Employment Law in 2022: What In-House Counsel Must Know

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January 19, 2022

Background Checks and Criminal Convictions in Illinois (presented by Mike Cramer)

- Ogletree article on Illinois law - https://ogletree.com/insights/illinois-enacts-stronger-anti-discrimination-and-equal-pay-laws-focusing-on-criminal-convictions-and-demographic-reporting/
- SB 1480 – https://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=108&GA=101&DocTypeId=SB&DocNum=1480&GAID=15&LegID=118365&SpecSess=&Session=
- IDHR FAQs - https://www2.illinois.gov/dhr/FilingaCharge/Documents/IL%20SB1480%20-%20Conviction%20Record%20Protections%20FAQ%20from%20IDHR.pdf
- Info re OD Comply – Background Checks - https://ogletree.com/solutions/compliance-solutions/od-comply/background-checks/

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 21-04 **August 12, 2021**

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

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Mandatory Submissions to Advice

Thanks to the strength of Regional staffs across the country, the vast majority of cases can and should be processed without guidance or excessive oversight from Headquarters. Ensuring that Regions have all the necessary resources to process their cases and provide the public with the highest quality service is something I hope to make a hallmark of my term as General Counsel. However, there are some areas that I believe compel centralized consideration.

In this regard, over the past several years, the Board has made numerous adjustments to the law, including a wide array of doctrinal shifts. These shifts include overruling many legal precedents which struck an appropriate balance between the rights of workers and the obligations of unions and employers. At the same time, there are many other issues that also should be carefully considered to determine whether current law ensures that employees have the right to exercise their fundamental Section 7 rights both fully and freely. Submissions of these topics to Advice will allow the Regional Advice Branch to reexamine these areas and counsel the General Counsel's office on whether change is necessary to fulfill the Act's mission.

This memo is divided into three sections. The first section identifies cases and subject matter areas where, in the last several years, the Board overruled legal precedent; the second section identifies other initiatives and areas that, while not necessarily the subject of a more recent Board decision, are nevertheless ones I would like to carefully examine; and the third section identifies other casehandling matters traditionally submitted to Advice.

No list such as this will be exhaustive.[1] The Board's issuance of decisions often raises new questions. In addition, other yet-to-be-considered policy issues will undoubtedly arise. Regions should be sensitive to the need to submit such issues to Advice. Regions should seek clearance from Advice before taking controversial positions, e.g., before seeking to overturn Board precedent. Regions should also continue to make Operations aware of cases that are the subject of attention outside of their local area, or that have a high profile in the local area. If such cases involve Advice issues, Regions should also notify Advice.

[1] I am aware that there are many important cases and issues not included in this initial memo; I fully expect that this memo will be supplemented at some point in the future to include other important issues, as well as refinements.

A. Cases Involving Board Doctrinal Shifts

1. Employer handbook rules

- Cases involving the applicability of *The Boeing Co.*, 365 NLRB No. 154 (2017), (imposing a new framework for determining the legality of workplace/employee handbook rules). This includes, but is not limited to, *Boeing's* applicability to confidentiality rules, non-disparagement rules, social media rules, media communication rules, civility rules, respectful and professional manner rules, offensive language rules and no camera rules. This further includes applicability of *L.A. Specialty Produce Co.*, 368 NLRB No. 93 (2019) (changing General Counsel's initial burden in rules cases to not only establish that a reasonable employee would interpret a facially neutral rule as potentially interfering with the exercise of Section 7 rights, but that work rules should be judged from the perspective of the objectively reasonable employee who is aware of his legal rights and also interprets work rules as they apply to the "everydayness" of his job).

- Cases involving the applicability of *AT&T Mobility*, 370 NLRB No. 121 (2021) (overruling prong three of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), and finding that an otherwise lawful work rule applied to restrict Section 7 activity remains lawful and that rescission of such rule in those circumstances is inappropriate).

2. Confidentiality provisions/Separation agreements and instructions

- Cases involving the applicability of *Baylor University Medical Center*, 369 NLRB No. 43 (2020) overruling *Clark Distribution Systems*, 336 NLRB 747 (2001) and finding that separation agreements that contain confidentiality and non-disparagement clauses, as well as those prohibiting the departing employee from participating in claims brought by any third party against the employer in return for severance monies, lawful. *See also International Game Technology*, 370 NLRB No. 50 (2020) (applying *Baylor* to a separation agreement requiring the departing employee not to make any public statements "detrimental to the business or reputation" of the employer).

- Cases involving applicability of *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019) (overruling *Banner Estrella Medical Ctr.*, 362 NLRB 1108 (2015) and assessing confidentiality rules applicable to workplace investigations under the Board's decision in *The Boeing Co.*, 365 NLRB No. 154 (2017) rather than on a case by case basis). *See also Watco Transloading, LLC*, 369 NLRB No. 93 slip op. at 8, n. 24 (2020) and *Alcoa Corp.*, 370 NLRB No. 107 (2021) (extending the holding of *Apogee* to oral confidentiality instructions given to employees).

- Cases involving the applicability of *California Commerce Club*, 369 NLRB No. 106 (2020) (overruling *Professional Janitorial Services of Houston*, 363 NLRB No. 35 (2015) and finding confidentiality provision of arbitration agreement that prohibits "disclosure of evidence or award/decision beyond the arbitration proceeding" lawful under the Act).

3. What constitutes protected concerted activity

- Cases involving the applicability of *Alstate Maintenance, LLC,* 367 NLRB No. 68 (2019) (overruling *WorldMark by Wyndham*, 356 NLRB 765 (2011) and narrowly construing what rises to the level of concerted activity and what constitutes mutual aid or protection within the meaning of Section 8(a)(1)). See also, *Quicken Loans, Inc*., 367 NLRB No. 112 (2019) (narrowly construing bathroom conversation as not involving working conditions). In addition, Regions should also submit cases involving the applicability of the inherently concerted doctrine, set forth in *Hoodview Vending Co*., 359 NLRB 355 (2012), including to subjects other than wages, but that regularly arise in the workplace, such as issues involving employees' health and safety.

- Cases involving applicability of *Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (2019) (overruling *Purple Communications*, 361 NLRB 1050 (2014) governing employees' rights to use an employer's email system for workplace communications). Regions should also submit cases involving employees' use of other electronic platforms in the workplace, i.e. Discord, Slack, Groupme, or other employer communication systems.

- Cases involving the applicability of *Wynn Las Vegas, LLC*, 369 NLRB No. 91 (2020) (overruling the standard for distinguishing solicitation from mere "union talk" articulated in *Wal-Mart Stores*, 340 NLRB 637 (2003)).

- Cases involving the applicability of *Amnesty International of the USA, Inc.*, 368 NLRB No. 112 (2019) (narrowing what constitutes mutual aid or protection; Board holding, among other things, that employees who engage in a concerted protest on behalf of interns are not engaged activity for mutual aid or protection within the meaning of Section 7 of the Act).

4. *Wright Line*/General Counsel's burden

- Cases involving the applicability of *Tschiggfrie Properties, Ltd*., 368 NLRB No. 120 (2019) (overruling *Mesker Door*, 357 NLRB 591 (2011) and *Libertyville Toyota*, 360 NLRB 1298 (2014) and heightening the animus requirement for the General Counsel's prima facie burden in *Wright Line* cases.)

- Cases involving the applicability of *Electrolux Home Products*, 368 NLRB No. 34 (2019) (de-emphasizing the significance of pretext in furtherance of satisfying the General Counsel's burden under *Wright Line*, and distinguishing *El Paso Electric Co*., 355 NLRB 428 n. 3 (2010) and *Whitesville Mill Service Co*., 307 NLRB 937 (1992) (where pretext was relied upon to satisfy the General Counsel's burden of proof)).

- Cases involving the applicability of *General Motors*, 369 NLRB No. 127 (2020) (overruling *Atlantic Steel*, 245 NLRB 814 (1979) and calling other site-specific standards into question and, instead, requiring the application of *Wright Line* in most adverse action cases).

5. Remedial issues

- Cases involving applicability of *Shamrock Foods Co*., 369 NLRB No. 5 (2020) (distinguishing earlier Board cases, including *Clark Distribution Systems*, 336 NLRB 747, 751 (2001) and *Webel Feed Mills & Pike Transit Co*., 229 NLRB 178, 179-80 (1977) and finding the offer of significantly more backpay than is owed in return for a waiver of reinstatement lawful).

- Cases involving the applicability of *UPMC*, 365 NLRB No. 153 (2017) (overruling the "full remedy" standard set forth in *Postal Service*, 364 NLRB No. 116 (2016) for the acceptance of settlement agreements, even over the objections of the General Counsel and/or charging party, if the terms are "reasonable" under an *Independent Stave* analysis).

6. Union access

- Cases involving the applicability of *Tobin Center for the Performing Arts*, 368 NLRB No. 46 (2019) (overruling *New York New York Hotel & Casino*, 356 NLRB 907 (2011) and holding that a property owner may exclude off duty contractor employees seeking access to engage in Section 7 activity unless they work both regularly and exclusively on the property and the property owner fails to show they have one or more reasonably non-trespassory alternative means of communication).

- Cases involving the applicability of *UPMC*, 368 NLRB No. 2 (2019), and *Kroger Ltd Partnership,* 368 NLRB No. 64 (2019) (overruling *Sandusky Mall*, 329 NLRB 618 (1999) and redefining discrimination to allow an employer to exclude union representatives from, inter alia, access to public spaces on employer property).

7. Union dues

- Cases involving the applicability of *Valley Hospital Medical Center*, 368 NLRB No. 139 (2019) (overruling *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015) and finding that an employer may lawfully cease checking off and remitting dues unilaterally following contract expiration).

- Cases involving the applicability of *United Nurses & Allied Professionals (Kent Hospital)*, 367 NLRB No. 94 (2019) (requiring that unions provide non-member *Beck* objectors with verification that the financial information disclosed to them has been independently audited and that lobbying costs are not chargeable to such objectors).

8. Employee status

- Cases involving the applicability of *SuperShuttle DFW, Inc*., 367 NLRB No. 75 (2019) (overruling *FedEx Home Delivery*, 361 NLRB 610 (2014) in determining whether a party has met its burden of establishing independent contractor status, with emphasis on the significance of entrepreneurial opportunity).

9. Board jurisdiction over religious institutions

- Cases involving the applicability of *Bethany College*, 369 NLRB No. 98 (2020) (overruling *Pacific Lutheran University*, 361 NLRB 1404 (2014) in determining whether to assert jurisdiction over religious educational institutions).

10. Employer duty to recognize and/or bargain

- Cases involving the applicability of *MV Transportation*, 368 NLRB No. 66 (2019) (overruling *Provena St. Joseph Medical Ctr*., 350 NLRB 808 (2007), which set forth the clear and unmistakable waiver standard to determine whether an employer's unilateral action was permitted, and instead adopting a "contract coverage" standard, under which unilateral action is permitted if it falls within the compass or scope of certain contractual language in the CBA). Relatedly, cases involving the applicability of *Bath Iron Works Corp*., 345 NLRB 499 (2005) (providing, in the contract modification context, that employer's interpretation of contract need only have a sound arguable basis to avoid finding a violation).

- Cases involving the applicability of *Johnson Controls, Inc*., 368 NLRB No. 20 (2019) (overruling the "last in time" rule of *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001) and requiring that a union faced with an anticipatory withdrawal of recognition may only reacquire majority status through filing a petition for a Board election within 45 days from the date the employer gives notice of the anticipatory withdrawal).

