A Timely Analysis of Legal Developments

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The NLRB's 2014 Initiatives

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The National Labor Relations Board's (NLRB or Board) General Counsel, Richard Griffin, issued a memorandum (GCM 14-01) in late February to the Board's Regional Directors highlighting legal issues the Regions are required to submit to the Board's Division of Advice. The General Counsel's memorandum allows a glimpse into the crystal ball to see how the NLRB will chart its course for the upcoming year. Although some of the destinations are expected (*e.g.*, a return to the applicability of *Weingarten* rights to non-union employees), others represent an aggressive policy of furthering the Board's pro-labor agenda. If the General Counsel succeeds in advancing his agenda, dramatic changes are on the horizon for employers.

Expanding the Employer's Duty to Provide Financial Information During Bargaining

Historically, the Board has recognized an employer's lawful prerogative to claim that certain union proposals would create a competitive disadvantage for the employer and are therefore not in the employer's economic interest. Employers have been able to argue competitive disadvantage during negotiations without opening the door to a union's review of its financial records, provided the employer never states an "inability to pay" for the union's proposals.

GCM 14-01 highlights the General Counsel's desire for the Board to move away from the "magic words" standard and instead require disclosure of financial information where an employer merely makes assertions that are verifiable by reviewing the employer's financial records, even if the employer only asserts competitive disadvantage and never claims inability to pay or where, on the facts, the employer asserts—without expressly stating—an "inability to pay" claim, meaning that it is financially incapable of meeting the union's demands. Accordingly, employers should prepare to face heightened disclosure requirements when claiming competitive disadvantage at the bargaining table.

Perfectly Clear Successors: Acquiring a New Business May Become More Risky

The pace of corporate acquisitions during the last two decades shows no sign of slowing, despite the economic downturn in 2008. For years, unions have blamed corporate acquisitions for the decline in union membership. Based on GCM 14-01, unions may have found a sympathetic ear.

Under existing precedent, a successor employer is free in most instances to establish the initial terms and conditions of employment under which it may hire employees of the predecessor without first bargaining with the incumbent union. However, in circumstances in which it is perfectly clear that the new employer plans to retain all of the employees in a bargaining unit, a successor employer must first negotiate with the union that represents the seller's employees before establishing terms and conditions of employment.

The General Counsel's Memorandum makes it clear that the Board will closely examine and possibly expand the circumstances under which an employer may be deemed a "perfectly clear successor" and, therefore, bound by the existing terms and conditions of employment set by the seller's labor agreement. Although it is unclear from GCM 14-01 what precisely those expanded circumstances may be, a more aggressive analysis by the Board's General Counsel could raise the stakes for a company involved in an acquisition. An expansive view of the "perfectly clear successor" standard could hamper or curtail many acquisitions of unionized companies that may be struggling. It could discourage continuity in employment relationships because of legal and artificial barriers that might result from an overbroad standard sought by the Board's General Counsel. The unintended consequences may be that many unionized businesses will become unsellable or be forced to close and lay off their workforces before a purchaser will be willing to acquire any assets.

Pursuing Section 10(j) Remedies in Successor Refusal-to-Hire Cases

The General Counsel plans to publish a new Section 10(j) Manual advising the Regions on seeking 10(j) remedies. The General Counsel has indicated previously that pursuing Section 10(j) remedies in successor refusal-to-hire cases, in which the new employer declines to hire a number of employees from the unionized predecessor, is a "major" priority for his office.

Although Section 10(j) relief in successor refusal-to-hire cases is not new for the Board, the General Counsel will likely encourage the Regions to pursue these remedies more aggressively. As a result, employers may see an increase in cases in which Regional Directors will ask courts to order employers to reinstate certain employees and recognize and bargain with the union, and then closely scrutinize the employer's subsequent conduct with the threat of federal court contempt actions.

Special Remedies Expanding in First Contract Cases

The General Counsel's office continues to prioritize remedies in first-contract bargaining cases. Specifically, GCM 14-01 directs Regions to submit to Advice any first-contract bargaining cases where reimbursement of bargaining or litigation expenses might be appropriate. The General Counsel's directive is in line with former Acting General Counsel Lafe Solomon's GC Memorandum 11-06, *First Contract Bargaining Cases: Regional Authorization to Seek Additional Remedies and Submissions to Division of Advice* (GCM 11-06).

