

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 17-02

March 10, 2017

TO: All Division Heads, Regional Directors, Officers-In-Charge,
and Resident Officers

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



SUBJECT: Report on the Midwinter Meeting of the ABA Practice and Procedure Under the
National Labor Relations Act Committee of the Labor and Employment Law Section

In early March, I attended the Annual Midwinter meeting of the Practice and Procedure Under the National Labor Relations Act Committee (P&P Committee) of the American Bar Association (ABA) Labor and Employment Law Section together with several senior Agency managers. As in years past, a primary purpose of this meeting was to respond to and discuss Committee concerns and questions about Agency casehandling processes. As prior General Counsels have done, I am sharing the P&P Committee members' concerns and the Agency's responses with you so that you can have the benefit of this important exchange. While we did not have time to respond to every question raised at the meeting, we have included all the questions posed to the Agency and the Agency's responses.

During my tenure as General Counsel, I intend to conduct the business of the Office of the General Counsel in a productive manner. Continuing a constructive, cooperative relationship with the organized Bar is an important element of this objective and one to which I am committed. At the Midwinter meeting, members of the Committee shared their appreciation of the constructive relationships enjoyed by members of many local P&P groups with individual Regional Directors. I encourage you to facilitate those exchanges where they do not exist and to continue to broaden those relationships where they do. Open communication with representatives of both management and labor who appear before us enhances the Agency's performance and benefits the public we serve.

Attachment
Release to the Public

cc: NLRBU
NLRBPA

UNFAIR LABOR PRACTICE ISSUES

A. Statistics

1. Please provide the number of ULP charges filed, the settlement rate, the number of complaints issued, the litigation win rate (separating complete wins on all charges or claims from partial wins on less than all charges or claims), the number and type of cases sent to the Division of Advice, and merit determinations.

In FY 2016, the number of unfair labor practice (ULP) charges filed was 21,326; the settlement rate was 93%; the number of complaints issues was 1,272; and the litigation success rate was 89%, which were won in whole or in part. The Agency does not keep statistics separating out complete wins from partial wins. The percentage of ULP charges filed in which merit was found was 37.1%. In addition, there were 480 submissions to the Division of Advice. The Agency does not track the number of cases sent to the Division of Advice by case type.

2. In FY 2016, how many Motions for Summary Judgment (MSJs) were filed as a result of an alleged default in a settlement agreement that included a default provision? What were the results of such MSJs?

The Agency does not keep specific statistics on the number of cases in which the default language is triggered. A document search disclosed that, in FY 2016, there was only one MSJ filed as a result of an alleged default in a settlement agreement that included a default provision. That MSJ was granted.

3. Please provide statistics on pre-arbitral and post-arbitral deferrals, including the number of cases deferred, the number of cases not deferred and the reasons for not deferring by category, and the length of time the cases have been pending. Does this represent a change from prior years?

There were 1,122 cases in pre-arbitral deferral status at the end of FY 2016, which is 278 (almost 20%) less than last fiscal year. 585 cases were deferred during FY 2016, which are 215 cases (more than 25%) less than last fiscal year. The median length of time cases have been pending is 335 days. The Agency does not keep statistics on the number of post-arbitral deferrals or on the number of cases not deferred and the reasons for not deferring by category.

4. Please share statistics concerning the use of investigative subpoenas to obtain testimony and documents, the frequency of petitions to revoke, and the success of such petitions? Can you please break down the statistics between subpoenas directed at parties and non-parties?

In FY 2016, 1270 subpoenas were issued – 743 ad testificandum and 527 duces tecum. The cases in which they issued resulted in merit findings in 298 cases and non-merit findings in 231 cases, with 107 still pending. There were 138 petitions to revoke subpoenas, and, in 25 cases, we sought and obtained enforcement. The Agency does not track the other information sought. Please see the following table which provides a Region-by-Region breakdown of the number of (1) situations in which subpoenas were issued, (2) subpoenas ad testificandum, (3) subpoenas duces tecum, (4) total subpoenas, (5) situations in which an investigative subpoena was issued and there was a merit determination, (6) situations in which

an investigative subpoena was issued and there was a non-merit determination, (7) situations in which an investigative subpoena was issued and there was neither a merit nor a non-merit determination, (8) number of petitions to revoke an investigative subpoena, and (9) number of situations in which the Region sought and obtained enforcement of an investigative subpoena in District Court.

Region	# Cases	AT	DT	Total	Merit	Non-Merit	Other	Petition to Revoke	Enforced
1/34	31	12	28	40	16	8	7	6	0
2	22	17	20	37	5	12	5	2	0
3	4	7	24	31	1	0	3	4	0
4	11	11	6	17	7	3	1	0	0
5	14	27	9	36	10	3	1	0	2
6	24	47	8	55	13	7	4	0	0
7	36	33	28	61	21	9	6	7	1
8	13	28	11	39	6	3	4	12	0
9	28	24	15	39	15	10	3	5	4
10/11	30	53	12	65	15	10	5	1	0
12/24	56	24	58	82	21	17	18	11	1
13	30	35	28	63	16	14	0	0	0
14/17	12	12	8	20	6	5	1	1	0
15/26	89	147	67	214	31	48	10	51	6
16	25	30	10	40	15	9	1	0	0
18/30	19	49	10	59	15	4	0	1	0
19/36	20	15	17	32	9	9	2	2	0
20	8	4	8	12	3	3	2	1	1
21	17	17	15	32	7	6	4	3	0
22	38	51	33	84	15	13	10	3	2
25/33	14	0	15	15	6	2	6	1	3
27	7	7	4	11	4	3	0	0	0
28	24	38	21	59	12	10	2	8	3
29	6	0	11	11	3	1	2	3	1
31	40	18	46	64	20	12	8	7	1
32	18	37	15	52	6	10	2	9	0
Total	636	743	527	1270	298	231	107	138	25

5. Please provide updated statistics on the number of cases in which a compliance hearing is needed after a Board remedial order has issued since Fiscal Year 2010.

Below is the number of compliance hearings held since FY 2010:

FY 2011	8
FY 2012	6
FY 2013	11

FY 2014	4
FY 2015	4
FY 2016	6

6. For FY 16, please provide the number of appeals received by the Office of Appeals; the number and percentage of cases sustained and overturned; the median number of days to process all such cases and those that were sustained; and the average number of days an appeal was pending.

During FY 2016, the Office of Appeals received 1547 appeals. Of these cases, 1.8% (27) were sustained. The median processing days for sustained cases were 98. The average number of days that an appeal was pending in the Office of Appeals was about 32 processing days.

7. Where does the Board plan to publish statistics? Which statistics can be found on the Board's website? Which can be found in the Agency's annual Performance and Accountability Report (PAR)? Where can practitioners access the PAR?

The Agency publishes graphs and tables on statistics of ULP and representation cases which can be found at <https://www.nlrb.gov/news-outreach/graph-data>. Statistics can also be found on our website through our Performance and Accountability Reports (PARs) and our GC Memoranda entitled Report on Midwinter Meeting of the ABA Practice and Procedure under the National Labor Relations Act Committee of the Labor and Employment Law Section.

B. Section 10(j) Injunctions

1. Please provide statistics concerning the number of 10(j) injunctions requested. by Region, the number submitted to the Board, the number authorized by the Board and the number granted by the courts in FY 16.

The Division of Advice received 118 10(j) requests from Regional Offices. The General Counsel submitted 28 cases to the Board requesting authorization for 10(j) proceedings. The Board authorized 29 cases during the fiscal year, one of which was pending at the end of the prior fiscal year. Of the 29 cases authorized, 2 cases were not filed due to developments in the cases after Board authorization, 9 cases were pending resolution at the end of the fiscal year, 8 were litigated to conclusion by the end of the fiscal year, with 4 wins (3 full/1 partial) and 4 losses. 10 cases resulted in a settlement/adjustment.

2. Please also provide statistics regarding the average time between the filing of the charge and when a given Region: submits a request to Advice; when the Region makes a determination to issue a complaint; when the complaint is filed; when the case is filed in federal court; and the date of any injunction determination.

The median days from charge filing to Regional determination is 71 days.
The median days from charge filing to Complaint issuance is 96.5 days.
The median days from charge filing to submission to the Division of Advice's Injunction Litigation Branch is 133.5 days.
The median days from charge filing to District Court proceeding is 177 days.
The median days from charge filing to District Court determination is 307 days.

3. GC Memo 16-01 asks Regions to submit the following 10(j) matters to Advice:

- 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(1) order;
- d. Recommendations regarding appeal in 10(j) or 10(1) cases in which a district court denied injunctive relief; and,
- e. Notice of Appeal filed in a 10(j) or 10(1) case.

Please provide statistics regarding how many of each category of 10(j) cases have been submitted to Advice and describe any trends and the issues presented in these or other 10(j) cases.