- Cases involving the applicability of *Ridgewood Health Care Center, Inc*., 367 NLRB No. 110 (2019) (overruling *Galloway School Lines*, 321 NLRB 1422 (1996) and finding that a successor employer that discriminates in refusing to hire a certain number of the predecessor's workforce to avoid a *Burns* successorship bargaining obligation does not necessarily forfeit the right to set employees' initial terms).

- Cases involving the applicability of *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017) (overruling *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016), where the Board held that actions consistent with a past practice created under a management rights clause in an expired contract or involving employer discretion constituted a change triggering a notice/bargaining obligation).

- Cases involving the applicability of *Arlington Metals Corp*, 368 NLRB No. 74 (2019) (distinguishing the Supreme Court decision in *NLRB v Truitt Mfg*., 351 U.S. 149 (1956) and Board decision in *Nielsen Lithographing Co*., 305 NLRB 697 (1992) in finding no claimed inability to pay triggering an obligation to furnish requested employer financial records and instead finding employer to be asserting "competitive disadvantage").

- Cases involving the applicability of *American Security Programs, Inc*., 368 NLRB No. 151 (2019) (failing to follow a long line of cases provided for an affirmative bargaining order to remedy unlawful implementation of a last and final offer and unlawful unilateral changes).

- Cases involving the applicability *Sysco Grand Rapids, LLC*, 367 NLRB No. 111 (2019) (failing to confer an otherwise appropriate *Gissel* bargaining order based merely on delay, much of which was occasioned by the employer).

- Cases involving the applicability of *Pittsburgh Post-Gazette*, 368 NLRB No. 41, slip op. at 3, n.5 (2019) (distinguishing *Finley Hospital*, 362 NLRB 915 (2015) in determining whether the post-contract status quo required increases to employer fund contributions). See also *Richfield Hospitals, Inc*., 368 NLRB No. 44, slip op. at 3, n.7 (2019) (where Board again declined to rely on *Finley* in connection with whether longevity pay increases were required post-contract expiration).

- Cases involving the applicability of *Care One at New Milford*, 369 NLRB No. 109 (2020) (overruling *Total Security Management, LLC*, 364 NLRB No. 106 (2016), and finding that employers have no duty to bargain over discretionary discipline of employees not yet covered by a collective bargaining agreement, provided the discipline is similar in kind and degree to past actions).

- Cases involving a refusal to furnish information related to customer complaints. See *Palace Station Hotel & Casino*, 368 NLRB No. 148 (2019) (overruling *Mercedes Benz of San Diego*, 357 NLRB No. 114 (2011) and finding these complaints not presumptively relevant).

11. Deferral

- Cases involving the applicability of *United Parcel Service*, 369 NLRB No. 1 (2019) (overruling *Babcock & Wilcox Construction Co*., 361 NLRB 1127 (2014), which required the party urging deferral to demonstrate that (1) the arbitrator was explicitly authorized to decide the ULP issue, (2) the arbitrator was presented with and considered the statutory issue or was prevented from doing so by the party opposing deferral, and (3) Board law reasonably permits the arbitral award, and, instead, returning to the standards of *Spielberg Mfg*,112 NLRB 1080 (1955) and *Olin Corp*., 268 NLRB 573 (1984)).

B. Other Areas and Initiatives

1. Employee status

- Cases involving the applicability of *Velox Express, Inc*., 368 NLRB No. 61 (2019) (Board refusing to find a violation based on an employer having misclassified drivers as independent contractors).

- Cases involving the applicability of *Brevard Achievement Center, Inc.*, 342 NLRB 982 (2004) (declining to extend the Act's coverage to individuals with disabilities on grounds that these individuals, where working in a rehabilitative setting, are not employees within the meaning of Section 2(3) of the Act).

- Cases involving the applicability of *Toering Electric Co*., 351 NLRB 225 (2007) (requiring a showing that an individual is someone genuinely interested in seeking

to establish an employment relationship to prove entitlement to Section 2(3) status as an employee under the Act).

2. Weingarten

- Cases involving the applicability of *United States Postal Service*, 371 NLRB No. 7 (2021) (Board refusing to find a pre-disciplinary interview right to information, including the questions to be asked in the interview, as a purported extension of *Weingarten*).

- Cases involving the applicability of *Weingarten* principles in non-unionized settings as enunciated in *IBM Corp*., 341 NLRB 1288 (2004).

3. National Mediation Board vs. NLRB jurisdiction

- Cases involving the applicability of *ABM Onsite Services-West* (2018) (Board, after initially asserting jurisdiction and certifying union as representative of employer's airport bag jammer technicians and dispatchers, reversed course and deferred to NMB's advisory decision in which NMB found RLA jurisdiction under traditional six-factor carrier control test and overruled NMB cases requiring carrier control over personnel decisions). *See also Oxford Electronics, Inc. d/b/a Oxford Airport Technical Srvcs.*, 369 NLRB No. 6 (Jan. 6, 2020) (giving substantial deference to National Mediation Board advisory opinions concerning RLA jurisdiction).

4. Employer duty to recognize and/or bargain

- Cases involving surface bargaining akin to what the Board found lawful in The *George Washington University Hospital*, 370 NLRB No. 118 (2021).

- Cases involving a refusal to furnish information related to a relocation or other decision subject to *Dubuque Packing* (see former Chairman Liebman's dissent in *Embarq Corp*., 356 NLRB No. 125 (2011) and OM-11-58).

- Cases involving the applicability of *Shaw's Supermarkets, Inc.*, 350 NLRB 585 (2007) (to assess whether this case should be overruled. The case permits mid-term withdrawals of recognition where they occur after the third year of a contract of longer duration).

- Cases in which an employer refuses to recognize and bargain with a union where the union presents evidence of a card majority, but where the employer is unable to establish a good faith doubt as to majority status; specifically, where the employer refusing to recognize has either engaged in unfair labor practices or where the employer is unable to explain its reason for doubting majority status in rejecting the union's demand. *See Joy Silk Mills, Inc*., 85 NLRB 1263 (1949).

5. Employees' Section 7 right to strike and/or picket

- Cases involving an allegation that an employer's permanent replacement of economic strikers had an unlawful motive under *Hot Shoppes*, 146 NLRB 802 (1964).

- Cases involving the applicability of *Wal-Mart Stores*, 368 NLRB No. 24 (2019) (broadly defining an intermittent strike).

- Cases involving the applicability of *Preferred Building Services, Inc*., 366 NLRB No. 159 (2018) (Board finding employees picketed with a secondary object and lost protection of the Act where they were protesting sexual harassment and unsafe working conditions).

- Cases involving the applicability of *Service Electric Co*., 281 NLRB 633 (1986) (allowing an employer to unilaterally set terms and conditions of employment for replacements even where those terms are superior to those that had been paid to striking unit employees).

6. Remedies and compliance

- Cases involving make-whole remedies for construction industry applicants or employees who sought or obtained employment as part of an organizing effort as enunciated in *Oil Capitol Sheet Metal, Inc.,* 349 NLRB 1348 (2007).

- Cases involving the applicability of *St. George Warehouse*, 351 NLRB 961 (2007) (to assess whether this case should be overruled and an employer should again have the burden of showing that a discriminatee failed to make an adequate search for interim employment).

- Cases involving the applicability of *Ex-Cello Corp*, 185 NLRB 107 (1970) (declining to provide a make whole compensatory remedy for failures to bargain).

7. Employer interference with employees' Section 7 rights

- Cases involving the applicability of *Tri Cast*, 274 NLRB 377 (1985) to employer statements that employee access to management will be limited if employees opt for union representation.

- Cases involving the applicability of *Crown Bolt*, 343 NLRB 776 (2004) (overruling *Springs Industries*, 332 NLRB 40 (2000) (in cases involving an employer's threat of plant closure where there is little evidence of dissemination to other employees, such dissemination should be presumed).

- Cases involving the applicability of *Cordua Restaurants, Inc.*, 368 NLRB No. 43 (2019) (Board finding, among other things, that an employer does not violate the Act by promulgating a mandatory arbitration agreement in response to employees engaging in collective action).

C. Other Casehandling Matters Traditionally Submitted to Advice

- Cases involving the validity of partial lockouts.

- Cases in which the Region recommends alleging *Golden State* liability of an entity that has purchased a bankrupt entity through a free and clear sale.

- Cases involving the legality of a pending or completed lawsuit or the legality of allegedly overbroad discovery requests, where the Region recommends issuing complaint.

- Cases in which the Board invites parties to file position statements following a remand from the Court of Appeals or on the Board's own motion, and cases in which the Region wants to seek to file a brief notwithstanding the lack of a Board invitation to do so.

- Case in which the Board has invited the parties to file briefs addressing a novel or complex issue, or one of first impression.

- Cases involving the need to harmonize the NLRA with local, state, or other federal statutes.

- Cases involving potential or overlapping jurisdiction with other Federal agencies, unless there is an inter-agency memorandum of understanding.

- Injunction Litigation matters should be submitted to the Injunction Litigation Branch, including requests for authorization to file a Section 10(j) petition; 10(j) recommendations in all cases involving complaints seeking a *Gissel* bargaining order, discharges during an organizing drive, first contract bargaining, employer withdrawals of recognition, or successorship cases.

- Requests for authority to seek contempt of a Section10(j) or 10(l) order should be submitted to the Injunction Litigation Branch.

- Requests regarding appealing a Section 10(j) or 10(l) case in which a district court denied injunctive relief should be submitted to the Injunction Litigation Branch.

- Notice of any Notice of Appeal filed in a Section 10(j) or 10(l) case should be submitted to the Injunction Litigation Branch.

- Complex subpoena issues, including for example where there is a serious claim of privilege, where following issuance of any subpoena, intervening circumstances present enforcement problems, or where the Region is considering denying the request of a private party for enforcement of a subpoena *ex rel*.

- Cases where the Region lost an ALJD on an Advice-authorized legal theory and the Region does not want to take exceptions; cases where new evidence was introduced at the hearing that could call into question the continued validity of the Advice-authorized legal theory, and cases where an ALJD raises novel or complex questions even if the case was not previously submitted to Advice.

- EAJA cases where the Region wishes to pay a claim.

- Cases in which a Region has obtained a unilateral settlement agreement where the Regional Advice Branch had previously authorized complaint.

- Other casehandling matters identified in casehandling manuals or outstanding memoranda as requiring submission to Advice.

/s/
J.A.A

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 21-06 **September 8, 2021**

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

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Seeking Full Remedies

Section 10(c) of the National Labor Relations Act states that the Board shall order those found to have committed an unfair labor practice "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act."[1] It is well established that the Board possesses broad discretionary authority under Section 10(c) to fashion just remedies to fit the circumstances of each case it confronts.[2] Consistent with that authority, Regions should request from the Board the full panoply of remedies available to ensure that victims of unlawful conduct are made whole for losses suffered as a result of unfair labor practices.

Our remedies have been revised and updated in the past to ensure that victims of unfair labor practices are provided full relief.[3] Indeed, two weeks ago, the Board stated a willingness to explore a new make-whole remedy to those traditionally ordered: an award of consequential damages to make employees whole for economic losses (apart from the loss of pay or benefits) suffered as a direct and foreseeable result of an employer's unfair labor practice.[4] Examples cited by the Board include compensation for health care expenses that an employee may incur as a result of an unlawful termination of health insurance, or compensation for credit card late fees incurred or for loss of a home or a car that an employee suffers as a result of an unlawful discharge.[5] In my

[1] 29 U.S.C. § 160(c).

[2] See, e.g., *NLRB v. J.H. Rutter-Rex Mfg. Co*., 396 U.S. 258, 262-63 (1969);

[3] See, e,g., *Cascades Containerboard Packing*, 371 NLRB No. 25, slip op. at 5 (2021) (modifying and clarifying new remedy issued in 370 NLRB No. 76 (2021), for application in all pending and future cases).