In GCM 11-06, Solomon encourages the use of additional remedies in certain first-contract bargaining cases by directing regional offices to use their discretion in seeking notice-reading, certification-year extension, and bargaining-schedule remedies in certain unfair labor practice cases. GCM 11-06 also directs Regions to submit cases to Advice where bargaining or litigation expenses might be appropriate. According to Solomon, reimbursement of bargaining expenses is necessary to "restore the status quo" in those instances where unfair labor practices have "infected the core of the bargaining process," and the application of traditional remedies would be ineffective.

Given GCM 14-01's reference to GCM 11-06 and its continued directive to the Regions to submit cases to Advice where an award of bargaining or litigation expenses may be appropriate, the General Counsel's office may continue searching for vehicles to award such remedies in first-contract bargaining cases.

Special Remedies Expanding in Nip-in-the-Bud Organizing Campaign Cases

The General Counsel's Office also plans to include in its Section 10(j) Manual a section advising the Regions on the importance of addressing cases in which employers are accused of unfair labor practices which actively diminish union support through discipline or terminations, known as "nip-in-the-bud" campaigns, leading up to an election. The General Counsel's policy on the substantially more aggressive use of Section 10(j) remedies to address "nip-in-the-bud" campaigns was foreshadowed in GCM 10-07, *Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns*, in which former Acting General Counsel Solomon noted the Agency's commitment to "giv[ing] all unlawful discharges in organizing cases priority action and a speedy remedy . . . because [such discharges] have a severe impact on Section 7 rights."

In GCM 11-01, *Effective Remedies in Organizing Campaigns*, Solomon outlined other situations during organizing campaigns in which Regions should consider the use of Section 10(j) remedies, including a notice-reading remedy where an employer is believed to have committed a serious Section 8(a)(1) violation. If the unfair labor practice is believed to have interfered with communications between employees, or between employees and a union, Regions are also directed to seek an order allowing union access to an employer's bulletin boards as well as employee names and addresses.

GCM 14-01 discloses the General Counsel plans to ask the Board to expand the degree of union access even further in certain circumstances, including granting a union access to non-work areas during employees' non-work time; giving a union notice of, and equal time and facilities to respond to, any address made by the company on the issue of representation; and affording the union the right to deliver a speech to employees at an appropriate time prior to any Board election.

The degree of access the General Counsel proposes is unprecedented and represents an extreme remedy that has been long advocated by organized labor. Further, the access advocated by GCM 14-01 is not limited to physical bulletin boards on employer property, but includes access to employer e-mail, electronic bulletin boards, and intranet.

Ritchey and the Further Narrowing of "Exigent Circumstances"

GCM 14-01 indicates that cases involving novel issues arising from application of the Board's decision in *Alan Ritchey, Inc.*, 359 NLRB No. 40 (Dec.14, 2012), should be submitted to the Division of Advice. In *Ritchey*, the Board held that a newly unionized employer has a duty to bargain with a union before imposing discretionary discipline on an employee, even though an initial collective bargaining agreement has not yet been negotiated. However, the Board noted an exception to the rule where exigent circumstances exist. In other words, where the employer has a "reasonable, good-faith belief that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel," the employer can discipline immediately, provided that, "promptly afterward," the union is given an opportunity to bargain about the decision and its effects.

It is likely the General Counsel will narrowly apply the "exigent circumstances" standard and expand remedies for failure to engage in pre-discipline bargaining. However, to date, no such post-*Ritchey* decisions have been handed down.

Applicability of *Weingarten* Rights to Non-Unionized Workforces

GCM 14-01 warns employers that *Weingarten* rights may once again apply to non-union employees. In *NLRB v. Weingarten*, the Supreme Court approved the Board's holding that a union-represented employee has the right to request that a union representative accompany the employee to an investigatory interview if the employee reasonably believes that the interview could result in discipline. Since the *Weingarten* decision, the Board has changed course several times regarding whether non-union employees also enjoy *Weingarten* rights. Its most recent decision affirmatively addressing the issue was handed down in 2004 by the Bush-era Board in *IBM Corp.*, in which the Board held that *Weingarten* rights apply to union employees, but are not available to non-union employees.

In GCM 14-01, the General Counsel's office directs the Regions to submit to Advice any "cases involving the applicability of *Weingarten* principles in non-unionized settings as enunciated in *IBM Corp.*," indicating that the General Counsel may be looking for a case to present the Obama Board with an opportunity to once again extend *Weingarten* rights to non-union workers.