As to a., the Agency does not maintain statistics on whether the Regions' recommendations request authorization to seek an injunction or not. As to b., other than cases involving discharges during organizing campaigns, the Agency does not track statistics on the type of case submitted. For those 10(j) cases involving discharges during organizing campaigns, Regional Offices submitted 46 cases -- 20 of those recommended seeking injunctive relief and the General Counsel sought relief in 13 of those cases. Of the remaining 7, 2 cases settled, 1 involved a changed circumstance, and 4 others were deemed not to warrant seeking such relief. As to c., two requests for authority to seek contempt of a 10(j) order were received and authority was granted in one of those cases. As to d., the Agency considered filing an appeal or cross appeal in 8 10(j) cases, which includes losses from filings made in the prior fiscal year. As to e., the Agency filed a notice of appeal in two 10(j) cases.

The General Counsel sought injunctions in a wide range of contexts, including to remedy discharges that occurred during an organizing campaign, egregious violations that precluded the holding of a fair election (obtaining interim *Gissel* bargaining orders), successor failures to hire and/or bargain, and surface bargaining and/or other misconduct occurring during the initial year of a union's certification. There were no observable trends or recurring novel issues.

C. Deferral

1. Are there any new considerations with respect to deferring cases pre-arbitration and/or deferring to arbitration decisions after *Babcock & Wilcox* and GC Memo 15-02?

There are no new considerations with respect to deferring cases pre-arbitration or deferring to arbitration decisions after *Babcock & Wilcox*. We note that Agency staff has developed materials and has been educating arbitrators, and soon mediators, with regard to the new deferral standard as well as with regard to applicable Board case law addressing matters that would typically come before them.

2. What kinds of cases concerning deferral are being sent to Advice?

The types of deferral cases being sent to the Division of Advice involve questions regarding which standard to apply based on the Board's directions regarding retroactivity in *Babcock & Wilcox*, and application of the new standard in cases where the prospective rule applies.

3. To what extent has the direction to the Regions to make "arguable merit" determinations resulted in more cases being dismissed rather than deferred under *Collyer*?

The "arguable merit" standard is not a new requirement. Former General Counsel Nash first identified this requirement in GC Memorandum 73-31, which explained:

"The region should first determine preliminarily whether the allegations of the charge and the evidence submitted by the charging party in support of the charge and any other evidence at hand establish an arguable violation of the Act. If this preliminary determination does not establish such a violation of the Act, i.e., the charge is determined to be frivolous or clearly lacking in merit, the charge should be dismissed in accordance with Section 102.19 of the Board's Rules and Regulations."

Further, Section 10118.1 of the ULP Casehandling Manual (CHM), detailing *Collyer* deferral, has begun with the phrase "Upon a determination of arguable merit" at least since the 2005 edition. See Memorandum OM 05-77 (attaching 2005 version of that Section); see also GC Memorandum 12-01 (citing 2011 version of that Section), as well as the 2015 version of the CHM. Thus, there has been no change to the General Counsel's policy in this regard during the last 30 years. While there was a loosening of those requirements about 20 years ago in light of resource issues, the standard remains in place. We have not observed any change in the number of dismissals under this standard.

4. What guidance has been given to the Regions on 8(a)(3) deferral standards? What is the General Counsel doing to monitor or ensure that the new 8(a)(3) deferral standards are being implemented properly?

No further guidance has been given to Regions other than that set out in GC Memorandum 15-02, which provides guidance on implementing the new standards. As explained in our answer to this question last year, new training materials, which address deferral generally and include significant information on the new 8(a)(1) and 8(a)(3) deferral standards, have been distributed to Regional Offices and their respective staffs. The Division of Operations-Management has designated a point person for questions on the new standard and, as noted in GC Memorandum 15-02, Regions are instructed to submit a number of different types of issues that might arise to the Division of Advice. The Division of Operations-Management checks for compliance with the new guidance in periodic reviews of Regional cases.

5. Are there any pending cases raising *Babcock & Wilcox* issues?

A number of cases are pending at various stages in which the *Babcock & Wilcox* analysis is applicable, including cases that Regions have deferred to the grievance-arbitration procedure under *Collyer*, and cases where Regions have declined to defer to an arbitration decision or grievance settlement because the *Babcock & Wilcox* standard is not met. The Agency does not specifically track all cases where the *Babcock & Wilcox* standard is applied by Regions, the Division of Advice, Administrative Law Judges, or the Board.

6. In cases deferred to arbitration, have there been requests for elements of the GC's investigative file? What is the GC's position on production of such documents? Have cases been pulled back from deferral if arbitration is delayed pending production of the GC's investigative file?

The Agency receives requests for the contents of investigative files from time to time. However, the Agency does not regularly track whether such requests are for deferred cases as opposed to ones where a complaint has issued.

However, with regard to cases that have been deferred to arbitration, these are considered open cases. As such, the case files contain records and information compiled for law enforcement purposes the disclosure of which could reasonably be expected to interfere with enforcement proceedings under 5 U.S.C. 552(b)(7)(A). Thus, Agency policy is to withhold these documents from disclosure. We are not aware of any instances where a case has been pulled back from deferral on the basis of an arbitration being delayed pending production of aspects of the Agency's investigative file, nor would we normally pull it back for that reason.

D. Investigative Subpoenas

1. GC Memo 16-01 asks Regions to submit the following subpoena matters to Advice:

- a. Requests to issue investigative subpoenas post-complaint;**
- 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 OHM 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.**

Please provide statistics regarding how many of each category of investigative subpoena cases have been submitted to Advice, broken down by the above categories by document or testimony, and describe any trends and the issues presented in these and other subpoena cases.

According to the Board's ULP CHM, these issues need to be addressed either by the Division of Advice and/or the Contempt, Compliance, and Special Litigation Branch (CCSLB) of the Division of Legal Counsel. In general, very few of these cases have been submitted to either the Division of Advice or CCSLB, and neither office maintains any statistics related thereto.

2. Please provide FY 2016 statistics regarding the number of investigative subpoenas issued as a percentage of total cases that have gone to decision.

During FY 2016, Regions issued 1,270 subpoenas in 636 situations, divided between 743 subpoenas ad testificandum and 527 subpoenas duces tecum. This total constitutes approximately 3.0 percent of the 21,326 ULP charges filed during the fiscal year.

3. What guidance, if any, is provided to the Regions in connection with the issuance of complaints where there are not corroborating witnesses and/or documents?

There is no specific guidance per se. Regions are directed and endeavor to obtain corroborative testimonial and documentary evidence through voluntary means, and sometimes through involuntary means, i.e. an investigative subpoena as referenced below. However, corroborative evidence is not a requirement in all situations in order for a complaint to be issued.

4. What guidance, if any, is provided to the Regions concerning the issuance of investigative subpoenas?

There has been no change to the guidance in this area. Pursuant to ULP CHM Section 11770.2 and GC Memorandum GC 00-02, Regions have authority to issue investigative subpoenas ad testificandum and duces tecum to charged parties and third party witnesses whenever the evidence would materially aid in the determination of whether a charge allegation has merit and whenever such evidence cannot be obtained by reasonable voluntary means.

E. Access to Information

1. What is the status of the Agency's efforts concerning website enhancements to enable counsel to obtain charges and other filings via the website or efforts to publish redacted settlement agreements and other redacted pre-hearing documents on the website?

The Agency has implemented significant changes to its website to make more information on formal documents available online. Data regarding charges and petitions is currently accessible on the Agency's website at: <https://www.nlr.gov/news-outreach/graph-data/recent-filings>. In addition, the FOIA Branch has begun posting records to the NLRB's Frequently Requested Records web page located at: <https://www.nlr.gov/news-outreach/foia/frequently-requested-recods>. That page contains links to records in high profile cases or records that have been requested multiple times and released pursuant to FOIA requests, such as representation petitions and certifications, as well as charges and dismissal letters. Web users will be able to search for these records by Region and filing date and download redacted PDF copies.

The Agency encourages members of the public, including counsel for parties to NLRB matters, who seek copies of records, such as petitions, settlement agreements, and charges to e-file a FOIA request at: <https://www.nlr.gov/news-outreach/foia/e-foia-request-form>. E-filing directly with the FOIA Branch avoids the time delay resulting from NLRB field staff routing a FOIA request from their offices to the FOIA Branch in Headquarters. And, while requesters may continue to submit requests via mail or facsimile to the FOIA Branch, e-filing the FOIA request assists in prompt processing within the system.

With respect to FOIA privacy redactions in Agency records, the FOIA staff redacts the names and personal identifiable information (PII) of third party individuals, such as non-supervisory employees, employee stewards, and alleged discriminatees. The exceptions to this policy are that information concerning institutional Charged Parties representatives, who may be union officers, supervisors, and company officials, is generally released when they provide the information in their professional capacity. The FOIA staff also redacts the PII of individuals whose supervisory status is in dispute. The policy applies to pre-hearing records in unfair labor practice proceedings and in representation cases.

2. What is the status of the Agency's efforts concerning website enhancements to publish petitions for review, applications for enforcement, and/or monthly appellate court reports?

Real-time information about petitions for review and applications for enforcement can now be found on our website at <https://www.nlr.gov/cases-decisions/appellate-court/petition-and-application>.