[4] *The Vorhees Care and Rehabilitation Center*, 371 NLRB No. 22, slip. op. at 4 fn. 14 (2021).

[5] Id.

view, remedies such as these will better ensure that discriminatees are afforded full relief under the Act.

Like the Board, I, too, welcome the opportunity to revisit remedies, and during my tenure as General Counsel, I expect to periodically issue remedy updates. This particular memorandum will focus on the types of remedies that Regions should be requesting from the Board in all appropriate cases. I will be issuing another memorandum shortly that sets forth the types of remedies that Regions should incorporate in settlement agreements.

In cases involving unlawful firings of discriminatees, it is critical that Regions avail themselves of all remedial tools to ensure discriminatees are restored as nearly as possible to the status quo they would have enjoyed but for the unlawful conduct. In furtherance of that aim, Regions should seek compensation for consequential damages,[6] front pay,[7] and liquidated backpay in a combined complaint and compliance specification where appropriate. Where unlawful firings of undocumented workers are implicated, Regions should seek, in addition to the remedies previously highlighted in GC Memorandum 15-03 (issued on February 27, 2015),[8] compensation for work performed under unlawfully imposed terms (such as work performed under an unlawfully reduced pay rate),[9] employer sponsorship of work authorizations,[10] and any

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[6] See *The Vorhees Care and Rehabilitation Center*, 371 NLRB No. 22, slip. op. at 4 fn. 14.

[7] See *HTH Corp*., 361 NLRB 709, 718-19 (2014) (concluding that front pay in lieu of reinstatement may be appropriate in some circumstances), enfd. in relevant part 823 F.3d 668 (D.C. Cir. 2016).

[8] These remedies include notice readings, publication of the notice in newspapers and/or other forums, training for employees on their rights under the Act, training for supervisors and managers on compliance with the Act, *Gissel* bargaining orders, union access to employee contact information, reimbursement for organizing or bargaining expenses, consequential damages, instatement of qualified referred candidates, and "[a]ny other remedies that may be appropriate in a particular case."

GC Memorandum 15-03 further advises that in cases where immigration status issues may impact the Agency's ability to remedy or litigate a potential unfair labor practice violation, Regions should determine whether potential discriminatee(s) could be eligible for U or T Visas, or for deferred actions. See also OM 11-62.

[9] See *In re Tuv Taam Corp*., 340 NLRB 756, 759 n. 4 (2003) (agreeing that such a remedy would not be precluded by the Supreme Court's decision in *Hoffman Plastics Compounds, Inc. v. NLRB*, 525 U.S. 137, 148-49 (2002), which held that undocumented workers were not entitled to an award of backpay for work not performed).

[10] See *Saipan Hotel Corp*., 321 NLRB 116, 120-21 (1996), enfd. mem. 116 F.3d 485 (9th Cir. 1997).

other remedies that would prevent an employer from being unjustly enriched by its unlawful treatment of undocumented workers.[11]

Cases involving unlawful conduct committed during a union organizing drive present particular challenges with respect to remedies. It goes without saying that the "laboratory conditions" necessary for a free and fair election are often difficult to restore sufficiently in the face of unlawful firings, threats of retaliation, surveillance, and other coercive tactics designed to root out and squelch union support among employees. However, effective remedies still remain at our disposal. The following, which does not represent an exhaustive list, are remedies that Regions should seek from the Board in all appropriate cases:

- Union access (e.g., requiring an employer to provide a union with employee contact information, equal time to address employees if they are convened by their employer for a "captive audience" meeting about union representation, and reasonable access to an employer's bulletin boards and all places where notices to employees are customarily posted);[12]

- Reimbursement of organizational costs (e.g., requiring an employer to pay for organizational costs that a union incurs in a re-run election because the employer has engaged in unlawful conduct sufficiently egregious as to cause the results of the prior election to be set aside);[13]

- Reading of the Notice to Employees and the Explanation of Rights to employees by a principal or, in the alternative, by a Board Agent, in the presence of supervisors and managers, with union representatives being permitted to attend all such readings, or, where appropriate, video recording of the reading of the notice and the Explanation of Rights, with the recording being distributed to employees by electronic means or by mail;[14]

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[11] See *Mezonos Maven Bakery*, 357 NLRB 376, 384 (2011) (Pearce, Liebman concurring) (suggesting that the Board's remedial authority would arguably not prevent the Board from ordering payment by an employer of backpay equivalent to what it would have owed an undocumented discriminatee and that such backpay could be paid into a fund to make whole discriminatees whose backpay the Board had been unable to collect).

[12] See, e.g., *Haddon House Food Products, Inc*., 242 NLRB 1047, 1059-60, enfd. in relevant part 640 F.2d 392, 400 (D.C. Cir. 1981).

[13] See *Texas Super Foods*, 303 NLRB 209, 209 (1991).

[14] See *HTH Corp.*, 361 NLRB at 720-23.

- Publication of the notice in newspapers and/or other forums (such as online publications and websites maintained by an employer, including social media websites), chosen by the Regional Director and paid for by the employer, so as to reach all current and former affected employees, as well as future potential hires;[15]

- Visitorial and discovery clauses to assist the Agency in monitoring compliance with the Board's Orders (e.g., requiring an employer to grant a Board Agent access to its facility and to produce records so that the agent can determine whether the employer has complied with posting, distribution, and mailing requirements,[16] or permitting the Agency to obtain discovery under the Federal Rules of Civil Procedure for compliance purposes);[17]

- Extended posting periods for notices where the unfair labor practices have been pervasive and occurred over significant periods of time;[18]

- Distribution of notices and the Board's Orders to current and new supervisors and managers;[19]

- Training of employees, including supervisors and managers, both current and new, on employees' rights under the Act and/or compliance with the Board's Orders (e.g., requiring an employer to provide such training, one time or ongoing, with an outline of the training submitted to the Agency in advance of what will be presented, or requiring that a Board Agent be permitted to conduct such training);[20]

- Instatement of a qualified applicant of the union's choice in the event a discharged discriminatee is unable to return to work;[21] and

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[15] See id.

[16] See id.

[17] *Cherokee Marine Terminal*, 287 NLRB 1080, 1104-05 (1988).

[18] See *HTH Corp.*, 361 NLRB at 720-34.

[19] See id.

[20] See, e,g., *J.P. Stevens & Co., Inc.*, 244 NLRB 407, 408 (1979).

[21] See *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408, 417-19 (1995) (Browning, dissenting in part), enfd. 134 F.3d 50 (2d. Cir. 1997).

- Broad cease-and-desist orders requiring violating parties to cease and desist "in any other manner" from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.[22]

As for bargaining orders in cases involving union organizing drives, I refer you to GC Memorandum 21-04 (issued August 12, 2021). In it, I directed Regions to submit cases to the Division of Advice in which an employer refuses to recognize and bargain with a union where the union presents evidence of a card majority and the employer is unable to establish a good faith doubt as to majority status. As I consider *Joy Silk*-type bargaining orders,[23] Regions should actively seek *Gissel* bargaining orders where appropriate.[24]

In cases involving unlawful failures to bargain, I am considering make-whole remedies that would compensate employees for the losses they sustain as a result of their employers' failures to bargain. It is important, therefore, as I requested in GC Memorandum 21-04, that Regions also submit to the Division of Advice all cases concerning the applicability of *Ex-Cell-O Corp*., 185 NLRB 107 (1970) (declining to provide a make-whole compensatory remedy for failures to bargain).

As for other types of remedies in the context of unlawful failures to bargain (tests of certification, withdrawals of recognition, first-contract negotiations, and any other situations where disruptions in collective bargaining have occurred), Regions should seek the following in all appropriate cases:[25]

- Bargaining schedules (e.g., requiring a respondent to bargain not less than twice a week, at least six hours per session, until an agreement or a bona fide impasse is reached);[26]

- Submission of periodic progress reports to the Agency on the status of bargaining (e.g., requiring a respondent to submit sworn written reports to the Agency every 30 days, over the course of a specified period, showing in detail the nature and course of

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[22] See, e.g., *David Saxe Productions, LLC*, 370 NLRB No. 103, slip op. at 9-11 (2021).

[23] *Joy Silk Mills, Inc*., 85 NLRB 1263 (1949), enf'd as modified 185 F.2d 732 (D.C. Cir. 1950), cert. denied 341 U.S. 914 (1951).

[24] *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1960).

[25] Again, this list is not exhaustive.

[26] See, e.g., *Camelot Terrace*, 357 NLRB 1934, 1941-42 (2011) enfd. in relevant part 824 F.3d 1085 (D.C. Cir. 2016).

bargaining with the union and attaching any written communications between the parties with respect to such bargaining);[27]

- 12-month insulation periods, including extensions of the certification year, from the date an employer commences compliance with its bargaining obligations pursuant to a Board's Order, during which a union's status as bargaining representative may not be challenged;[28]

- Reinstatement of unlawfully withdrawn bargaining proposals;[29]

- Reimbursement of collective-bargaining expenses (e.g., requiring a respondent to reimburse an opposing bargaining party for negotiation expenses incurred during the entire period in which it fails to bargain in good faith);[30]

- Engagement of a mediator from the Federal Mediation and Conciliation Service (FMCS) to help facilitate good-faith bargaining between parties;

- Training of current and/or new supervisors and managers in cases involving failures to bargain (Regions should be aware that such training has routinely been incorporated in settlement agreements to resolve contempt allegations over chronic failures to timely furnish information to unions);[31] and

- Broad case-and-desist orders.

Lastly, the requirement to post a Notice to Employees will allow us to educate victims of unfair labor practices about our Agency, its mission, and their rights under the Act. While the Board's Orders currently reference physical posting, posting on intranet sites, and distribution of the notice by email, Regions should also seek Orders expressly

[27] See, e.g., *All Seasons Climate Control, Inc.*, 357 NLRB 718, 718 fn. 2 (2011).

[28] See, e.g., *Mar-Jac Poultry Co*., 136 NLRB 785, 787 (1962); *Metta Electric*, 349 NLRB 1088, 1089 (2007).

[29] See *Universal Fuel, Inc.*, 358 NLRB 1504, 1505-06 (2012); *Mead Corp*., 256 NLRB 686, 687 (1981), enfd. 697 F.2d 1013 (11th Cir. 1983).

[30] See, e.g., *Camelot Terrace*, 357 NLRB at 1942.

[31] See, e.g., *NLRB v. United States Postal Service,* Nos. 14-1223 and 14-2575 (6th Cir. 2018).

directing the distribution of the notice by text messaging and by posting on social media websites and on any internal apps used by an employer to communicate with its employees. Regions should also request company-wide postings and mailings where appropriate, such as when an unlawful work rule has been applied across all facilities.

As stated earlier, another memorandum on settlements will issue soon. In the meantime, I encourage Regions to continue exploring new and alternative remedies to ensure that we are providing the most effective relief possible to those who have been harmed by unlawful conduct.

/s/
J.A.A.

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 21-07 **September 15, 2021**

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

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Full Remedies in Settlement Agreements

Last week, I issued GC Memorandum 21-06, Seeking Full Remedies, in which I urged Regions to seek from the Board "the full panoply of remedies available to ensure that victims of unlawful conduct are made whole for losses suffered as a result of unfair labor practices." In that memorandum, I encouraged Regions to take into account and employ new and alternative remedies to plead in their complaints to ensure that Board Orders provide full relief to those harmed. This memorandum continues the discussion of remedies, focusing on the types of remedies that Regions should seek in their informal and formal settlement agreements.[1]

A settlement fully effectuates the mission of the National Labor Relations Act (the Act) when the Agency can deliver timely, effective, and full relief to discriminatees and the public we serve. Settlement agreements that provide complete relief to charging parties and victims of an unfair labor practices, as well as that offer charged parties quick resolution of legal actions that reduce litigation expenditures, are highly beneficial to all.

