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NLRB General Counsel Issues Three Policy Measures Impacting Employers with Union Employees

Services

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Traditional Labor Relations

Acting General Counsel of the Labor Relations Board Mandates Default Language in All Settlement Agreements of Board Charges, Challenges State Laws Mandating Secret Ballots in Representation Elections and Recommends the Board No Longer Automatically Defer to Arbitrations and Grievance Settlements in Unfair Labor Practice Cases.

On June 21, 2010, President Obama appointed Lafe E. Solomon, a career attorney at the National Labor Relations Board (NLRB), as the Acting General Counsel, and on January 5, 2011, nominated him to serve as General Counsel. Since his nomination, Solomon has issued three significant directives and recommendations that could have significant implications for employers with union-represented employees.

Mandatory Settlement Default Provisions. On January 12, 2011, Solomon issued Revised Casehandling Instructions Regarding the Use of Default Language in Informal Settlement Agreements and Compliance Settlement Agreements, requiring all NLRB offices to include language in settlement agreements that would provide for a default procedure against the charging party or respondent that was either unable or unwilling to fulfill obligations agreed to in the settlement agreement. The General Counsel's memorandum notes that eight of the NLRB's regional offices already propose or require default language in settlement agreements, and states that adoption of this default procedure language would result in uniformity in all settlement agreements and "considerable savings of resources and avoidance of delays in the event of a breach of the settlement agreement in requiring the inclusion of default provisions in such agreements and enforcing such provisions in a

summary proceeding in the event of a breach." The required provision is as follows:

> "The Charged Party/Respondent agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party/Respondent, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party/Respondent, the Regional Director will [issue/reissue] the [complaint/compliance specification] previously issued on [date] in the instant case(s). Thereafter, the General Counsel may file a motion for summary judgment with the Board on the allegations of the [complaint/compliance specification]. The Charged Party/Respondent understands and agrees that the allegations of the aforementioned [complaint/compliance specification] will be deemed admitted and its Answer to such [complaint/compliance specification] will be considered withdrawn. The only issue that may be raised before the Board is whether the Charged Party /Respondent defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the [complaint/compliance specification] to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party/Respondent, on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is customary to remedy such violations. The parties further agree that the U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte."

Although similar language is often included in many settlement agreements, it is most likely to impact the employer respondent who in almost all instances is the party with the obligations under the agreement. As such, it is much more likely to be invoked by the union as a tactical weapon.

Preemption of State Laws Mandating Secret Ballots in Union Elections. In last Fall's elections, four states—South Dakota, Arizona, Utah and South Carolina—in response to concerns about the Employee Free Choice Act (EFCA) legislation, enacted state laws that require union elections be conducted only by secret ballot. By letters dated January 13, 2011 directed to the Attorneys General of those four states, Acting General Counsel Solomon gave notice that it was the NLRB's position that the National Labor Relations Act (NLRA) preempts these state laws. A copy of the letter to the Attorney General of Arizona is representative of the letters sent to each state and is available here. Solomon's letter noted that under the Act and U.S. Supreme Court rulings, federal law "provides employees two different paths to vindicate their Section 7 right to choose a representative: certification based on a board-conducted secret ballot election or voluntary recognition based on other convincing evidence of majority support." Because the state laws preclude the right to organize on the basis of voluntary recognition under federal law, it is the NLRB's position that these laws are preempted by the Supremacy Clause of Article VI of the U.S. Constitution.

Solomon's letter requested the Attorneys General agree to "a judicially sanctioned stipulation concerning the unconstitutionality of these amendments" within two weeks of receipt of the letter, and if those were not forthcoming, he would initiate civil actions in federal courts to invalidate the state statutes.

Limits on Deferral to Arbitration Procedures and Grievance Settlements of Unfair Labor Practices. On January 20, 2011, Solomon issued Memorandum GC 11-05 "Guideline Memorandum Concerning Deferral to Arbitral Awards in Grievance Settlements in Section 8(a)(1) and (3) Cases." These sections of the NLRA make it an unfair labor practice for an employer to discriminate against or otherwise interfere with, restrain, or coerce employees to engage in concerted activity. The NLRB has a long practice of deferring to the parties' resolution of NLRA rights. The Acting General Counsel believes that the NLRB should *not* defer to the settlement of claims unless the party urging deferral meets the burden of demonstrating that the statutory rights under Sections 8(a)(1) and (3) have adequately been considered:

> "Specifically, in Section 8(a)(1) and 8(a)(3) statutory rights cases, the Board should no longer defer to an arbitral resolution unless it is shown that the statutory rights have adequately been considered by the arbitration. This includes not only cases involving Section 8(a)(1) and 8(a)(3) discipline and discharge, but also other cases involving Section 8(a)(1) conduct that is subject to challenge under a contractual grievance provision."

Memorandum GC 11-05 recognizes that if the NLRB adopts this recommendation, then in cases where the regions would normally defer consideration and investigation to pre-arbitral procedures under the *Collyer* and *United Technologies* decisions, in cases brought under 8(a)(1) and (3), the regions should take affidavits from the charging party and from all witnesses within the control of the charging party before a determination to defer is made. Moreover, in all pending and future cases deferred to arbitration, the region should review the arbitration award to determine if (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; (2) the arbitrator correctly applied the statutory principles in deciding the issues; and (3) the arbitral award is not clearly repugnant to the NLRA. The region's recommendation would then have to be submitted to the NLRB's Division of Advice for review.

What This Means to You

The mandatory settlement language leaves no discretion with the regional offices of the NLRB. When an employer settles with the NLRB, unions can use either the threat of a claim of default or file for default against the employer. Should this occur, it may well make employers less inclined to enter into settlement agreements or settle only when there are conditions or contingencies in the agreement to its obligations to perform. However, the delays and costs to employers of litigating charges are likely to significantly deter the benefits of prompt and certain resolution of these disputes.

The preemption battle lines have now been drawn, and it will be up to the courts to decide. There have been judicial limitations to the breadth of Constitutional preemption where the state law did not intrude on the regulatory scheme, but by and large preemption remains a significant legal impediment to these attempts to limit or amend federal law.

The recommendation concerning deferral to arbitral awards and grievance settlements will not come into play unless and until the NLRB accepts the guideline recommendation of the Acting General Counsel. As his memorandum recognized, the NLRB has limited agency resources that are not likely to expand in this cost-cutting political environment. The NLRB may well decide it is more prudent to retain the benefits of arbitration and settlement and rely upon the aggrieved parties to ensure that rights under Sections 8(a)(1) and (3) are enforced.

Contact Info

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