3. What is the status of the Agency's efforts to create a PACER-type searchable platform or function? Will the Agency create a function, similar to federal court filings, for electronic service on all parties of electronically filed documents?

While the Agency has adopted a PACER-type docket for each case and an e-Service pilot, due to budgetary constraints, we have been unable to fund the project that would enable the electronic search and service functions described in your question.

4. What instructions been provided to the Regions and staff regarding updates to the NxGen system over the past year? Please detail any significant changes delineated in OM 17-06.

NxGen Instructions to the Regions are set forth in the following Operations-Management Memoranda:

OM 16-08 NxGen January Release (10.1), with (Attachment 1 & Attachment 2) – Introduction of the Forms Wizard for filing charges and petitions via nlr.gov.

OM 16-12 NxGen March Release (10.2) – Miscellaneous improvements based on user suggestions.

OM 16-14 NxGen May Release (10.3) – Miscellaneous improvements based on user suggestions.

OM 16-25 NxGen August Release (10.5) – Expansion of the pilot e-Service project in which Regions issue documents to the United States Postal Service electronically.

OM 16-28 NxGen September Release (10.6) – Miscellaneous improvements based on user suggestions.

OM 16-23 Collecting Data in Connection with Fair Pay and Safe Workplaces with (Attachment 3) – Describes how data collected on a voluntary basis pursuant to the Executive Order regarding Fair Pay and Safe Workplaces should be recorded in NxGen.

OM 17-06 NxGen December Release (10.8) – This release presents no “significant changes”, but rather provided some “bug fixes” to address user and data integrity concerns.

5. Concerning the new filing system:

- a. Is there a mechanism for amending or withdrawing charges? If not, is the Agency considering such a mechanism?**

At this time, there is no wizard assistance or other mechanism for automated amending or withdrawing of charges. However, amended charges and withdrawal requests may be filed electronically.

- b. Is the public at large able to view the charge? If so, is it viewable immediately upon filing? If not, why not? What is the Agency’s current thinking or plan regarding public access to charges?**

The Agency continues to endeavor to put as much information as possible on its website for public access. The Agency’s system automatically creates a redacted version of charges and petitions, which omit individuals’ names, address, and other personally identifiable information. The redacted version is what will post to the website, but not immediately after filing. Two antecedent events must occur first: (1) a member of the Regional Office staff manually toggles the document’s properties to trigger public posting of the redacted version of the charge, and (2) cycling of the next day of automatic updates to the website (currently, this occurs in the 12:01 a.m. – 2:00 a.m. Eastern Time window).

- c. What is the relationship between the filing confirmation number and the traditional case docket number?**

There are three numbers which are related to this inquiry: 1. the filing confirmation number, 2. an inquiry number, and 3. the traditional case docket number (or “case number”). This response will address all three.

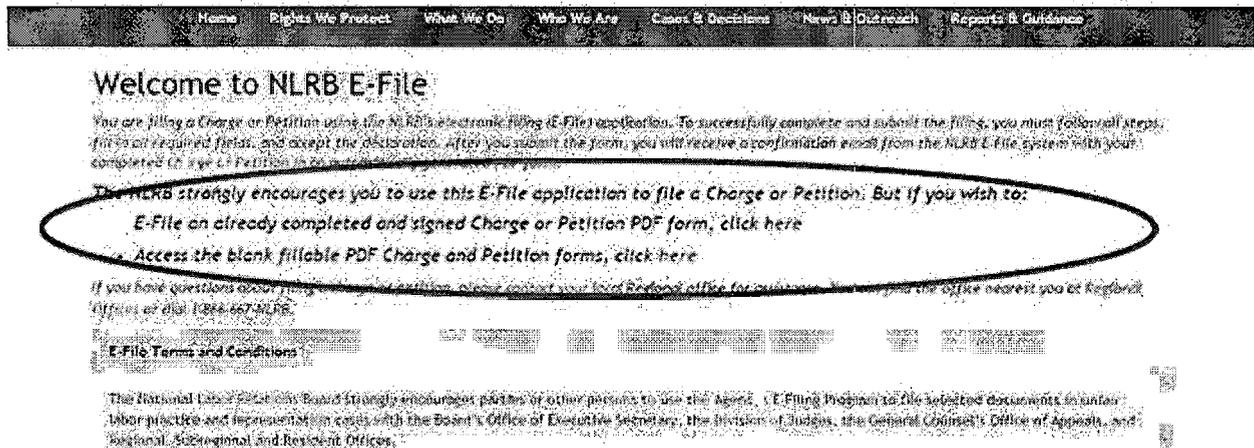
The filing confirmation number is merely a tracking number generated at the e-filing web portal immediately upon successful e-filing. A confirmation e-mail that the e-filing has been processed successfully into the Agency’s case-management system ensues typically 10-15 minutes after each e-filing. In the event of problems with the automatic migration of documents from the Agency’s e-filing web portal to the case-management system, for example stemming from mechanical or software error, cyber-attack, or disaster-related system problems, the filing confirmation number serves as an electronic receipt that the document was filed and provides a unique identifier that the Agency can use to track what happened to the document.

An inquiry number is generated when a user e-files a charge or petition. This number represents a holding place within the Agency's electronic case management system where data can be tracked and documents associated before docketing. Any data and documents associated with an inquiry will automatically migrate to the case number after docketing. When a party e-files a charge or petition, a subsequent e-mail will identify the inquiry number and the e-filer can use the inquiry number to e-file additional documents until a case number has been assigned through docketing.

Upon docketing, each case is assigned a unique case number, which follows the familiar pattern of (Region # e.g. 05, 21)-(case type, e.g. CA, CB, RD)-(unique docket number, e.g. 163123), and all documents and data associated with the inquiry migrate to that case number such that continued use of the filing confirmation number or inquiry number is no longer necessary.

d. Can parties no longer e-file a pdf? If they do so, will it be converted to a web formatted charge?

Parties continue to have the ability to e-file pdf charges, but it is not converted to a web formatted charge. The introduction of wizard-assisted filing did not alter this. The Agency did receive some feedback that the information on how to accomplish this was not apparent from the web-page layout. As a result, the Agency reconfigured the webpage so that this option would be more apparent, as shown below.



e. If parties fax in a charge, will it be converted to a web formatted charge?

No. Faxed charges will be docketed as they are file and processed no differently than before the introduction of wizard-assisted filing.

6. What is the status of Worker.gov concerning issues related to the National Labor Relations Act?

The NLRB is a part of an inter-agency workgroup that provided initial input regarding the development and deployment of worker.gov. During beta testing, the Agency continued to provide feedback on enhancing the current website's organizational structure, design and content, including adding more relevant information, such as through worker stories, to assist users with understanding each Agency's

mission and the interplay between agencies where there is overlapping jurisdiction. The lead role of the project has transitioned from a team at the Department of Labor to one at General Services Administration. Once the new team is up to speed, the inter-agency workgroup will reconvene.

F. GC Memo 16-01 – Mandatory Submissions to Advice and Advice Case Processing

1. GC Memo 16-01 asks Regions to submit to Advice cases that involve either the status of workers in the on-demand economy or independent contractor misclassification cases. Please provide statistics regarding how many of each category of such cases have been submitted to Advice and describe any trends and the issues presented in these types of cases.

During FY 2016, the Division of Advice considered nine cases involving independent contractor misclassifications, two of which involved the status of workers in the on-demand economy. The independent contractor cases generally involved application of the Board's decision in *FedEx Home Delivery*, where the Board reaffirmed that it will apply the traditional Restatement (Second) common-law factors of Agency, and also clarified that it will consider evidence that the putative contractor is rendering services as part of an independent business. The issues involving the status of workers in the on-demand economy involved applying the particular circumstances of those operations to the *FedEx Home Delivery* test. There were no observable trends.

2. Please provide statistics regarding how many cases have been submitted to Advice regarding the status of temporary agency employees, and describe any trends and the issues presented in these types of cases.

During FY 2016, two cases tangentially involving the status of temporary agency employees were submitted to the Division of Advice. One concerned whether the use of temporary employees to perform unit work violated the parties' collective-bargaining agreement, and the other concerned whether the temporary agency was a joint employer with the user employer. There were no observable trends.

3. What is the average length of time a case remains in the Division of Advice?

The Division of Advice does not keep statistics regarding average pending time in the Division, but the median case-processing time for FY 2016 was 17.5 days.

4. What is the process to have a "Go memo" posted to the Board's website?

Only "Go" memoranda in closed cases are posted on the Agency's website. The FOIA Branch determines if the relevant unfair labor practice case has closed. Once the case is closed, the FOIA Branch confirms with the Region that the posting of the memorandum will not impact any open, related ULP proceeding. If it will, the memorandum is held until the closure of the related case(s). The FOIA Branch then reviews the memorandum, and, pursuant to the FOIA, redacts any personal identifiable information and any casehandling instructions that may impact pending or future case litigation. Upon completion of this review process, the Go memorandum is posted on our website for public viewing.