Because Regions are less constrained by the remedies that they may seek in settlement, as opposed to those they may currently seek from the Board, Regions should skillfully craft settlement agreements that ensure the most full and effective relief is provided to those whose rights have been violated.[2] And, if a settlement fails to materialize, Regions should seek from the Board all appropriate remedies but not limited to the guidance set forth in GC Memorandum 21-06.

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[1] All of the relevant remedies discussed in GC Memorandum 21-06, Seeking Full Remedies, should be sought by Regions in settlement agreements. This memorandum will highlight remedies that I believe are likely to be implicated more frequently in settlement negotiations. However, Regions should understand that the remedies cited in this memo are illustrative and should be expounded upon in all appropriate cases.

[2] As you know, unilateral settlements are the exception, not the rule, and Regions are asked to send recommendations for approval of such to the Division of Advice.

Remedies for Non-Backpay Economic Harm – Compensation for Consequential Damages

A monetary remedy comprised only of backpay and lost benefits often fails to truly make whole victims of an unfair labor practice, particularly those who have been unlawfully discharged and struggle afterwards to find comparable employment in order to mitigate their loss of earnings. Therefore, in negotiating settlement agreements, in addition to seeking no less than 100 percent of the backpay and benefits owed, Regions should always make sure to seek compensation for any and all damages, direct and consequential, attributable to an unfair labor practice.

As I discussed in GC Memorandum 21-06, in *The Voorhees Care and Rehabilitation Center,* the Board recently signaled a willingness to explore an award of consequential damages to make employees whole for economic losses (apart from the loss of pay or benefits) suffered as a direct and foreseeable result of an employer's unfair labor practice.[3] In that decision, the following examples of such economic losses were provided:[4]

- Interest or late fees on credit cards incurred by an unlawfully fired employee to cover living expenses;

- Penalties incurred by an unlawfully fired employee from having to prematurely withdraw money from a retirement account to cover living expenses; and

- Loss of a home or a car suffered by an unlawfully fired employee because of an inability to keep up with loan payments.

I certainly agree with Board Chair McFerran's observation that "[t]here are a myriad of other possible examples." The following are further examples where relevant compensation would be appropriate:

- Compensation for damages caused to an employee's credit rating following an unlawful firing;

- Compensation for financial losses suffered by an unlawfully fired employee from having to liquidate a personal savings account or an investment account to cover living expenses; and

[3] 371 NLRB No. 22, slip. op. at 4 fn. 14 (2021).

[4] Id.

- Fees and/or expenses for training or coursework required to obtain or renew a security clearance, a certification, or a professional license that had been denied or lost as a result of an unfair labor practice.[5]

And, I remind Regions of remedies supported by existing Board law, including:

- The cost of obtaining comparable health insurance coverage following an unlawful firing, or the cost of medical expenses incurred through loss of medical insurance;[6]

- Moving expenses (e.g., where an unlawfully fired employee is forced to move to obtain comparable employment and/or thereafter returns after accepting an unconditional offer of reinstatement);[7]

- Medical expenses incurred by an employee who suffers physical injury in retaliation for engaging in activity protected under the Act;[8] and

[5] An example of a non-economic remedy for this consequential harm may be to require the employer to request, in writing, reinstatement of the license or certification to the appropriate governing body or agency.

[6] See, e.g., *M.D. Miller Trucking & Topsoil, Inc.*, 365 NLRB No. 57, slip. op. at 1 (2017), enfd. mem. 728 Fed. Appx. 2 (D.C. Cir. 2018) (ordering reimbursement to an unlawfully fired employee for health insurance premiums the employee incurred during the backpay period, over and above what he would have paid had he been working for the employer); *The Voorhees Care and Rehabilitation Center*, 371 NLRB No. 22, slip op. at 3-5 (2021) (ordering reimbursement directly to employees for their medical expenses already paid to medical providers and further ordering payment directly to medical providers for those employees' still-unpaid medical bills).

[7] See *Ampersand Publishing, LLC*, 370 NLRB No. 119, slip. op. at 1 (2021) (ordering reimbursement for moving expenses incurred by an unlawfully fired employee).

[8] See *Nortech Waste*, 336 NLRB 554, 554 n. 2 (2001) (finding that an employee was entitled to medical expenses attributable to the employer's unlawful conduct of assigning more onerous work that the employer knew would aggravate her carpal tunnel syndrome, but leaving to compliance the question of whether the employee incurred medical expenses and, if she did, whether they should be reimbursed).

- Legal expenses that an employee incurs in connection with the employer's unlawful conduct.[9]

Accordingly, in preparing for settlement negotiations, Regions must broadly consider and assess harms caused by an unfair labor practice to ensure that their settlement agreements provide the fullest relief possible.[10]

Backpay, Front Pay, and Other Remedies

The purpose behind Board Orders requiring employers to reinstate and to compensate unlawfully fired employees for loss of backpay and benefits is to restore them to the economic status they would have had but for the unlawful conduct. I cannot underscore enough the importance of the remedy of reinstatement. When an unlawfully fired employee returns to work pursuant to a Board Order or a settlement agreement, the effectiveness of our Agency's ability to enforce the Act has been demonstrated in a very public manner, especially to the other employees at the workplace. That will, in turn, deter that employee's employer from further committing unfair labor practices and inform the other employees that they have legal rights that will be honored and, if not, they will be protected by the Agency.

While it has always been the Agency's policy to seek nothing less than reinstatement and full backpay in all cases involving unlawful firings, there are instances, of course, where unlawfully fired employees may understandably not wish to return to work pursuant to an unconditional offer of reinstatement. Where employees are willing to waive reinstatement, the Agency is denied a critical remedy necessary to achieve full effectuation of the purposes and policies of the Act. Thus, in addition to seeking no less than 100 percent of the backpay and benefits owed, and all compensation owed for any consequential damages, Regions should also include front pay as part of their settlement calculations where reinstatement will not be attained.

Along with the economic relief described above, Regions should, where applicable, negotiate a provision where those who voluntarily waive reinstatement may utilize an employer's in-house outplacement service or services of a third-party outplacement firm for a certain duration at the employer's expense. Other appropriate remedies that Regions should seek for employees who waive reinstatement include neutral references and agreements by employers not to contest unemployment compensation.

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[9] See *DHSC, LLC, d/b/a Affinity Medical Center*, 362 NLRB 654, 654, 669-70 (2015) (awarding reimbursement of reasonable legal fees incurred by an employee in having to defend a state nursing board action after the employer discriminatorily reported the employee to the board in retaliation for her union activities).

[10] This would also include rescission of facially lawful rules that affect the broader workplace population, which have been unlawfully applied and led to the discharge or other discipline of an employee(s).

Default Language

An important provision that Regions should include in all settlement agreements provides for the expedited issuance of Board Orders in the event of their non-compliance. By operation of GC Memorandum 11-04 (January 12, 2011), GC Memorandum 11-10 (March 30, 2011), and Operations-Management Memorandum 14-48 (April 10, 2014), Regions had been required to incorporate the following default language in all of their informal settlement agreements and compliance agreements:[11]

> 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.

I believe that the aforementioned default language remains an effective and appropriate means to ensure that charged parties will comply their obligations set forth in a settlement agreement to which they freely agreed. Further, such language protects Regions from having to litigate what they reasonably believed were issues already settled in the event of a breach. Accordingly, with very limited exceptions, Regions should return to the practice of incorporating default language in all of their settlement agreements,

[11] The prior General Counsel rescinded GC Memorandum 11-04, Default Language (January 12, 2011), and thus the requirement to include the aforementioned language in settlement agreements and compliance agreements ceased. See GC Memorandum 18-02, Mandatory Submission to Advice (December 1, 2017). Through this memo, I am reinstating GC Memorandum 11-04.

which will ensure the timely delivery of agreed-upon relief to those harmed by unlawful conduct.[12]

Letters of Apology

Where a settlement agreement incorporates a provision requiring that an employer make an unconditional offer of reinstatement to an unlawfully fired employee, Regions should also seek to require that the employer draft a written letter of apology to the employee, particularly where the employee is likely to accept the offer. Such a letter may assist in de-escalating lingering tensions between the employee and the employer during the reinstatement process.

Sponsorship of Work Authorizations and Other Remedies in Cases Involving Immigrant Workers

Immigrant workers are especially vulnerable to unfair and unlawful treatment in the workplace. It is crucial that Regions seek in their settlement agreements all possible remedies to ensure that these employees are provided the fullest relief. For example, where an employer's unfair labor practice causes the loss of an employee's work authorization, Regions should seek, at the very least, a settlement agreement requiring the employer, at its own expense, to sponsor the work authorization of the affected employee, such as payment of any fees in having to sponsor the affected employee's non-immigrant visa (such as H-1B, H-2B, J-1, F-1, TN), and reimbursement for any legal fees, application fees, and travel costs that the affected employee may incur in seeking to regain a lost work authorization. Additionally, where an employer has misused the E-Verify system in an unlawfully discriminatory manner, Regions should require all of the employer's supervisors and managers to attend training on the E-Verify system conducted by the Department of Justice's Immigrant and Employee Rights Section.

Expanded Use of Security Provisions

Regions should expand their use of confessions of judgment,[13] promissory notes, and other forms of security—especially where a settlement agreement provides for backpay and other payments to be made in installments—to ensure that the Agency will be able to expeditiously commence collections proceedings following non-compliance with any agreed-upon payment terms.[14]

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[12] Such exceptions include the following: where there has been no Regional determination in the case or where the Regional Director has determined that the case presents isolated instances of conduct by a non-recidivist requiring only a cease and desist remedy.

[13] Operations-Management Memorandum 09-58, Confessions of Judgment (April 10, 2009).

[14] Regions should be mindful that settlements containing installment payment provisions are discouraged, absent special circumstances.

Admissions

Regions are reminded that non-admission clauses in informal settlement agreements should remain the exception and that, absent special circumstances, Regions should continue insisting on the exclusion of non-admission clauses in all settlement agreements and strongly consider the inclusion of admission clauses for repeat violators.

Notices to Employees

Regions are encouraged to consider multiple and innovative provisions in their settlement agreements pertaining to the dissemination of the notice. Technology has evolved to such a degree that distribution of the notice electronically to employees is, in many cases, likely to be a more effective means of informing affected employees of their rights under the Act. Regions should, therefore, seek to incorporate in their settlement agreements various means of electronic distribution of the notice to accompany physical posting. For example, the notice should be sent via text message to mobile work phone numbers and to personal email addresses or via text message to their mobile personal phone numbers if a charged party maintains that information on file. Regions should also seek posting on an employer's public social media website, where appropriate,[15] and on any internal mobile apps that an employer uses to communicate with its employees.

For settlement purposes, Regions should seriously consider posting periods that exceed 60 days depending on the circumstances and forbid the posting of any side notices. Moreover, Regions should draft language in the notice that may more effectively communicate to employees their rights under the Act and the charged party's obligations under the settlement agreement.[16] And, finally, Regions should incorporate provisions in their settlement agreements that will allow them to monitor compliance with any posting requirements, such as a visitorial provision[17] and provisions requiring a charged party to submit photographs of all posting locations to the Region on a weekly basis during the duration of the posting period.