Distribution, Solicitation, and Access to Employer Property (*Register Guard*)

The treatment of employee solicitation, distribution, and e-mail usage was clarified in 2007 in the Board's decision in *The Register Guard*. In that case, the Board, recognizing an employer's property rights, held that an employer has the right to prohibit all personal use of company e-mail systems. The Board further narrowed its disparate treatment analysis, holding that "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." In this regard, the Board found that an employer may draw a line between charitable solicitations and non-charitable solicitations without violating the NLRA, as discrimination must be along Section 7 lines to be unlawful. From a practical standpoint, *Register Guard* seems to suggest that employers currently have greater latitude to allow communications and solicitations that are common in every workplace, without fear that they have opened the door to union-related solicitations.

The General Counsel, however, appears intent on convincing the Board to reverse or severely curtail *Register Guard*. The General Counsel likely will use the Board's pending decision in *Roundy's, Inc.* to seek a reversal of the Bush-era holding in *Register Guard*. Employers should prepare for a change in Board law on the issues of solicitation, distribution, and use of employer e-mail systems.

The Board Will Continue to Advance Its Principles in *D.R. Horton*

GCM 14-01 indicates that mandatory arbitration agreements with a class action prohibition that are not resolved by *D.R. Horton* or subsequent Advice memoranda should be submitted to the Division of Advice. In *D.R. Horton, Incorporated v. NLRB*, Case No., 12-6003, the Fifth Circuit invalided the Board's decision that arbitration agreements which precluded litigation of claims in the form of class actions, violated the NLRA. Despite the Fifth Circuit's decision, the Board has yet to revise its enforcement position on the subject of class action waivers in employment arbitration agreements. Rather, the General Counsel has directed the Regions to proceed based on the underlying NLRB decision, which the Fifth Circuit reversed in *D.R. Horton*, until otherwise directed by the GC's office.

Confidentiality Rules in Internal Investigations and a Union's Right to Investigative Notes

While not stated in GCM 14-01, the Board is expected to continue diminishing an employer's ability to keep its internal investigations confidential. This particular policy focus of the Board began in July 2012, when it surprised employers with its decision in *Banner Health System d/b/a Banner Estrella Medical Center*. In that case, the Board held that an employer may not maintain a blanket rule prohibiting employees from discussing ongoing investigations of employee misconduct but must instead articulate a legitimate need for confidentiality.

Memoranda and decisions handed down after *Banner Health* make clear that the NLRB will continue expanding a union's right to access an employer's internal investigation notes. Under the Board's most recent approach, employers must evaluate the issue of confidentiality on a case-by-case basis keeping in mind *Banner Health*'s heavy burden requiring the employer to present a legitimate business justification for confidentiality that outweighs employees' Section 7 rights.

Application of *Specialty Healthcare*'s "Overwhelming Community of Interest" Standard

On August 15, 2013, the Sixth Circuit Court of Appeals upheld the Board's decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, affirming that the Board has broad discretion to determine appropriate bargaining units for union representation elections, including narrow so-called "micro-units." Under the *Specialty Healthcare* framework, the Board generally will approve a petitioned-for unit with a shared community of interest, unless the party seeking a larger unit shows that employees in the larger unit share an "overwhelming community of interest" with employees in the petitioned-for unit.

The Board's decisions following *Specialty Healthcare* demonstrate that proving an "overwhelming community of interest" is a hefty burden for employers. Regional Directors have likewise applied the decision broadly, most notably in the retail industry in the *Neiman Marcus Group* and *Macy*'s decisions, both of which remain pending before the Board.

The General Counsel is likely to continue supporting unions' efforts to organize smaller units that would have been deemed inappropriate under the traditional community of interest standard. The Sixth Circuit's affirmation of *Specialty Healthcare* may also embolden the newly-constituted Board, and result in a continuation of the Board's recent trend of finding micro-units to be appropriate.

Next Steps for Employers

With a full, five-member Board now in place, controlled by three Democrats and two Republicans, the NLRB is poised to make dramatic changes to labor-management relations. With former Board recess appointee Richard Griffin, Jr. confirmed as General Counsel of the NLRB, a strong pro-labor advocate is now in a position that wields enormous power. Employers should chart their course with these developments in mind, and proactively develop practices and policies to avoid being caught with their shields down.

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