G. GC Memo 16-03 – Seeking Board Reconsideration of the *Levitz Furniture Co. of the Pacific*, 333 NLRB 7171 (2001)?

1. What is the status of cases seeking Board reconsideration of *Levitz Furniture Co. of the Pacific*, 333 NLRB 7171 (2001)? Are there cases pending before the Board alleging that an employer has violated Section 8(a)(5) by unlawfully withdrawing recognition from an incumbent union absent objective evidence that the union actually had lost majority support?

The Regional Offices will continue to seek Board reconsideration of *Levitz Furniture Co.* in appropriate cases. There are two cases pending on appeal before the Board.

2. Have the number of RM petitions increased since GC Memo 16-03 was issued?

The memo issued on May 9, 2016. Hence, we reviewed the number of RM petitions filed from May 10, 2016 to February 10, 2017, which totaled 46. By comparison, the number of RM petitions filed from May 10, 2015 to February 10, 2016 was 42.

H. Intermittent Strikes

What cases are in the pipeline regarding intermittent strikes, as referenced in OM 17-02?

There are no pending cases scheduled for litigation or in the Division of Advice regarding intermittent strikes.

I. Time Targets

1. What are the current time frames for case dispositions?

The General Counsel's Impact Analysis program provides the analytical framework for classifying cases in accordance with their impact on the public and significance to the achievement of the Agency's mission. Pursuant to this program, there have been no changes to the time frames for ULP case dispositions since modifications were implemented on October 1, 2014. The current time frames for case dispositions are as follows:

Category III	7 weeks
Category II	11 weeks
Category I	14 weeks

(a) What happens when these time frames are not met?

The time targets set forth above in response to question 1 are incorporated into each Regional Director's performance plan.

Upon the filing of a charge, the Regional Director or Assistant Regional Director will assign the case an Impact Analysis category. Any case still pending disposition on the last day of the month in which the time target is exceeded is reported as "overage". The time targets themselves are fixed; however, depending on the given situation, a case may be excused. The Division of Operations-Management

conducts a monthly review of overage cases and determines whether any given case should be excused. Acceptable reasons for cases going overage are discussed in response to question 1(b).

Overage statistics for ULP cases are kept monthly, but are measured on an annual basis. Under the current standards, Regions have an overage allowance of up to 10% in each of the three categories of cases. Should any Region exceed the 10% allowance in any given category for the year, such would have an impact on the Regional Director's performance evaluation for that given year.

(b) What criteria does the Division of Operations-Management use to determine whether a case should be excused from these time frames?

A case is not excused from the time frames entirely, but may be excused typically for reasons considered outside of the control of the Regional office. There are a variety of reasons a case might not meet the Impact Analysis time targets, but which would be considered outside the Region's control. This list, while not exhaustive, underscores that, in addressing whether a case is excused, the Division of Operations-Management gives serious consideration to such matters. For example, a new charge alleging violations that have occurred after the initial charge was filed, and where both are so intertwined that a common analysis and determination is required, represents one situation in which failure to meet the time target for the first case is deemed outside of the Region's control. Similarly, where the charging party raises additional allegations that pre-date the subject charge, an amended charge adding the earlier allegation would excuse the charge from failing to meet the time target. The issuance of an investigative subpoena to obtain testimony or documents necessary to enable the Region to make a decision excuses the case from being considered overage for a reasonable period — usually one month. In situations where there has been a Regional determination and serious settlement negotiations are underway, the Region is generally excused from issuing a complaint for one month. In certain circumstances, charges held in abeyance pending the outcome of related proceedings in other cases may also be excused from meeting the time target.

2. In FY 2016, did you meet the overall goal of issuing at least 50% of all decisions within 90 days of the close of the hearing and within 45 days of receipt of briefs or other submissions?

In FY 2016, ALJs issued half of their decisions within 99 days from the close of hearing and within 48 days from receipt of briefs or submissions.

3. In FY 2016, what percentage of cases went "over age" [unexcused]? What was the breakdown for Category I, II and III cases?

There are few cases in Regional Offices that exceed the time targets without excuse. In FY 2016, 1.62% of Category I, 1.95% of Category II, and 3.46% of Category III cases were overage and unexcused.

4. What events will toll or suspend the time targets?

As explained above, the time targets are fixed and are not tolled or suspended per se. Rather, a case that does not meet the relevant time target and goes overage may be excused for a particular month.

J. General Case Processing Issues

1. Assuming the petition for certiorari is granted, what will be the approach in continuing to handle -- *D.R. Horton/Murphy Oil* cases? What will the approach be for moving from complaint to ALJ?

The *D.R. Horton/Murphy Oil* line of cases present the question of whether mandatory arbitration agreements that bar employees from pursuing work related claims on a collective or class basis violate Section 8(a)(1) of the Act. In view of the January 13, 2017, Supreme Court decision to grant certiorari in *NLRB v. Murphy Oil USA* (5th Cir.), *Epic Systems Corp. v. Lewis* (7th Circuit) and *Ernst & Young, et al. v. Morris* (9th Cir.), the Agency issued OM Memorandum 17-11, which sets forth the approach to be taken in cases raising this issue. Specifically, in merit cases which allege the employer is maintaining and/or enforcing an agreement prohibited by the *D.R. Horton/Murphy Oil* line of cases, Regions are to propose that the parties enter informal settlement agreements conditioned on the Agency prevailing before the Supreme Court. For cases alleging both the maintenance/enforcement of a *D.R. Horton/Murphy Oil* agreement, as well as allegations unrelated to that issue, Regions will go forward on the unrelated allegations absent settlement. Case involving opt-in/opt-out clauses are to be held in abeyance. If complaint has already issued and the matter is before the ALJ, Regions will not oppose motions to stay proceedings related to *D.R. Horton/Murphy Oil* allegations.

2. Please provide a list of the pending cases involving *D.R. Horton/Murphy Oil* issues, the status of such cases, and the Regions or appellate courts in which they are pending.

The list attached at the end of this memo shows: *D.R. Horton/Murphy Oil* cases presently before the Supreme Court; *D.R. Horton/Murphy Oil* cases arising from Board decisions and that are now in the courts of appeals or that have previously been resolved in court; private-party *D.R. Horton/Murphy Oil* cases in which the Board has participated as amicus; and *D.R. Horton/Murphy Oil* cases decided by the Board that have not gone to court.

3. Please provide a list of any cases in which the General Counsel has authorized the Regions to argue for reconsideration of *Spruce Up* and the status of such cases.

The Agency does not maintain a list of cases in which the General Counsel has authorized the Regions to argue for reconsideration of *Spruce Up*. Further, as of March 2016, these cases were no longer mandatory Advice submissions. However, in the following cases, the General Counsel authorized Regions to argue for reconsideration of *Spruce Up*.

Walden Security, 14-CA-170110, pending;

Ernest-Spencer Metals, 14-CA-180657, pending;

MaxSent Security, 19-CA-139976 *e. al.*, closed;

Northgate PostAcute Care, 20-CA-160353, closed.

4. Please explain the rationale behind Memorandum OM 17-05, concerning the "Non-Docketing of Facially Inappropriate Charge or Petition Forms." Who determines if allegations on charges or petition forms are "blatantly false," "demeaning," or include "inappropriate language" or "epithets?" What is the standard? Is there a process by which a charging party or petitioner can challenge a Region's decision to reject a charge or petition?

Over the years, Regional Offices have docketed a small number of charges that contained inappropriate comments regarding opposing parties or counsel that may cast aspersions on their legitimacy in some way. These comments generally do not serve to advance or explain a charge allegation, but, rather, serve a private purpose wholly at odds with the impartial investigation of the charge. The General Counsel has concluded that it does not serve the public's interest to docket charges or petitions, and any supporting documents contemporaneously submitted, with such blatantly false or demeaning content. In all cases, the Regional Director will make the initial determination, with consultation with staff in the Division of Operations-Management, as required. Although there is no formal standard or appeal process, the Regional Director will offer to accept the charge or petition without offending language, and may docket such a charge if rejection would result in a charge being time-barred, subject to it being subsequently amended.

5. In the context of settlements and non-admissions clauses, what is a "repeat offender" or "recidivist" employer? Who makes such determinations? What is the standard? Is there a sunset on such designation? Is this designation solely regional in nature, or national? To the extent that Regional Directors have discretion in this area, is there any guidance provided to the RDs?

The term recidivist is commonly used in Board decisions where consideration is given to accepting any given settlement agreement. Whether recidivist behavior warrants rejection of a settlement agreement is fact specific, including consideration of the seriousness of prior violations, length of time between violations and number of facilities involved. See *Service Merchandise Co.*, 299 NLRB 1132 (1990). Repeat offenders, used more broadly, include the universe of charged parties who have been found to have violated the Act by a particular Regional Office in the recent past. Those Regional Directors have full discretion to make such determinations. Non-admission clauses are not routinely incorporated into settlement agreements regardless of whether the charged party is a repeat violator. See ULP CHM Section 10130.8. While there is not a specific standard, in situations where a charged party has been found by the Region to have violated the Act in the recent past, Regions have been given guidance to consider progressively increasing the formality of settlement agreements and may decline to agree to inclusion of a non-admissions clause, or decline to agree to an informal settlement, instead insisting on a formal settlement. Ultimately, whether to agree to any given settlement or not is left to the discretion of the Regional Director. As in prior years, the progression is not mandated, and there may be compelling circumstances where a Region may insist on a formal settlement even the absence of prior merit findings or, conversely, may approve an informal settlement notwithstanding prior merit findings.