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[15] It would certainly make sense to insist on posting on a public social media website where, for example, the website was used in the commission of an unfair labor practice.

[16] Of course, notices should also be printed in all languages spoken by the affected employees.

[17] GC Memorandum 85-5, Inclusion of Visitorial Clauses in the Board's Remedial Orders (September 23, 1985).

Conclusion

As the Agency is Congressionally mandated to protect the statutory rights of employees throughout our country, it is critical that our settlement agreements provide the fullest and most effective relief possible to the victims of unfair labor practices and send a message to workers nationwide. The Board agents in the field offices have a great responsibility in effectuating the Act. Through their field presence and active participation in seeking the most full and effective relief in settlement agreements, we can ensure workers' statutory rights are vigorously protected. I thank you for your continued commitment and dedication to our mission.

/s/

J.A.A.

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 22-01 November 8, 2021

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

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Ensuring Rights and Remedies for Immigrant Workers Under the NLRA

From the inception of the National Labor Relations Act, the NLRB and reviewing courts have widely recognized that the Act's statutory protections are afforded in equal measure to all covered workers, regardless of their status as immigrants to this country.[1] As far back as 1984, the Supreme Court in *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 891-892 (1984), confirmed that undocumented workers are statutory employees entitled to protection under the NLRA. In order for all workers to be able to exercise their rights under the Act, we must zealously guard the right of immigrant workers to be free of immigration-related intimidation tactics that seek to silence employees, denigrate their right to act together to seek improved wages and working conditions, and thwart their willingness to report statutory violations. I am resolved to hold fully accountable those entities that, by targeting immigrant workers and their workplaces, undermine the policies of the NLRA and the nation's immigration laws.

In this memorandum, I will lay out the policies and procedures related to effectively serving the particularized needs of immigrant communities and to ensuring that the NLRB is not only accessible to all workers who seek our assistance, but is also a safe place where they are treated with dignity, without regard to immigration status or work authorization.

I. Safe, Accessible, and Dignified Engagement with the NLRB

A. Seeking and Obtaining Immigration Relief For Witnesses and Victims of Unfair Labor Practices

A cornerstone of the NLRB's capacity to protect the rights of all immigrant workers—documented and undocumented—is our ability to gain meaningful immigration-related relief on a case-by-case basis by working with the Department of Homeland Security (DHS) and its constituent agencies. In his October 12, 2021, memorandum, *Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual,* DHS Secretary Alejandro Mayorkas

[1] See, e.g., *Logan & Paxton*, 55 NLRB 310, 315 n.12 (1944) ("The Act does not differentiate between citizens and non-citizens. In order to effectively carry out the purposes of the Act, we conclude that no distinction should be drawn on such a basis.").

stated the Department's goal to, "adopt immigration enforcement policies to facilitate the important work of the Department of Labor and other government agencies to enforce wage protections, workplace safety, labor rights, and other laws and standards." Specifically, Secretary Mayorkas directed U.S. Immigration and Customs Enforcement (ICE) and U.S. Citizenship and Immigration Services (USCIS) to develop plans to alleviate the concerns associated with cooperating with labor enforcement agencies by "provid[ing] for the consideration of … available relief for noncitizens who are witnesses to, or victims of, abusive and exploitative labor practices." I applaud Secretary Mayorkas' commitment to engaging with labor enforcement agencies, such as the NLRB, to protect workers from continued abuse and to encourage their full participation in agency processes. Therefore, upon request by a charging party or witness, the NLRB will seek immigration relief including deferred action, parole, continued presence, U or T status, a stay of removal, or other relief as available and appropriate, to protect these workers in the exercise of their statutory rights and allow for vigorous enforcement of the Act. Individuals or their representative can indicate the need for such relief to the NLRB Regional Office investigating the case, or to the Agency's Immigration Team.

B. Certifying Petitions for U and T Visas (or Status)

The NLRB will continue to support victims of labor exploitation in obtaining U and T visas (or status) by certifying applications in appropriate cases. Congress created the U visa program with the passage of the Victims of Trafficking and Violence Protection Act in 2000 as a means to strengthen the ability of law enforcement agencies to investigate and prosecute cases involving certain abusive practices against undocumented individuals (including certain workplace violations) while, at the same time, offering protections to the victims. U visa relief—including interim protection in the form of deferred action and work authorization for successful petitioners and their immediate family—may be available to victims of qualifying crimes through a petition submitted to USCIS, where a law enforcement agency, such as the NLRB, certifies that the individual has been helpful to the investigation or prosecution of unlawful conduct. A sister program offers temporary immigration relief under the T visa classification, which may be issued to certain victims of a severe form of trafficking in persons, including labor trafficking.[2]

The NLRB has long recognized that an employer's abuse of members of vulnerable communities who engage in protected, concerted activities under the Act provokes concern among them about seeking the assistance of, or providing evidence to, the NLRB. It is for this reason that the Agency has been a USCIS-recognized certifying law enforcement agency for many years. I remain committed to this role and, as such, I will

[2] For further information regarding U and T visa benefits see Victims of Criminal Activity: U Nonimmigrant Status; *Victims of Human Trafficking: T Nonimmigrant Status*; recent Updated and Comprehensive Guidance on T Visa Adjudications; and a resource guide from the Center for Countering Human Trafficking on continued presence, which is a temporary designation for trafficking victims who may be potential witnesses. See also Updated Procedures in Addressing Immigration Issues that Arise During NLRB Proceedings, OM Memorandum 11-62 (issued on June 7, 2011).

certify requests for U and T petitions for individuals who have been helpful to a NLRB investigation or litigation, and have suffered harm as a victim of a qualifying crime.[3]

Pursuant to USCIS's newly announced "Bona Fide Determination" process, a bona fide U visa petitioner before USCIS, who attains law enforcement certification by an agency such as ours, will have the means to secure timely deferred action and employment authorization, which will assist in their ability to continue to cooperate with the NLRB as we move forward with our case processing.[4] Notably, even if an individual does not qualify for a U or T visa, the NLRB may still request prosecutorial discretion from DHS, including deferred action and an employment authorization document, in appropriate cases.

NLRB Board Agents will be provided with documentary information to share with charging parties, witnesses, and their representatives on the processes by which to seek U and T visa certifications from the Agency. The Immigration Team will also be developing a related NLRB public website page, as well as training for NLRB Board Agents on these processes.

C. Responding to Coercive Tactics Directed Against Immigrant Workers

The Board has long recognized that immigration-related intimidation tactics are often used to silence employees and thwart their willingness to report statutory violations. Immigration-related threats are particularly coercive and "evoke the most intense fear" because, in addition to threatening possible loss of employment, they also place in jeopardy employees' ability to remain in their homes. See *Viracon, Inc*., 256 NLRB 245, 247, 252-53 (1981). The Board has noted that, "threats touching on employees' immigration status warrant careful scrutiny," because, "they are among the most likely to instill fear among employees." *Labriola Baking Co*., 361 NLRB 412, 413 (2014). Absent safeguards, immigration-related threats and retaliation directed at workers who have come forward and assisted an NLRB investigation or litigation may chill, "even authorized employees . . . from exercising their Section 7 rights if it means they might be questioned about their actual or perceived immigration status." *Farm Fresh Co.,* 361 NLRB 848, n.1 (2014). And when an employer targets immigrant employees in this way, it can undermine the labor rights of all employees by interfering in mutual aid, organizing efforts, and the effective enforcement of labor and employment laws.[5]

Thus, we will continue to be vigilant and take very seriously any threat or retaliatory conduct by a charged party or respondent in an unfair labor practice case that is related

[3] Common qualifying crimes uncovered during an unfair labor practice investigation include obstruction of justice, witness tampering, extortion, and felonious assault. See 8 C.F.R. 214.14(a)(9) (2008).

[4] See *USCIS Issues Policy Providing Further Protections for Victims of Crime*, USCIS press release dated June 14, 2021.

[5] See Ruben J. Garcia, *Marginal Workers: How Legal Fault Lines Divide Workers and Leave Them Without Protection* (2012).

to immigration status or work authorization.[6] Regions should seek full and immediate remedies regarding such conduct at every stage of the case, including seeking Section 10(j) injunctive relief and amending existing complaints, if warranted. If charged party counsel is involved in such unlawful conduct, Regional management should consider referring counsel for misconduct under Section 102.177 of the Board's Rules and Regulations, and should also consider referral to a state bar association for appropriate sanctions.

II. Investigation and Litigation Practices that Fully Effectuate the Act in Matters Involving Immigrant Workers

A. Effective Investigatory Practices

We are unable to effectuate the Act when discriminatees and witnesses are unwilling to file charges and present evidence, including affidavit testimony, to a Board Agent. Employee concern about testifying against their current or former employer's interests is intensified if they also fear involvement in our case processing procedures and protocols. Thus, Regions should seek to understand the challenges that arise in investigations involving immigrant workers and be flexible and empathetic.

Starting today, Board Agents should advise every person giving affidavit testimony that an individual's immigration or work authorization status is not relevant to the investigation of whether the Act has been violated, and that the Board agent will not inquire about the individual's immigration or work authorization status. Further, Board Agents should refrain from asking for social security numbers or Individual Taxpayer Identification Numbers (ITINs) during the merits stage of a case. The Immigration Team will soon distribute a document in multiple languages that can be provided to any witness or party who expresses a concern related to immigration status and our case processing procedures.

Regions should review and update the procedures for witnesses' access to Regional Offices, including directions on how to locate their offices, and the security and safety procedures witnesses should expect to follow. Regions should share that information broadly with local immigrant communities and advocacy groups. As a federal agency, we also recognize that some immigrant witnesses may be uncomfortable or unable to visit our offices that are located in federal buildings. Where a witness expresses hesitancy or inability to come into a federal building, Board Agents should find a neutral place to meet to take the witness's affidavit.[7] Further, to facilitate access to our processes, we will continue to create and distribute bilingual materials, and to hire bilingual Board Agents.

[6] A threat related to the immigration status of a participant in a Board proceeding may constitute the qualifying crime of obstruction of justice or witness tampering under the enabling U visa statute, as well as cause for consideration of Section 10(j) injunctive relief.

[7] Meeting by telephone or virtually should only be arranged if no other reasonable alternatives exist.

I recognize that privacy concerns also impact the public's willingness to file charges or to participate in NLRB investigations. For example, if a witness expresses concern about providing a home address in an affidavit, the Region should explore whether there is reliable alternative contact information that can be used, such as that of a family member. Notably, while the NLRB has a general policy to cooperate with other federal and state agencies that request Agency case information to assist in law enforcement efforts, such cooperation does not include sharing NLRB witness information with ICE, unless an individual requests that the Agency share their information to assist them with obtaining an immigration benefit.

I also recognize that there are a variety of reasons why a person may use a name at their workplace other than their legal name. Board Agents have no obligation to affirmatively inquire as to whether affiants use any names other than the name commonly used at the workplace.[8] However, if an affiant advises a Board Agent that they use a name different than their legal name, the Board Agent should indicate this in the affidavit by providing the following: "I, (legal name), also known as (other name(s))…" The affiant should sign the affidavit with their legal name. The Region should use the same practice in all communications with administrative law judges, the Board, or other tribunals, referring to the person as "(legal name), also known as (other name(s))…" Board Agents should also advise discriminatees who have used a name other than their legal name at work that, if the Region ultimately issues a complaint in their case, the complaint must refer to them by their legal name.

