

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 07-11

September 25, 2007

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

FROM: Ronald Meisburg, General Counsel

SUBJECT: Mandatory Submissions to Advice

As General Counsel, my goal is to be a responsible and vigorous prosecutor. I recognize that Section 3(d) gives important responsibilities to me and the entire staff in the Office of the General Counsel. How we carry out this responsibility significantly impacts the development and direction of the law and, in turn, affects how management and labor interact on a day-to-day basis. It is with this in mind that I have reviewed the issues that are required to be sent to the Division of Advice and discussed this matter with senior staff including the Regional Directors Committee.

The issues identified in this memorandum present novel, complex, or unsettled legal questions that implicate litigation policy issues arising under Section 3(d) which, for that reason, should be submitted to the Division of Advice.

The list is divided into groups of issues. The first group identifies matters that should be submitted because there is no governing precedent or they involve a policy issue in which I am particularly interested. For example, I am particularly interested in focusing agency resources on the enforcement of the bargaining obligations of employers and unions during first contract negotiations. Matters related to this priority should be submitted consistent with GC Memorandum 07-08 discussing that project.

The second group of matters refers to those in which the law is in flux as the result of Board or court decisions. In these cases, submission to Advice will insure that we develop a comprehensive and consistent nationwide response to the issues raised by these decisions. A number of such issues are currently pending before the Board. We anticipate that Board decisions on the pending cases and subsequent guideline memoranda may obviate the need for required submissions thereafter.

The third group identifies particularly difficult issues that are relatively rare in any individual Region. Submission of these cases to Advice will insure that we are applying a consistent approach to them.

Finally, the fourth group lists 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. Clearly when these cases involve Advice issues, Regions should also alert Advice. I look forward to working with you to develop our legal positions in all of these matters.

**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 07-08 in which the Region determines that a violation has occurred during bargaining for an initial contract.
2. Cases involving novel legal theories or remedies not covered by OM or GC memorandums.
3. Cases where a Region wishes to overturn Board precedent.
4. Cases covered by OM Memorandum 04-76 involving the legality or validity of any aspect of a "neutrality" or card check agreement or other pre-recognition agreement.
5. *Beck* issues regarding:
  - a. the chargeability of expenses for organizing employees.
  - b. the chargeability of expense for a strike fund, or other types of funds "beyond the competitive market" of unit employees.
  - c. chargeability of expenses for job targeting programs.
  - d. the type and level of audit unions must give *Beck* objectors.
  - e. litigation expenses beyond those incurred in defending or prosecuting rights of unit employees.
  - f. whether *Beck* objectors are entitled to audits along with the notice of their *Beck* rights.
6. 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.

7. 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.

**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; or cases where the Region desires the GC to seek to file a brief notwithstanding lack of a Board invitation. See GC Memorandum 95-14.
2. Cases involving validity of union mergers, affiliations, and disaffiliations where there is continuity of representation but lack of due process is alleged. See OM Memorandum 05-27.
3. Cases involving the rights of employees (including off duty employees) to have access to private property owned by their employer, or by a third party at whose premises they are working, to communicate with co-workers or with the public. See New York New York Hotel and Casino, Cases 28-CA-14519 et al., General Counsel's Statement of Position on Reconsideration, dated May 15, 2003.
4. Cases involving claims that rules that prohibit or limit non-business use of employer supplied e-mail, access to the Internet, cell phones, digital assistants, or other employer-owned means of electronic communication unlawfully interfere with the Section 7 protected activities. This does not include cases alleging only discriminatory enforcement of such rules within the meaning of E. I. DuPont, 311 NLRB 893 (1993).
5. 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).
6. Cases involving whether a novel form of conduct (e.g., use of banners, rats, coordinated "shopping," excessive use of loudspeakers, corporate campaigns, etc.) constitutes Section 8(b)(4)(i) or (ii) or 8(b)(7) conduct. Cases submitted pursuant to OM Memorandum 06-42 may use the short format authorized in that Memorandum.

7. 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.
8. Cases alleging a bargaining violation, not subject to Collyer/Dubo deferral, in which a Charged Party claims that a collective-bargaining agreement authorizes it to take unilateral action.

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

1. Cases alleging that an agreement violates Section 8(e) of the Act or that a labor organization engaged in coercive conduct to obtain a Section 8(e)-prohibited agreement, in violation of Section 8(b)(4)(A).
2. Consistent with GC Memorandum 02-09 (September 20, 2002), cases involving the legality of a pending lawsuit or grievance filing where the Region wishes to take action other than holding the charge in abeyance; and cases involving the legality of a completed lawsuit or grievance filing that was ultimately determined to be non-meritorious.
3. Cases involving the need to resolve a disputed interpretation of, or to harmonize the NLRA with, other local, state or federal statutes.
4. Cases of potential or actual overlapping jurisdiction with other Federal agencies except where there is an inter-agency memorandum of understanding.
5. 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.
6. Cases involving to what extent an employer with a newly certified union or a successor employer must bargain over a past practice of unfettered exercise of discretion regarding discipline or work rules.
7. Cases involving whether the obligation to bargain, if any, over non-Fibreboard subcontracting (e.g., subcontracting work to be done at another facility by another employer's employees) should be analyzed under Dubuque Packing Company, 303 NLRB 386 (1991), Fibreboard Corp. v. NLRB, 379 U.S. 203 (1964), or Torrington Industries, 307 NLRB 809 (1992).

8. Cases involving whether a successor employer had plans to retain all the predecessor's employees when the employer announced unilaterally changed working conditions after it promised a union to retain the predecessor employees but before it actually made job offers to employees. See Spruce Up Corp., 209 NLRB 194 (1974); Canteen Company, 317 NLRB 1052 (1995).
9. Cases involving the validity of partial lockouts.
10. Cases involving whether activities, including participation in rallies, either in support or against legislation is activity protected by the Act.

**D. Traditional 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. Requests for permission to file a §10(j) petition later than 48 hours after Board authorization.
  - d. Requests for authority to seek contempt of a 10(j) or 10(l) order.
  - e. Recommendations regarding appeal in §10(j) or 10(l) cases in which a district court denied injunctive relief.
  - f. Notice of any Notice of Appeal filed in a §10(j) or 10(l) case.
2. Formal Settlement Agreements that the Region recommends accepting unilaterally. See Casehandling Manual (ULP) Sec. 10164.8.
3. EAJA cases where Region wishes to pay a claim.
4. 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.

5. Cases in which the Region is considering issuing or has issued complaint against an individual or entity that has been discharged in bankruptcy. Section 10670.3(a).

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

/s/  
R. M.

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