6. For the EAJA letters (evidence letters) that Charged Parties receive:

- a. When a letter has issued and the Charging Party subsequently filed an amended charge, what should the Charged Party respond to and are the deadlines also modified?**

Requesting a Charged Party's response to an amended charge, along with providing a deadline for the submission of evidence, is handled on a case by case basis, balancing such factors as the Agency's obligation to conduct full and complete investigations, its statutory obligation to resolve unfair labor practice allegations expeditiously, its obligation to provide the Charged Party with adequate notice of the allegations and sufficient time to respond, the complexity of the allegations, and the amount of additional information, if any, that is being sought. There are some situations in which the amendment to the charge is not substantial (i.e., it reflects a correction in a party's name or address, or it merely deletes allegations) and does not warrant an extension of the deadline for submitting evidence or the issuance of a new request for evidence letter. Similarly, there are situations in which, although the amendment is substantial, the Agency has already requested the information needed to resolve the amended allegations in its initial request for evidence letter. In such cases, the Agency may determine that a new request for evidence letter and extension of the deadline for submitting evidence are not necessary. Conversely, in situations in which the amendment to the charge and the additional information being sought is substantial, and, where the Region has not already requested this information during its initial contacts with the Charged Party, an additional request for evidence would be made and the deadline for submitting evidence would be extended.

- b. After an amended charge is filed, there is sometimes – but not always – a new EAJA letter incorporating what is still active at that time. Recognizing that amended charges often not only add allegations but also remove allegations, is there guidance regarding issuing a new letter, rather than relying upon the original letter which may be outdated and which may seek information beyond the scope of the remaining allegations?**

Since there are myriad situations, depending upon such factors as the allegations of the original and amended charge, and whether any additional information is being sought as a result of the amendment, there is no written guidance regarding whether a new request for evidence letter is warranted as a result of the filing of an amended charge. As noted in the prior answer, there are some situations in which no new request for evidence is necessary and some cases in which a new request for evidence letter is issued.

- c. After the initial EAJA letters are issued, is there any instruction on investigation follow-up requests, including whether agents should vet such requests with a supervisor before sending or other efforts to limit the number of requests?**

The Agency strives to ensure that its requests for follow up evidence are necessary to assist in making a final Regional determination. There are no specific instructions on investigative follow-up requests, including whether an agent should vet such requests with a supervisor. However, Board agent discussions with his/her supervisor often occur when there are novel or complex issues in the case and when the Board agent has minimal Board tenure and/or experience with those issues.

8. When a party or witness leaves a voicemail message on the Regional Office's general voice mail, does that message get transcribed and sent to the Board agent? If so, does that message become part of the case record?

Regional office main numbers are not designed in such a way that voicemail messages can be transcribed. Any voicemail message left on the main number is retrieved by Regional Office administrative professional staff and relayed to the appropriate individual.

9. When a petition for review or application for enforcement is filed, it is unclear whether a system exists for notifying parties who filed the charges or were otherwise involved in the case, with the result being that parties do not learn of the petition or application until after the deadline for intervening has passed, if ever. What is the current procedure for notifying the charging party and other involved parties, if any? Will the Agency consider making it routine procedure to notify all the parties involved at the time the agency learns a petition for review or application for enforcement is filed?

In accordance with the Federal Rules of Appellate Procedure, we serve copies of our applications and cross-applications for enforcement on all parties to the Board proceeding, including the Charging Party. Those same Rules similarly require parties filing petitions for review to serve "each party admitted to participate in the agency proceedings, except for the respondents."

Real-time information about petitions for review and applications for enforcement can now be found on our website at <https://www.nlr.gov/cases-decisions/appellate-court/petition-and-application>.

10. Is the General Counsel giving Regions direction on consulting with charging parties before settlement is reached with a charged party? Do such discussions occur before or after discussion with the charged party?

The General Counsel understands the importance of the Charging Party's position in any settlement discussion. While the ULP CHM's sections on settlement have not changed since this question was answered in 2015, Regions have subsequently been strongly encouraged to follow best practices of consulting with the Charging Party prior to making an initial settlement proposal to the Charged Party and to use their discretion in determining whether to submit the initial settlement proposal to both parties concurrently. In addition, the General Counsel has imparted to Regions the importance of regularly considering the Charging Party's position when assessing any counterproposals made by the Charged Party, and to consider involving the Charging Party in that process, including to test factual assertions made by the Charged Party.

II. Remedies

A. Following the D.C. Circuit's decision in *H.T.H. Corp. v. NLRB*, 2016 WL 2941936 (May 20, 2016), what is the General Counsel's position on requesting fees and expenses? Are there any other cases pending concerning such remedies?

The Board has inherent authority to award litigation costs as an exception to the American Rule if a party engages in unusually aggravated bad-faith conduct related to the litigation before the Board. The Board also has broad remedial authority under Section 10(c) of the Act to direct violators to reimburse Charging Parties for their negotiating and other expenses to remedy egregious bargaining violations. The General Counsel continues to seek litigation expenses where necessary to effectuate the purposes of the Act following the D.C. Circuit's *H.T.H. Corp.* decision. The Agency does not track pending cases concerning such remedies.

B. Does the Agency have any plans to increase Regional staff training with regard to the deferred action process under the Department of Homeland Security policies?

The Agency has no plans to increase Regional staff training on this issue at this time.

C. Are Regions seeking additional remedies where *Hoffman Plastic* bars back pay? If so, please describe. How many formal settlements have resulted where *Hoffman Plastic* bars back pay?

Regardless of whether there is a bar to backpay due to immigration or work authorization status, Regions have sought enhanced remedies in cases where Respondents have targeted vulnerable immigrant workers by engaging in threatening and retaliatory conduct. In these cases, while there was no bar to backpay, remedies pled have included a requirement that Respondents: post and read a Board notice to employees in both Spanish and English; mail a copy of the Board order to Respondent's employees and supervisors at all facilities; publish the Board order in local publications of general interest; allow employees of Respondent to undergo training regarding their rights under the Act conducted by a Board agent during paid work time; require supervisors and managers of the Respondent to undergo a training on compliance with the Act conducted by a Board agent on paid work time; and provide a union with access to employee contact information.

D. OM 16-24 notes that Regions have been instructed to seek reimbursement for consequential economic harm incurred as a result of a respondent's unlawful conduct (for example, expenses resulting from car repossession due to failure to make a car payment, penalties for early withdrawal from retirement accounts in order to cover living expenses, and loss of home equity in foreclosure action due to missed mortgage payments). It also notes that Regions are encouraged to continue to search for other appropriate remedies that address the allegations in the complaint. Please describe any such remedies sought and the results of such efforts to obtain these remedies.

The Office of the General Counsel's Compliance Unit in Headquarters is tasked with furnishing guidance and training to Regions regarding appropriate remedies generally, including reimbursement for consequential economic harm. The Agency has not collected data regarding examples of remedies sought and obtained as reimbursement for consequential economic harm.

E. GC Memo 16-01 asks Regions to submit the following matters to Advice:

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;
Cases covered by GC Memo 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 nonemployees to non-work areas, and (3) providing a union with equal time to respond to captive audience speeches;
Cases covered by GC Memo 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.

Please provide statistics regarding how many of each category of such cases have been submitted to Advice and describe any trends or novel remedial issues presented in these or other cases. What is the number of complaints issued and/or pending for each such category, and merit determinations?

During FY 2016, no cases were submitted to the Division of Advice presenting the issue raised in *St. George Warehouse*. Similarly, no cases were submitted asking for any of the specific remedies enumerated above from GC Memorandum 11-01. However, in one case, a Regional Office was authorized to seek an order requiring that the employer provide the union with access to employee contact information, a remedy also discussed in GC Memorandum 11-01. In that same case, which involved unlawful conduct directed toward employees' immigration status, the Regional Office was authorized to seek the additional remedies discussed in GC Memorandum 15-03, namely, training for employees on their rights under the Act conducted by a Board agent during paid work time and training for supervisors and managers on compliance with the Act conducted by a Board agent on paid work time. In two other cases in FY 2016, two Regional Offices were authorized to seek reimbursement of bargaining expenses. There were no discernible trends presented in these cases, and the Agency does not track the progress of the case after authorizing a Regional Office to seek a particular remedy. Lastly, no submissions were received regarding litigation expenses in first contract cases.

F. If a charged party agrees to a posting in an employer rules case involving a national handbook (or rules applicable in multiple regions), are Regions given guidance or is there a policy regarding whether to require a national posting?

As a general rule, both physical and electronic notice posting is contemplated for all locations affected by a violation of the Act. See ULP CHM Section 10132. In evaluating settlement proposals, Regions are also to assess practical considerations and whether it may effectuate the policies of the Act to accept a lesser remedy. See ULP CHM Section 10124.3.