Furthermore, during investigations involving non-English speakers, Regions should be cognizant of the difference between comprehension and speaking skills.[9] A non-English speaker may credibly testify regarding a threat directed at them, even if the witness cannot repeat the exact words in English. Consistent with case-handling guidance, the Regions should not use this kind of discrepancy to discredit a witness's testimony or to decide not to issue complaint on allegations involving unlawful statements.[10]

[8] If a person uses the name that they use at work in their NLRB affidavit, it is my view that this would not constitute a false material statement by the affiant for purposes of their obligation to provide truthful testimony.

[9] The concept that a person may comprehend a language without being able to speak it is well-recognized, and is sometimes referred to as "passive" or "receptive" bilingualism. See, e.g., Michael Erard, *The Small Island Where 500 People Speak Nine Different Languages*, The Atlantic (Nov. 26, 2018) *https://www.theatlantic.com/health/archive/2018/11/receptive-multilingualism-small-languages/576649/*; see also Hugo Baetens Beardsmore, *Bilingualism: Basic Principles* 16 (2d ed. 1986).

[10] See NLRB CASEHANDLING MANUAL, PT. 1, Unfair Labor Practice Proceedings (April 2021), Sec. 10064 ("If … the Regional Office is unable to resolve credibility conflicts on the basis of objective evidence regarding matters which would affect the Regional Office's merit determination, a complaint should issue, absent settlement.").

B. Seeking Remedies Tailored to Anti-Immigrant Worker Retaliation

The Agency's remedial initiatives apply to all charging parties and discriminatees without regard to immigration status. These remedial initiatives call upon us to develop imaginative and robust remedies tailored to the specific circumstances of each case. Thus, the Regional Offices and Headquarters branches will continue to work together to develop significant remedies tailored to all discriminatees and their workplaces in order to remedy retaliatory and other unlawful conduct visited upon all members of the public, including immigrant workers.

In cases involving the unlawful discharge of an employee, Regions should seek a traditional make-whole remedy, including full backpay and the unconditional reinstatement of the discriminatee. In rare instances, a Region may believe that it has actual or constructive knowledge that a discriminatee does not currently possess work authorization required under immigration laws to return to the workplace. Establishing actual or constructive knowledge can be complicated. Therefore, as described in more detail below, the Region should not independently make such a determination and should contact the Immigration Team. The Immigration Team will assist the Region in assessing the question, and will work with the Region and the Office of Legal and Government Ethics to determine an appropriate remedy under the specific factual circumstances.[11]

If there is a determination that the Region cannot seek backpay or reinstatement in a particular case, the Region should consider a wide variety of alternative relief in order to avoid remedial failure. Where a discriminatee may not have work authorization, a conditional reinstatement order issued under the parameters articulated by the Board in *Mezonos Maven Bakery*, 362 NLRB 360, 363 (2015), would afford the discriminatee a "reasonable period of time" to complete forms and present appropriate documents allowing the respondent to meet its obligations under federal law to verify employee work authorization. Regions should also consider seeking an order of instatement of a qualified candidate referred by a labor organization, where support for that organization has been eroded and its bargaining strength negatively impacted by a respondent's unlawful conduct, as that would, "provide some way to remedy the chilling effect on unit employees' exercise of their Section 7 rights." *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB at 417-19 (Member Browning, dissenting in part).

[11] The Agency is precluded from seeking *unconditional* reinstatement and full backpay only in the very limited circumstance where the Region has actual or constructive knowledge that a discriminatee is presently unable to work lawfully in the United States. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (Board foreclosed by immigration laws from awarding backpay to an individual who was not legally authorized to work in the United States during the backpay period*); A.P.R.A. Fuel Oil Buyers Group,* 320 NLRB 408, enfd. 134 F.3d 50 (2d Cir. 1997) (conditional reinstatement order appropriate where discriminatee presently is not work authorized).

More broadly, as I indicated in previous memoranda,[12] Regions should use all appropriate means to seek focused, yet robust, remedies for discriminatory conduct in all cases, including those involving unlawful retaliation relating to employees' immigration status or work authorization. This includes consequential damages making employees whole for economic losses suffered as a direct and foreseeable result of an employer's unfair labor practices;[13] the publication of the Notice to Employees designed to reach current and former affected employees, as well as potential future hires; a Notice reading in the presence of the respondent's supervisors and managers; an order that a respondent make a payment into a remedial monetary fund in lieu of backpay; and sponsorship of work authorization (including all associated fees) where an employer's unfair labor practice has caused an employee's loss of such authorization.[14] Moreover, Regions should routinely seek compensation for work already performed under unlawfully imposed terms, as that remedy does not implicate the Supreme Court's effort in *Hoffman Plastics* to harmonize the nation's immigration and labor laws.[15]

In appropriate cases, Regions should also seek an order requiring that a respondent's supervisors and managers undergo training on employee rights under the Act and compliance with Board Orders; an order requiring training of a respondent's supervisors and managers in non-discriminatory immigration practices offered by the Department of Justice's Immigrant and Employee Rights Section; or an order requiring training by the U.S. Citizenship and Immigration Services on the appropriate use of the E-Verify system, where the respondent manipulated that tool in a manner that violated the Act. Regions

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[12] Seeking Full Remedies, GC Memorandum 21-06 (issued on September 8, 2021), and Full Remedies in Settlement Agreements, GC Memorandum 21-07 (issued on September 15, 2021).

[13] Since *Hoffman*, the Board and lower courts have carefully limited its application by distinguishing between backpay awards for "work not performed," which runs counter to the policies underlying immigration law and therefore is not permissible, and other monetary awards. See, e.g., *Tuv Taam Corp.,* 340 NLRB 756, 759 n.4 (2003) (monetary award appropriate for work already performed under unlawfully imposed rate); *Lamonica v. Safe Hurricane Shutters, Inc*., 711 F.3d 1299, 1307-1308 (11th Cir. 2013) (holding that *Hoffman* precludes backpay remedies under the NLRA but not compensation for work performed under the FLSA); *Lucas v. Jerusalem Café, LLC*, 721 F.3d 927, 933 (8th Cir. 2013) (same), cert. denied, 134 S.Ct. 1515 (2014). Thus, where an employer has demonstrated that an employee is or has been unauthorized to work during the relevant backpay period, it is appropriate for the Board to award monetary damages directly resulting from an employer's unfair labor practice, other than those that are strictly for "work not performed." Such damages, unlike backpay, do not effectively reconstitute an unlawful employment arrangement. Instead, these damages compensate an employee for economic harms suffered directly because of the employer's unlawful conduct, but that do not relate to wages and benefits that would directly undermine the Immigration Reform and Control Act's (IRCA) prohibitions. Such damages could include, for example, those relating to out-of-pocket health, transportation, relocation or loss of housing expenses and certain legal or other costs.

[14] See Seeking Full Remedies, GC Memorandum 21-06, at pp. 2-3, as well as remedies highlighted in Updated Procedures in Addressing Immigration Status Issues that Arise During ULP Proceedings, GC Memorandum 15-03 (issued on February 27, 2015).

[15] *Tuv Taam Corp.,* 340 NLRB at 759 n.4.

are encouraged to seek assistance from the Immigration Team to determine if additional remedies are appropriate to ensure the fullest relief possible.

C. Preventing Abuses During Litigation and Through Injunctive Relief Under Section 10(j) of the Act

Regions should be vigilant in protecting the rights of witnesses to be free of intrusive and unfounded interrogation about their immigration status during the liability phase of an unfair labor practice proceeding when immigration status is irrelevant.[16] Attempts by a respondent to probe a witness's work authorization or immigration status undermines the integrity of the Board's processes by intimidating witnesses whose cooperation is crucial to our enforcement of the Act. *Flaum Appetizing Corp*., 357 NLRB 2006, 2012 (2011) (noting that "[n]umerous Federal courts have recognized that such formal inquiry into immigration status and facts arguably touching on it is intimidating and chills the exercise of statutory rights.").

For this reason, the Board has plainly stated that it will not allow its process to become an "open-ended inquiry" into a witness's immigration or work authorization status, which may devolve into a "fishing expedition [as] a method of discouraging employees from seeking back pay on meritorious claims." *Id.* at 2010. Rather, the Board imposes a requirement that the respondent have a "sufficient factual basis" that a discriminatee lacks work authorization before it is permitted to litigate an immigration-based affirmative defense in a compliance proceeding. *Id*. at 2011.

Accordingly, Counsel for the General Counsel (CGC) should generally oppose a respondent's intention to introduce evidence or question witnesses about their immigration status or work authorization during the liability phase of a ULP proceeding. To police this conduct, CGC should seek all safeguards, including by filing a motion *in limine*, a motion to quash an overreaching subpoena, or a motion for a bill particulars designed to examine a respondent's factual basis.[17] Through these efforts, CGC may preclude the respondent from turning a Board hearing into a fishing expedition regarding a witness's immigration status.

Regions should also consider whether a respondent's attempted inquiries into a witnesses immigration status or work authorization is itself an independent unfair labor practice. In *Lifeway Foods*, the Division of Advice concluded that the Employer violated

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[16] See *Intersweet, Inc*., 321 NLRB 1, 1, n.2 (1996), enfd. 125 F.3d 1064 (7th Cir. 1997) (consideration of employer's contention that discriminatees were not entitled to backpay or reinstatement because they had no legal right to work in the United States left to the compliance stage). Successive General Counsels have relied on Board and court law to acknowledge this bedrock principle. See *Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after Hoffman Plastic Compounds, Inc*., GC Memorandum 02-06 (issued on July 19, 2002), at p. 1; Reinstatement and Backpay Remedies for Discriminatees Who May Be Undocumented Aliens In Light of Recent Board and Court Precedent, GC Memorandum 98-15 (issued on December 4, 1998), at p. 4.

[17] Model motions are maintained by the Agency's Immigration Team.

Section 8(a)(1) and 8(a)(4) of the Act when it questioned two discriminatees about their immigration documents during an unfair labor practice proceeding, where the discriminatees' immigration status was not relevant, because it constituted an implied threat of reprisal and interefered with witness testimony. *Lifeway Foods*, Case 13-CA-169510, Advice Memorandum dated June 7, 2016.

Of course, any potential impediment to reinstatement may be relevant when assessing a respondent's obligation to reinstate or pay backpay; however, these issues arise only at the compliance stage of an unfair labor practice proceeding. Regions should not independently assess a respondent's assertion of a work authorization issue, and should consult with the Agency's Immigration Team, as the intricacies of work authorization are complex. For example, it is clear that a "no-match" letter issued by the Social Security Administration (SSA) does not shed light on the ability of an individual to work lawfully in this country. The no-match letter itself states that it does not make any statement about an employee's immigration status, and there is guidance and legal authority stating that inclusion of a worker's name on an SSA no-match letter makes no statement about the worker's immigration status.

As I stated in GC 21-05, I believe that Section 10(j) injunctions are one of the most important tools available to effectively enforce the Act, and this is especially true in cases involving particularly coercive conduct like immigration-related threats or retaliatory conduct. The Board has recognized that threats or retaliatory conduct on the basis of employees' immigration status are especially coercive and often risk irreparable harm to employees' exercise of their protected rights. See *Viracon, Inc.*, 256 NLRB at 247 ("…fears of possible trouble with the Immigration Service or even of deportation must remain indelibly etched in the minds of any who would be affected by such actions on Respondent's part. Such fears would, in our view, be extremely resistant to efficacious dissipation through the use of traditional remedies.").[18]

Thus, to safeguard access by all workers to the protections afforded by the Act, I will consider Section 10(j) relief in all cases where illegal intimidation regarding immigration status threatens the exercise of Section 7 rights and the Board's remedial authority.[19] I will also consider the propriety of seeking Section 10(j) relief in all appropriate cases, regardless of the immigration status of any employee or discriminatee,[20] and will seek

[18] See *Ahearn v. Beckley Mechanical, Inc.*, 1999 WL 328775 (S.D.W.V. Mar. 29, 1999) (Section 10(j) relief warranted where employer threatened employees with job loss and the closure of the business, interrogated employees, and promised them benefits).

