placed a “blind” newspaper advertisement seeking job applications (see OM 98-65).
- 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 CHM Sec. 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.

3. 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 the Division of Advice.

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

¹ Pursuant to CHM Sec. 11770.4, Regions should also continue to submit requests to CCSLB, which collaborates with the Division of Advice on these matters.

5. EAJA cases where the Region wishes to pay a claim.
6. 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.

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