G. Since OM 14-48, has there been any further guidance to Regions regarding default language; if not, is any planned?

The instructions relayed in OM Memorandum 14-48 remain in place. In OM Memorandum 16-19, the Associate General Counsel for the Division of Operations-Management furnished additional guidance for Regions concerning instances where it is necessary to pursue a default judgment based on non-compliance with a settlement agreement. The Office of the General Counsel has also updated the ULP CHM to regularize guidance on default language, including Sections 10130.10 and 10146.7.

H. What guidance have the Regions been given regarding discretion to include non-admissions clauses in settlement agreements? Is any further guidance planned at this time?

Section 10130.8 of the ULP CHM sets out that non-admissions clauses should not routinely be incorporated into settlement agreements. Regions are instructed that if the charged party requests a non-admissions clause, that request should be considered on a case-by-case basis. The Regional Director has discretion to determine whether agreeing to a non-admissions clause is appropriate in any given case. No further guidance is planned at this time.

III. REPRESENTATION CASES

A. Statistics

1. Please provide statistics concerning the number of RC and RD petitions filed, the number of elections conducted in each category, and the union win rate.

	Petitions Filed	Elections Conducted	% Won by Union
RC	2029	1396	73%
RD	313	174	40%

Overall, in FY 2016, there were 2537 petitions filed.

2. Please provide statistics concerning the median number of days from petition to election, with a comparison to the number of median days in prior years.

	Median Number of Days	With Election Agreement	With Contested Cases
FY 2013	38	37	59
FY 2014	38	37	59
FY 2015	33	32	55.5
FY 2016	23	23	35

3. Please provide statistics concerning the average unit size sought in RC petitions and the average unit size determined to be appropriate. How do these statistics compare to the years before *Specialty Healthcare*?

	Median size of unit petitioned for	Median size of unit deemed to be appropriate
FY 2011	20.5	20
FY 2012	26	26
FY 2013	25	25
FY 2014	25	25

FY 2015	23	23
FY 2016	22	22

4. Please provide statistics concerning the use of mixed, mail, and manual ballots. Have mail ballot elections increased? Has any guidance been provided regarding return time for mail ballots? Is consideration given to posting mixed, mail, or manual ballots statistics on the Board’s website?

	Manual	Mail	Mixed	Total
FY 2015	1,639	212	21	1,872
FY 2016	1,417	216	27	1,660

The amount of mail ballot elections remained about the same as last fiscal year. While there has not been recent guidance provided regarding return time for mail ballots, the Regional Offices follow the Representation CHM.

Further, we note that you can find many representation case statistics on our website at <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections>.

B. Election Rules

- 1. Some practitioners have asked why the pre-hearing conference is no longer used. Is there guidance regarding whether and when to have a pre-hearing conference?**

No guidance has been issued concerning the discontinuation of pre-hearing conferences. GC Memorandum 15-06, provides the following guidance concerning pre-hearing conferences:

If the parties have not entered into an election agreement, the Region should, where appropriate, conduct a pre-hearing conference at the Regional Office or by conference call for the purpose of further exploring the possibility of entering into an election agreement or narrowing the issues to be litigated at a hearing.

At this conference, the Board agent should explore the issues raised in the Statement of Position and attempt to obtain an election agreement. If an agreement is not possible, every effort should be made to narrow the issues for hearing and to reach written stipulations on the issues that are not in dispute, such as commerce, labor organization status, eligibility formulas, unit inclusions, and unit exclusions. These stipulations can either be read into the record or be introduced as exhibits during the hearing. The Board agent should also discuss with the parties the nature of the evidence to be presented and the order in which it will be elicited.

- 2. If information is missing from an Employer’s list, should the Regions still abide by the parties’ stipulated election date?**
 - a. If so, what factors are considered in making this decision?**

This response presumes the question refers to the voter eligibility list, rather than the list of names, work locations, shifts and job classifications of individuals in the proposed unit required by Section 102.63 of the Rules and Regulations.

The Representation CHM Section 11312.7 advises that if a voter list is not received at all or a list that does not include all of the required information is received (Sec. 11312.4), the Regional Director should proceed with the election unless requested not to, in writing, by the petitioner or an intervenor with a petitioner's showing of interest (i.e., 30 percent or the equivalent).

3. Specific questions about the election rules:

- a. **On Voter Lists, please provide information regarding the standard to determine whether personal email addresses and telephone numbers are deemed "available" to an employer. Have Regions been given any guidance on whether they are permitted to require employers who are preparing Voter Lists to provide individual employees' phone numbers or emails that are not contained in any official employer database and only possessed by supervisors without the knowledge of upper management or human resources? If so, what advice has been given?**

While, the Board did not provide a standard against which Regions are to judge whether personal email addresses or home and cellular telephone numbers are "available" or further define "available" in the Final Election Rule, in GC Memorandum 15-06, the General Counsel reminded Regions of the Board's statement that it is presumptively appropriate for the employer to produce multiple versions of the list where the data required is kept in separate databases or files so long as all of the lists link the information to the same employees, using the same names in the same order and are provided within the allotted time. Further, informal guidance has been given that employers, who fail to ask their supervisors and managers for such information to the extent that they possess it, may be at risk for having objections filed and potentially sustained regarding this issue.

b. Are parties permitted to provide Voter Lists in Excel format?

If the parties agree that the voter list will be provided in Excel format it is permissible to so provide the list. GC Memorandum 15-06 also provides the following guidance concerning the format of the voter list:

.the lists must be filed in common, everyday electronic file formats that can be searched. Accordingly, unless otherwise agreed to by the parties, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx).

c. For FY 2016, what is the median time from:

1. **Filing to election overall?**
2. **Filing to election in Stipulated Agreement cases?**
3. **Filing to election in DDE cases?**

In FY 2016, the median time frame from filing to election was 23 days, filing to election in stipulated election agreements was 23 days and the median time frame from filing to election in DDE cases was 35 days.

d. What is the total number and percentage of stipulated elections in FY 2016? How does that compare to FY 2015?

In FY 2016, there were 1,506 stipulated elections, which was 91.5%.
 In FY 2015, there were 1,679 stipulated elections, which was 91.7%.

e. What is the total number and percentage of withdrawn petitions in FY 2016? How do those compare to prior years?

In FY 2016, there were 835 petitions withdrawn out of a total of 2537 filed, which is 32.9%.
 In FY 2015, there were 863 petitions withdrawn out of a total of 2822 filed, which is 30.6%.

f. What is the total number and percentage of blocking charges in FY 2016? How do those compare to prior years?

	FY 2015	FY 2016
Total Petitions Filed	2,822	2,537
Total C Cases Blocking R Cases	237	168
Total R Cases Blocked by C Cases	133	100
Percentage of blocked petitions vs. petitions filed	4.7%	3.9%
Percentage of blocking charges vs. charges filed	8.4%	6.6%

g. Has guidance been issued on extensions of time on hearings (within the applicable 8-day period) to allow parties to negotiate stipulations? How many extensions have been granted, and under what circumstances?

GC Memorandum 15-06 provides that, if a party wishes to postpone the hearing, it may make a request to the Regional Director. The Regional Director may postpone the hearing for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances.

The Board did not articulate standards by which a Regional Director is to judge postponement requests. However, the Regional Offices follow the Representation CHM at Section 11143, which provides that, "A party wishing to request a postponement should make the request in writing and set

forth in detail the grounds for the request (i.e., not merely "prior commitments"). The request should include the positions of the other parties regarding the postponement."

In FY 2016, there were 379 rescheduled hearings.

In FY 2015, there were 651 rescheduled hearings.

The Agency does not maintain statistics on how many extensions have been granted or under what circumstances extensions are granted.

h. How many no-issue pre-election hearings were held in FY 2016? How does this compare to prior years?

The Agency does not maintain statistics about the number of no-issue pre-election hearings held.

1. Are there statistics on the median amount of time it is taking Regional Directors to issue decisions in no-issue hearings?

The Agency does not maintain statistics on the median amount of time it takes to issue decisions in no-issue hearings.

C. Joint Employer

1. How many cases have raised the issue of joint employment and, therefore, implicate the *Browning-Ferris* and/or *Miller & Anderson* decisions? Are Regions applying the *Browning Ferris* standard (articulated in an R-Case) to C-Cases? Does the Agency intend to distribute further guidance with regard to the impact of the *Browning-Ferris* and/or *Miller & Anderson* decisions?

In FY 2016, six ULP cases that raised the issue of joint employment were submitted to the Division of Advice. Regions are applying the *Browning-Ferris* standard in ULP cases. The General Counsel has no immediate plan to distribute further guidance with regard to the impact of the *Browning-Ferris* and/or *Miller & Anderson* decisions.

2. Has the Board provided any guidance on whether *McDonald's-type* cases can be settled by franchisees without admission of "joint employer" status?