[19] See, e.g., *Rubin v. American Reclamation, Inc.*, 2012 WL 3018335, at *3 (C.D. Cal. July 24, 2012) (interim Section 10(j) relief obtained where, among other things, employer made a veiled threat to call immigration authorities because employees were supporting the union).

[20] See, e.g., *Pate v. Bodega Latina Corporation*, 2015 WL 12661924, at *10-11 (C.D. Cal. July 30, 2015) (court ordered reinstatement where discriminatee obtained work authorization during the pendency of

deferred action, parole, or other immigration relief for employees whose interim reinstatement is appropriate under Section 10(j).

III. Meaningful Interagency Engagement

While we have many tools at our disposal to effectuate the Act for all employees regardless of immigration status, our ability to protect immigrant workers is greatly enhanced by our collaboration with other government agencies. In 2016, the NLRB entered into a Memorandum of Understanding with the Department of Homeland Security and other labor agencies that provides for a process of deconfliction. Deconfliction is the process of preventing conflicting enforcement actions between immigration agencies and labor enforcement agencies. Specifically, under the deconfliction MOU, ICE will refrain from enforcement activities at a worksite that is the subject of an existing investigation of a labor dispute and during the pendency of the investigation and any related proceeding, subject to a few limited exceptions. Deconfliction helps ensure that individuals who cooperate with labor investigations can do so without fear of retaliation, and that the enforcement of immigration laws is not manipulated to thwart effective enforcement of employment and labor laws.

The deconfliction process has become an important tool for preventing abuse and providing protection to employees who are participating in Board processes, and I am committed to further strengthening and expanding it. I fully support DHS Secretary Mayorkas' recent memo on worksite enforcement that puts DHS's focus where it belongs —on unscrupulous employers, who exploit the vulnerability of undocumented workers through threats of deportation, which undermines the nation's labor standards, and disadvantages law-abiding employers. As discussed in the DHS memo and above, I am committed to asking DHS to exercise prosecutorial discretion in all appropriate cases involving workers who are victims of, or witnesses to, violations of our Act. Regions should contact the Immigration Team if there is an indication that such a request would aid in enforcement of the Act.

With respect to unscrupulous employers that violate labor law through the abuse of immigration laws, we will collaborate with federal and state agency partners to seek joint enforcement activity against employer abuse. An example of such collaboration is the NLRB's Memorandum of Understanding with the Immigrant and Employee Rights Section of the Department of Justice, an agency that enforces the anti-discrimination provisions of immigration law.

Regional Offices should work with the NLRB's Immigration Team to refer cases to federal and state agencies for prosecution in the following circumstances: (1) an employer

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Section 10(j) proceedings, conditioned on discriminatee's presentation to the respondent of proper work authorization documents consistent with USCIS Form I-9); *Drew-King v. Deep Distributors of Greater NY, Inc.*, 194 F.Supp.3d 191, 201-202 (E.D.N.Y. 2016) (ordering interim reinstatement under Section 10(j) where respondent produced no evidence that discriminatees were not authorized to work in the U.S., noting that respondent presumably complied with IRCA when it hired them).

asserts that employees it terminated did not have work authorization where there is evidence that the employer had prior constructive or actual knowledge of this lack of work authorization in violation of IRCA; (2) there is evidence of discrimination or violation of IRCA's civil rights provisions; (3) there is evidence that an employer was not complying with its obligations regarding nonimmigrant work visas; or (4) there is evidence that an employer misused E-Verify.

Regional Directors and Regional Immigration Coordinators should also build interagency relationships at the local level with DHS and its subagencies to strengthen deconfliction principles and practices, cross-train staff to identify abuses of labor law that involve a worker's immigration status or work authorization, and better protect immigrant workers.

IV. Training Opportunities Within the NLRB and With Our Partners

The ability to fulfill our mission to protect the labor rights of all workers in the United States, without regard to immigration status, is contingent on our committed field staff having the training and resources they need. Accordingly, both our cadre of Regional Immigration Coordinators and our Board Agents will be asked to undergo updated training designed to familiarize them with issues involving the immigrant communities across the country and the policies discussed in this memo. Furthermore, for the Agency to establish meaningful partnerships with sister agencies at the federal, state, and local level, we must cross-train respective investigators and enforcement staffs. We will continue interagency collaboration, with both immigration-related and labor-enforcement agencies, to further our respective missions and ensure they do not conflict.

I also intend to continue to partner with foreign embassies and consulates that serve the needs of their communities, with the goal of supporting and expanding our joint efforts to inform all workers from those communities about our services.[21] Cross-training with the dedicated embassy and consular staff will serve to advance these goals, and it is imperative that we do so. Finally, as part of our robust outreach efforts, NLRB staff should continue to partner with advocacy groups, labor unions, and employer groups to offer training on the NLRB and the rights and obligations that underlie our statute.

I believe this memorandum will advance the NLRB's ability to fully enforce the rights of *all* covered workers in this country, without reference to immigration or work authorization status. I look forward to working with all of you to implement and strengthen these policies.

/s/
J.A.A.

[21] The Agency's recent Letter of Arrangement with Mexico, which Ambassador Moctezuma and I signed on September 2, 2021, is but one example of my intention to broaden outreach efforts to immigrant communities.

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 21-08 **September 29, 2021**

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

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Statutory Rights of Players at Academic Institutions (Student-Athletes)[1] Under the National Labor Relations Act

On January 31, 2017, the Office of the General Counsel issued GC 17-01, which addressed various issues regarding the statutory rights of university faculty and/or students under the National Labor Relations Act ("the Act" or "NLRA"). That memo summarized pertinent representation case decisions and was intended to serve as a guide for employers, labor unions, and employees regarding how the Office of the General Counsel intended to apply those cases in the unfair labor practice arena. GC 17-01 was later rescinded by GC 18-02. This memo reinstates GC 17-01, to the extent it is consistent with this memo, and, additionally, provides updated guidance regarding my prosecutorial position that certain Players at Academic Institutions are employees under the Act. Further, it explains that, where appropriate, I will allege that misclassifying such employees as mere "student-athletes", and leading them to believe that they do not have statutory protections is a violation of Section 8(a)(1) of the Act.

[1] While Players at Academic Institutions are commonly referred to as "student-athletes," I have chosen not to use that term in this memorandum because the term was created to deprive those individuals of workplace protections. Molly Harry, *A Reckoning for the Term "Student-Athlete*,*"* Diverse (Aug. 26, 2020), https://www.diverseeducation.com/sports/article/15107633/a-reckoning-for-the-term-student-athlete (explaining that NCAA's president and lawyers coined term "student-athlete" in 1950s to avoid paying workers' compensation claims to injured athletes and NCAA continues to utilize it in litigation involving rights of college athletes); *Level Playing Field: Misclassified* (HBO documentary broadcast Sept. 21, 2021) (describing ongoing use of moniker "student-athlete" to deprive those employees of their workplace rights); Jay D. Lonick, Bargaining with the Real Boss: How Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer, 15 Va. Sports & Ent. L.J. 135, 139-42 (2015) (arguing that "student-athlete" is "used to deny athletes legal protection and to preserve the myth that today's student-athletes are amateurs pursuing sports as a mere hobby or avocation").

GC 17-01 addressed *Northwestern University*, in which the Board declined to exercise jurisdiction over a representation petition filed by a union seeking to represent Northwestern University's scholarship football players and expressly declined to resolve whether Players at Academic Institutions are employees under the NLRA.[2] This memo briefly summarizes my position, set forth in detail in GC 17-01, that certain Players at Academic Institutions are employees under the Act and are entitled to be protected from retaliation when exercising their Section 7 rights. It also discusses developments in the case law and National Collegiate Athletic Association ("NCAA") rules related to Players at Academic Institutions, and contemporaneous societal shifts, including a dramatic increase in collective action among Players at Academic Institutions, all of which reinforce my position that they are protected by the Act.

As explained in GC 17-01, although the Board in *Northwestern University* declined to exercise jurisdiction over scholarship football players at that university, nothing in that decision precludes the finding that scholarship football players at private colleges and universities, or other similarly situated Players at Academic Institutions, are employees under the Act.[3] And more importantly, the conclusion that such Players at Academic Institutions are employees is supported by the statutory language and policies of the NLRA, as well as the Board's interpretation of the same in *Boston Medical Center Corp.*,[4] and *Columbia University*[5]. The definition of "employee" in Section 2(3) of the NLRA is broadly defined to include "any employee," subject to only a few, enumerated exceptions. Those exceptions do not include university employees, football players,

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[2] 362 NLRB 1350, 1356 (2015). More specifically, *Northwestern University* involved the University's Division I FBS (Football Bowl Subdivision) football players who receive grant-in-aid scholarships. 362 NLRB at 1350-51.

GC 17-01 also discussed *Pacific Lutheran University*, 361 NLRB 1401 (2014), in which the Board announced a new standard for determining when it would exercise jurisdiction over faculty members at self-identified religious colleges and universities and announced a new standard for determining when faculty members are managerial and, thus, excluded from protection under the Act, and *Columbia University*, 364 NLRB No. 90 (August 23, 2016), in which the Board reaffirmed its position that student assistants in colleges and universities are employees under the Act. *Columbia University* remains Board law, and I will continue to maintain the prosecutorial position that student assistants, as well as medical interns and non-academic student employees, are protected by the Act. With respect to *Pacific Lutheran*, the Board, in *Bethany College*, 370 NLRB No. 91, slip op. at 5 (February 19, 2021), overruled the religious-jurisdiction test set forth in that case and announced that the Board "does not have jurisdiction over teachers or faculty at *bona fide* religious educational institutions." In GC 21-04, I requested that all cases involving the applicability of *Bethany College* be submitted to Advice. In addition, in *Elon University*, 370 NLRB No. 91 (February 12, 2021), the Board revised the *Pacific Lutheran* test for determining when faculty are managerial. Specifically, it refined the portion of the managerial test to be applied when determining whether a faculty committee's decision-making authority will be attributed to members of that committee. *Elon University*, 370 NLRB No. 91, slip op. at 8-9.

[3] As *Columbia University* clearly explained, although *Northwestern University* denied protections of the Act to certain Players at Academic Institutions, it did so "without ruling on their employee status." 364 NLRB No. 90, slip op. at 7, n.56.

[4] 330 NLRB 152, 160 (1999).

[5] 364 NLRB No. 90, slip op. at 4-5.

or students.[6] Moreover, *Boston Medical* and *Columbia University* correctly recognize that the Supreme Court has endorsed the Board's expansive interpretation of "employee".[7]

The Board has also applied common-law agency rules governing the employer-employee relationship when applying the Act's expansive language and purpose to determine employee status.[8] Under common law, an employee includes a person "who perform[s] services for another and [is] subject to the other's control or right of control."[9] In addition, "[c]onsideration, *i.e.*, payment, is strongly indicative of employee status."[10] That law fully supports a finding that scholarship football players at Division I FBS private colleges and universities, and other similarly situated Players at Academic Institutions, are employees under the NLRA. Indeed, Players at Academic Institutions perform services for their colleges and the NCAA, in return for compensation, and subject to their control. Most notably, as GC 17-01 described, the following evidence presented in *Northwestern University* supported that finding:

- the athletes play football (perform a service) for the university and the NCAA, thereby generating tens of millions of dollars in profit and providing an immeasurable positive impact on the university's reputation, which in turn boosts student applications and alumni financial donations;

- the football players received significant compensation, including up to $76,000 per year, covering their tuition, fees, room, board, and books, and a stipend covering additional expenses such as travel and childcare;

- the NCAA controls the players' terms and conditions of employment, including maximum number of practice and competition hours, scholarship eligibility, limits on compensation, minimum grade point average, and restrictions on gifts and benefits players may accept, and ensures compliance with those rules through its "Compliance Assistance Program";

[6] *See Columbia University*, 364 NLRB No. 90, slip op. at 4; *Boston Medical Center*, 330 NLRB at 160.