No. Where it has been found that one charged employer is a joint employer of another charged employer's employees and jointly liable to remedy the other employer's unfair labor practices, both charged employers would ordinarily be party to a settlement agreement that remedies those unfair labor practices. In the particular circumstances where it has been found that a franchisor is jointly liable to remedy unfair labor practices based on a joint employer relationship with the franchisee, the General Counsel has provided no general guidance regarding settlement by the franchisee without the franchisor also being a party to the settlement agreement.

3. Have there been charges raising joint employer issues in secondary boycott cases? If so, please describe the GC's experience with such cases.

We do not have a report reflecting which charges alleging unlawful secondary boycott conduct (i.e., alleging violations of Sections 8(b)(4)(A), 8(b)(4)(B) or 8(e)) may have raised joint employer issues. However, none were submitted to the Division of Advice and, thus, the General Counsel has not been presented with such cases.

IV. MISCELLANEOUS

A. Are there any rules that the Board follows when it is either less than fully constituted or when it is awaiting appointment of new members after a change of political parties in the Executive Branch?

No. There are no specific rules.

B. What is the current policy for referral of cases to the National Mediation Board? Some practitioners have reported delayed processing of regional office investigations. Can the current process be improved in order to ensure more timely adjudication of open matters?

Section 11711 of the ULP CHM provides that, if it is clear that the NLRB has jurisdiction over the employer, the Regional Office should proceed with the processing of the case. On the other hand, if it is clear that the employer falls under the jurisdiction of the Railway Labor Act (RLA), the parties should be referred to the National Mediation Board (NMB) and the charge or petition should be dismissed, absent withdrawal. The Agency's practice is to refer cases of arguable or doubtful RLA jurisdiction to the NMB for an advisory opinion on the jurisdictional issue. Investigations of jurisdiction under the RLA are handled the same as other investigations where jurisdiction is in question and are often fact intensive. As with all its investigations, the Agency continues to explore ways to conduct them even more expeditiously.

C. What is the policy for reimbursing witnesses for hotel and travel expenses when subpoenaed by the GC to testify at a Board hearing? Are there time goals for providing such reimbursement? Some practitioners have reported long delays in witnesses receiving reimbursement.

Section 11780 of the ULP CHM provides that witnesses subpoenaed by the NLRB are entitled to travel expenses if they make the appropriate claim. Where appropriate, witnesses are reimbursed for travel, lodging, and meal expenses. A per diem allowance will be paid to a witness when an overnight stay is required at the place of attendance if such place is so far removed from the residence of the witness as to prohibit same day travel. In order to ensure prompt handling and payment, subpoenaed witnesses should immediately complete and sign a claim form supplied by the NLRB after appearance at the proceeding and after release from a subpoena, and provide accurate banking information or a signature to waive Electronic Funds Transfer payments in order to receive a paper check type of compensation.

D. What is the status of any memoranda, cooperation agreements and/or initiatives between the NLRB and the Department of Labor?

The NLRB and DOL's Wage and Hour Division have signed a memorandum of understanding to enhance and maximize the enforcement of the federal laws administered between the two agencies. The NLRB and DOL's OSHA Division have similarly done so.

E. Are there any plans for re-litigation of any issues and/or any anticipated changes in the Board's non-acquiescence policy?

No.

F. Has the GC developed technology or other initiatives to facilitate remote investigations (e.g., collection of affidavits while agents are working remotely)?

Skype capabilities and other unified communication enhancements have been deployed to the Regional Offices, along with our electronic case file, NxGen. Thus, Board agents working remotely have sufficient technology to ensure that investigations are being processed efficiently and effectively while teleworking. With regard to affidavits, particularly initial ones, it remains preferable to take those face to face.

G. Are there any plans for further Regional reorganizations?

Not at this time.

H. Is the Agency sufficiently funded to meet its mission? What would be the optimum funding level? If a lack of funding is affecting Agency operations, what areas are impacted?

No, the current Continuing Resolution level of \$273,702,700 is inadequate. We have been flat funded, with government-wide rescissions on top of the flat funding, for years. Thus, we have not been able to keep up with cost of living adjustments and other inflationary increases over the years. All areas are impacted, which leads to a detrimental effect on the public we serve despite all our efforts. For example, we are unable to sufficiently staff the Agency overall, and particularly the Regional Offices. And, our employees have not been able to participate in relevant and necessary training opportunities due to budgetary constraints. Further, we are unable to make significant enhancements to our technology to enable more efficient case processing, to offer more information and transparency to the public on our website, to fully perform an e-Service function, and to create a transactional system for the public on our website so that they can perform their own searches and on our website. Optimum funding would include increasing our appropriation significantly to enable us to, at the very least, hire and train qualified professionals and administrative professionals, including those needed for translation and technical support, and to exponentially enhance our technology, as opposed to just maintaining the status quo.

Cases Related to D.R. Horton

Supreme Court Case	Case No.
Certiorari Granted	
NLRB v. Murphy Oil USA, Inc.	16-307
Epic Systems Corp. v. Lewis	16-285
Ernst & Young LLP v. Morris	16-300
Petition Pending	
NLRB v. 24 Hour Fitness USA, Inc.	16-689 (Pet.)
NLRB v. PJ Cheese, Inc.	16-800 (Pet.)
NLRB v. SF Markets, LLC	16-801 (Pet.)

Board Case	Board Case No.	Reporter	D&O Date	Circuit/Lead Case No.	Brief Filed/Status	Argument	Judgment
Apple American Group LLC Applebees	18-CA-103319	363 NLRB No. 111	2/22/2016	2d Cir., 16-4232			
Rose Group d/b/a Applebee's Rest.	05-CA-135360	363 NLRB No. 75	12/22/2015	3d Cir. 15-4092	6/23/2016	10/5/2016	
AT&T Mobility Service, LLC	22-CA-127746	363 NLRB No. 99	1/21/2016	4th Cir., 16-1099	6/1/2016	12/7/2016	
ISS Facility Services, Inc.	28-CA-126024	363 NLRB No. 160	4/7/2016	5th Cir. 16-60261	Summary Disposition	N/A	9/7/2016
D.R. Horton	12-CA-025764	357 NLRB No. 184	1/3/2012	5th Cir., 12-60031	9/4/2012	2/5/2013	12/3/2013
Murphy Oil	10-CA-038804	361 NLRB No. 72	10/28/2014	5th Cir., 14-60800	4/1/2015	8/31/2015	2/18/2016
Chesapeake Energy	14-CA-100530	362 NLRB No. 80	4/30/2015	5th Cir., 15-60326	9/30/2015	N/A	12/2/2016
Neiman Marcus	31-CA-074295	362 NLRB No. 157	8/4/2015	5th Cir., 15-60572	Abeyance		
PJ Cheese	10-CA-113862	362 NLRB No. 177	8/20/2015	5th Cir., 15-60610	Summary Disposition	N/A	8/25/2016
Leslie's Poolmart	21-CA-102332	362 NLRB No. 184	8/25/2015	5th Cir., 15-60627	Abeyance		
On Assignment Staffing Servs.	32-CA-095025	362 NLRB No. 189	8/27/2015	5th Cir., 15-60642	Summary Disposition	N/A	6/6/2016
Amex Card Services Co.	28-CA-123865	363 NLRB No. 40	11/10/2015	5th Cir., 15-60830	Abeyance		
Citigroup Tech., Inc.	12-CA-130742	363 NLRB No. 55	12/1/2015	5th Cir., 15-60856	10/24/2016	N/A	12/8/2016
Prof. Janitorial Serv. of Houston	16-CA-112850	363 NLRB No. 35	11/24/2015	5th Cir., 15-60858	Partial Summ. Disp.	N/A	Dismissed
Brinker Intl. Payroll Co.	27-CA-110765	363 NLRB No. 54	12/1/2015	5th Cir., 15-60859	Abeyance		
U.S. Xpress Enterprises, Inc.	10-CA-141407	363 NLRB No. 46	11/30/2015	5th Cir., 15-60871	Abeyance		
Kmart Corp.	06-CA-091823	363 NLRB No. 66	12/16/2015	5th Cir., 15-60897	Abeyance		
RPM Pizza, LLC	15-CA-113753	363 NLRB No. 82	12/22/2015	5th Cir., 15-60909	Summary Disposition	N/A	7/29/2016
Citi Trends, Inc.	10-CA-133697	363 NLRB No. 74	12/22/2015	5th Cir., 15-60913	6/28/2016	N/A	8/10/2016
Domino's Pizza, LLC	29-CA-103180	363 NLRB No. 77	12/22/2015	5th Cir., 15-60914	Abeyance		
Ross Stores, Inc.	31-CA-109296	363 NLRB No. 79	12/23/2015	5th Cir., 15-60916	Abeyance		
SolarCity Corp.	32-CA-128085	363 NLRB No. 83	12/22/2015	5th Cir., 16-60001	Abeyance		
24-Hour Fitness USA, Inc.	20-CA-035419	363 NLRB No. 84	12/24/2015	5th Cir., 16-60005	Summary Disposition	N/A	6/27/2016
MasTec Services Co.	16-CA-086102	363 NLRB No. 81	12/23/2015	5th Cir., 16-60011	Summary Disposition	N/A	7/11/2016

Cases Related to D.R. Horton

Board Case	Board Case No.	Reporter	D&O Date	Circuit/Lead Case No.	Brief Filed/Status	Argument	Judgment
GameStop Corp.	20-CA-080497	363 NLRB No. 89	12/31/2015	5th Cir., 16-60031	Abeyance		
Employers Resource	31-CA-097189	363 NLRB No. 59	12/17/2015	5th Cir., 16-60034	6/30/2016	N/A	11/1/2016
Waffle House, Inc.	10-CA-121178	363 NLRB No. 104	2/1/2016	5th Cir., 16-60077	Summary Disposition	N/A	8/9/2016
UnitedHealth Group, Inc.	02-CA-118724	363 NLRB No. 134	2/25/2016	5th Cir., 16-60122	Summary Disposition	N/A	7/21/2016
RGIS, LLC	28-CA-136313	363 NLRB No. 132	2/23/2016	5th Cir., 16-60129	Summary Disposition	N/A	7/7/2016
SF Markets, LLC	21-CA-099065	363 NLRB No. 146	3/24/2016	5th Cir., 16-60186	Summary Disposition	N/A	7/26/2016
Multiband EC, Inc.	25-CA-108828	363 NLRB No. 100	1/21/2016	5th Cir., 16-60197	Abeyance		
Amerisave Mortgage Corp.	10-CA-082519	363 NLRB No. 174	4/29/2016	5th Cir., 16-60273	Abeyance		
CVS RX Services, Inc.	29-CA-141164	363 NLRB No. 180	5/4/2016	5th Cir., 16-60289	Abeyance		
Securitas Security Services USA, Inc.	31-CA-072179	363 NLRB No. 182	5/11/2016	5th Cir., 16-60304	Summary Disposition	N/A	8/16/2016
Acuity Specialty Prods., Inc.	32-CA-075221	363 NLRB No. 192	5/16/2016	5th Cir., 16-60367	12/19/2016		
Adecco USA, Inc.	32-CA-142303	364 NLRB No. 9	5/24/2016	5th Cir., 16-60375	11/17/2016/Abeyance		
Jack in the Box, Inc.	32-CA-145068	364 NLRB No. 12	5/24/2016	5th Cir., 16-60386	10/24/2016	N/A	12/13/2016
Lincoln Eastern Management Corp.	28-CA-147123	364 NLRB No. 16	5/31/2016	5th Cir., 16-60401	Abeyance		
Alternative Entertainment, Inc.	07-CA-144404	363 NLRB No. 131	2/22/2016	6th Cir., 16-1385	8/22/2016	11/30/2016	
Hobby Lobby Stores	20-CA-139745	363 NLRB No. 195	5/18/2016	7th Cir., 16-2297	Due 3/20		
Cellular Sales of Missouri	14-CA-094714	362 NLRB No. 27	3/16/2015	8th Cir., 15-1620	9/10/2015	1/13/2016	8/10/2016
Advanced Services, Inc.	26-CA-071805	363 NLRB No. 71	12/22/2015	8th Cir., 15-3988	Abeyance		
Countrywide Financial Corp.	31-CA-072916	362 NLRB No. 165	8/14/2015	9th Cir., 15-72700	6/15/2016		
Hoot Winc	31-CA-104872	363 NLRB No. 2	9/1/2015	9th Cir., 15-72839	6/3/2016		
Nijjar Realty, Inc. d/b/a Parma Mgt.	21-CA-092054	363 NLRB No. 38	11/20/2015	9th Cir., 15-73921	7/1/2016		
Philmar Care, LLC	31-CA-133242	363 NLRB No. 57	12/11/2015	9th Cir., 16-70069	11/22/2016		
CPS Security (USA), Inc.	28-CA-072150	363 NLRB No. 86	12/24/2015	9th Cir., 16-70488	Abeyance (Mediation)		
Century Fast Foods, Inc.	31-CA-116102	363 NLRB No. 97	1/20/2016	9th Cir., 16-70686	Abeyance		
Network Capital Funding Corp.	21-CA-107219	363 NLRB No. 106	2/18/2016	9th Cir., 16-70687	Abeyance		
FAA Concord H, Inc.	32-CA-066979	363 NLRB No. 136	2/24/2016	9th Cir., 16-70694	Abeyance		
The Pep Boys	31-CA-104178	363 NLRB No. 65	12/23/2015	9th Cir., 16-71036	Abeyance		
Kenai Drilling Ltd.	31-CA-128266	363 NLRB No. 158	3/31/2016	9th Cir., 16-71148	Abeyance		
Bloomingtondale's, Inc.	31-CA-071281	363 NLRB No. 172	4/29/2016	9th Cir., 16-71338	Abeyance		
Ralph's Grocery Co.	21-CA-073942	363 NLRB No. 128	2/23/2016	9th Cir., 16-71422	Abeyance		
Covenant Care California, LLC	21-CA-090894	363 NLRB No. 80	12/22/2015	9th Cir., 16-71502	Abeyance (Mediation)		
Valley Health System, LLC	28-CA-123611	363 NLRB No. 178	5/5/2016	9th Cir., 16-71647	Due 1/26		
Tarfton and Son, Inc./Robert Munoz	32-CA-119054	363 NLRB No. 175	4/29/2016	9th Cir., 16-71915			
Beena Beauty Holding, Inc.	31-CA-144492	364 NLRB No. 3	5/23/2016	9th Cir., 16-72015	Abeyance		
AWG Ambassador, LLC	28-CA-118801	363 NLRB No. 137	2/25/2016	9th Cir., 16-73514	Due 6/1		
SJK, Inc. d/b/a Fremont Ford	32-CA-151443	364 NLRB No. 29	6/16/2016	9th Cir., 16-74025			

Cases Related to D.R. Horton

Board Case	Board Case No.	Reporter	D&O Date	Circuit/Lead Case No.	Brief Filed/Status	Argument	Judgment
Everglades College, Inc.	12-CA-096026	363 NLRB No. 73	12/23/2015	11th Cir., 16-10341	7/1/2016	1/24/2017	
Samsung /Jorgie Franks	12-CA-145083	363 NLRB No. 105	2/3/2016	11th Cir., 16-10644	8/10/2016	1/24/2017	
Cowabunga, Inc.	10-CA-151454	363 NLRB No. 133	2/26/2016	11th Cir., 16-10932	8/8/2016	1/24/2017	
Victory Casino Cruises	12-CA-146110	363 NLRB No. 167	4/22/2016	11th Cir., 16-15955	Abeyance		
Bristol Farms	21-CA-103030	364 NLRB No. 34	7/6/2016	D.C. Cir. 16-1247	Abeyance		
Price-Simms, Inc. d/b/a Toyota Sunnyvale	32-CA-138015	363 NLRB No. 52	11/30/2015	D.C. Cir., 15-1457	5/27/2016	N/A	
Haynes Bldg. Servs., LLC	31-CA-093920	363 NLRB No. 125	2/23/2016	D.C. Cir., 16-1099	9/13/2016/Abeyance		
Prime Healthcare Paradise Valley	21-CA-133781	363 NLRB No. 169	4/22/2016	D.C. Cir., 16-1132	Abeyance		
Labor Ready Southwest, Inc.	31-CA-072914	363 NLRB No. 138	2/26/2016	D.C. Cir., 16-1174	Abeyance		
Adriana/Veronica's Insurance Services, Inc.	31-CA-113416	364 NLRB No. 17	5/31/2016	D.C. Cir., 16-1180	Abeyance		
California Commerce Club, Inc.	21-CA-149699	364 NLRB No. 31	6/16/2016	D.C. Cir., 16-1203	Abeyance		
Grill Concepts Servs. d/b/a The Daily Grill	31-CA-126475	364 NLRB No. 36	6/30/2016	D.C. Cir., 16-1238	2/2/2017		
Flyte Tyme Wortwide	04-CA-115437	363 NLRB No. 107	2/4/2016				
Fuji Food Prods., Inc.	21-CA-095997	363 NLRB No. 118	2/19/2016				
Great Lakes Rest. Mgmt., LLC	03-CA-143685	363 NLRB No. 130	2/23/2016				

Non-Board Case (Board Participating as Amicus)	Appeal From	Circuit	Brief Filed	Argument	Judgment	Supreme Court
Morris v. Ernst & Young LLP	N.D. California	9th Cir. 13-16599	11/6/2015	Did not participate	8/22/2016	16-300
Lewis v. Epic Systems Corp.	W.D. Wisconsin	7th Cir. 15-2997	12/16/2015	2/12/2016	5/26/2016	16-285
Patterson v. Raymours Furniture Co.	S.D. New York	2d Cir. 15-2820	12/23/2015	8/17/2016	9/2/2016	16-388
O'Connor v. Uber Technologies, Inc.	N.D. California	9th Cir. 15-17420	11/2/2016			
Bekele v. Lyft	D. Massachusetts	1st Cir. 16-2109	1/26/2017			