[7] *See Columbia University*, 364 NLRB No. 90, slip op. at 5; *Boston Medical Center*, 330 NLRB at 160.

[8] *See Columbia University*, 364 NLRB No. 90, slip op. at 4-5 (applying common law to find student assistants to be employees under the NLRA).

[9] *See Boston Medical Center*, 330 NLRB at 160.

[10] *Id*.

- the university controls the manner and means of the players' work on the field and various facets of the players' daily lives to ensure compliance with NCAA rules; for example, the university maintains detailed itineraries regarding the players' daily activities and football training, enforces the NCAA's minimum GPA requirement, and penalizes players for any college or NCAA infractions, which could result in removal from the team and loss of their scholarship.

In short, GC 17-01 concludes, and this memo reiterates, that the scholarship football players at issue in *Northwestern University* clearly satisfy the broad Section 2(3) definition of employee and the common-law test. Therefore, those football players, and other similarly situated Players at Academic Institutions, should be protected by Section 7 when they act concertedly to speak out about their terms and conditions of employment, or to self-organize, regardless of whether the Board ultimately certifies a bargaining unit.[11]

In addition, because those Players at Academic Institutions are employees under the Act, misclassifying them as "student-athletes", and leading them to believe that they are not entitled to the Act's protection, has a chilling effect on Section 7 activity.[12] Therefore, in appropriate cases, I will pursue an independent violation of Section 8(a)(1) of the Act where an employer misclassifies Players at Academic Institutions as student-athletes. Accordingly, cases involving the misclassification of Players at Academic Institutions should be submitted to Advice. That approach is consistent with GC 21-04, in which I requested that all cases involving the applicability of *Velox Express, Inc.*,[13] in which the Board refused to find a violation based on the employer having misclassified drivers as independent contractors, be submitted to Advice.[14]

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[11] It is important to note, as the Board explained in *Northwestern University*, that its decision not to assert jurisdiction in that one case does not preclude reconsideration of the issue in a future case. 362 NLRB at 1355 & n.28.

[12] *See Velox Express, Inc.*, 368 NLRB No. 61, slip op. at 13, 16, 19-21 (August 29, 2019) (Member McFerran, dissenting in part, concurring in part) (describing chilling effect of misclassification because employees reasonably would believe that exercising their rights would be futile or would lead to adverse employer action); *Level Playing Field: Misclassified* (HBO documentary broadcast Sept. 21, 2021) (explaining that NCAA intentionally misclassifies college scholarship athletes as "student-athletes" to avoid providing protections and benefits under employment laws, including wage and hour, workers compensation, health and safety, and unemployment benefits, as well as under labor laws, just as gig employers misclassify employees as "independent contractors," and describing how doing so institutionalizes racial segregation of workplace protections).

[13] Cases involving the misclassification of student assistants, medical interns, and non-academic student employees, who are led to believe that they are not entitled to the Act's protection, similarly should be submitted to Advice.

[14] Molly Harry, *A Reckoning for the Term "Student-Athlete,"* Diverse (Aug. 26, 2020), https://www.diverseeducation.com/sports/article/15107633/a-reckoning-for-the-term-student-athlete (describing NCAA's ongoing strategy of using term "student-athlete" in litigation, including in *Northwestern University* litigation, in its continuing effort to deprive athletes of workplace rights and financial benefits).

Moreover, since the issuance of GC 17-01, there have been significant developments in the law, NCAA regulations, and the societal landscape, that demonstrate that traditional notions that all Players at Academic Institutions are amateurs have changed. These developments further support the conclusion that certain Players at Academic Institutions are employees under the Act.

First, in *NCAA v. Alston*,[15] the Supreme Court, in a unanimous decision, recognized that college sports is a profit-making enterprise and rejected the NCAA's antitrust defense based in the notion of amateurism in college athletics. There, the Court addressed antitrust issues related to the compensation paid to athletes in men's Division I FBS football and men's and women's Division I basketball. The Court held that NCAA rules limiting certain education-related compensation that schools may offer athletes, such as rules that limit scholarships for graduate or vocational school, payments for academic tutoring, or paid post-eligibility internships, violate antitrust law.[16] Although the Court did not disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance, it recognized that amateurism in college sports has changed significantly in recent decades and rejected the notion that NCAA compensation restrictions are "forevermore" lawful.[17] The decision is likely a precursor to more changes to come in college athletics. Specifically, commentators argue that, as courts "continue to chip away at NCAA restrictions on benefits to student-athletes, more compensation that is untethered to academics brings student-athletes more fully within 'employee status' under the law."[18]

Justice Kavanaugh, in his concurring opinion in *Alston*, went further. He strongly suggested that the NCAA's remaining compensation rules also violate antitrust laws and questioned "whether the NCAA and its member colleges can continue to justify not paying student athletes a fair share" of the billions of dollars in revenue that they generate.[19] Moreover, he suggested that one mechanism by which colleges and students could resolve the difficult questions regarding compensation is by "*engag[ing] in collective bargaining*."[20]

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[15] 141 S. Ct. 2141 (2021).

[16] *Id*. at 2152, 2158.

[17] *Id*. at 2158.

[18] Alex Blutman, *The Strike Zone – NCAA v. Alston*, onlabor (June 22, 2021) https://onlabor.org/the-strike-zone-ncaa-v-alston/. *See* Sarah Eberspacher & Martin D. Edel, *Supreme Court Sides with Student-Athletes in* Alston v. NCAA, *Expands Permissible Types of Compensation*, The National Law Review (June 21, 2021), https://www.natlawreview.com/article/national-collegiate-athletic-association-v-alston.

[19] *Alston*, 141 S. Ct. at 2168 (2021) (Kavanaugh, J., concurring).

[20] *Id*. (emphasis added). Relatedly, on May 27, 2021, the College Athlete Right to Organize Act was introduced in the Senate. That law would amend the NLRA's definition of "employee" to expressly include certain college athletes, including those attending public institutions, and to give them collective bargaining rights. College Right To Organize Act, S. 1929, 117th Cong. (2021) https://www.congress.gov/bill/117th-congress/senate-bill/1929/text?q=%7B%22search%22%3A%5B%22college+athletes%22%5D%7D&r=4&s=1.

Shortly after the Supreme Court's decision, the NCAA announced the suspension of name, image, and likeness ("NIL") rules for Players at Academic Institutions.[21] The NCAA did so in the face of mounting pressure, as state laws throughout the country granting NIL rights were set to take effect.[22] Players at Academic Institutions now may collect payment for use of their name, image, and likeness, thereby opening the door for them to profit from endorsements, autograph sales, and public appearances, among other ventures.[23] In addition, Players at Academic Institutions are permitted to use professional service providers to assist them in engaging in NIL activities.[24] The freedom to engage in far-reaching and lucrative business enterprises makes Players at Academic Institutions much more similar to professional athletes who are employed by a team to play a sport, while simultaneously pursuing business ventures to capitalize on their fame and increase their income.[25]

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[21] Press Release, NCAA, NCAA adopts interim name, image and likeness policy (June 30, 2021), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy.

[22] Alan Blinder, *College Athletes Cash In as Generations of Rules Fade Under Pressure*, N.Y. Times, July 1, 2021 (updated Sept. 17, 2021) https://www.nytimes.com/2021/07/01/sports/ncaafootball/ncaa-college-athletes-endorsements.html.

[23] Alex Kirshner, *College Athletes Are Wasting No Time Getting Paid*, Slate (July 1, 2021, 5:56 PM), https://slate.com/culture/2021/07/ncaa-name-image-likeness-college-athletes-endorsements-ads-pay.html.

[24] Press Release, NCAA, NCAA adopts interim name, image and likeness policy (June 30, 2021), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy.

[25] *See generally* Dan Murphy, *Let's make a deal: NCAA athletes cashing in on name, image and likeness*, ESPN (July 1, 2021), https://www.espn.com/college-sports/story/_/id/31738893/ncaa-athletes-cashing-name-image-likeness. Further changes to NCAA restrictions are possible. The NCAA, under increasing pressure to remake the "multibillion dollar college sports industry," Alan Blinder, *N.C.A.A. Chief, Under Pressure, Says College Sports May Need Reorganization*, N.Y. Times, July 15, 2021https://www.nytimes.com/2021/07/15/sports/mark-emmert-ncaa-reorganize-supreme-court.html, will hold a constitutional convention later this year at which possible modifications to the structure of college sports will be addressed. Alan Blinder, *N.C.A.A. Looks to Rewrite the Constitution and Stave Off Critics, N.Y. Times, July 30, 2021,* https://www.nytimes.com/2021/07/30/sports/ncaa-constitution-mark-emmert.html.

Finally, those changes have taken place at a time when Players at Academic Institutions have been engaging in collective action at unprecedented levels. In 2020, activism among Players at Academic Institutions sky-rocketed along with the national attention to social justice issues following the murder of George Floyd and concerns regarding health and safety in the face of the Covid-19 pandemic.[26] For example, Players at Academic Institutions across the country banded together to speak out about racism at their colleges and to demand change, and some threatened to withhold their services in response to their coach's actions after George Floyd's murder.[27] Activism concerning such racial justice issues, including openly supporting the Black Lives Matter movement, directly concerns terms and conditions of employment, and is protected concerted activity.[28]

College football players also joined together using the monikers #weareunited and #wewanttoplay to express their desire to play the 2020 season despite the ongoing pandemic, while demanding adequate safety protocols and an opt-out option for players who chose not to play.[29] Those groups further sought open communication between players and university and NCAA leadership, and, ultimately, a "college football players' association" to represent them.[30] Moreover, Players at Academic Institutions have gained more power as they better understand their value in generating billions of dollars in revenue for their colleges and universities, athletic

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[26] *See* Michael T. Nietzel, *Black Athletes Are Leading The New College Protest Movement*, Forbes (June 28, 2020, 6:00 AM), https://www.forbes.com/sites/michaeltnietzel/2020/06/28/black-athletes-lead-the-new-college-protest-movement/?sh=f6ed01762fad; Alex Kirshner, *The End of College Football (as We Know It)*, Slate (Sept. 1, 2021, 5:55 AM), https://slate.com/culture/2021/09/college-football-future-nil-pay-playoff-conferences-tv.html.

[27] Alan Blinder & Billy Witz, *College Athletes, Phone in Hand, Force Shift in Protest Movement*, N.Y. Times, June 12, 2020, https://www.nytimes.com/2020/06/12/sports/ncaafootball/george-floyd-protests-college-sports.html; Sean Gregory, *College Athletes Are Realizing Their Power Amid the George Floyd Protects and COVID-19, Time (June 18, 2020 10:08 AM),* https://time.com/5855471/college-athletes-covid-19-protests-racial-equality/.

[28] *See SunBridge Healthcare LLC, d/b/a Milford Center, Case 01-CA-156820, Advice Memorandum dated January 20, 2016 at 9-12,* https://apps.nlrb.gov/link/document.aspx/09031d45835690dd (setting forth position of NLRB Division of Advice that employee conversations about workplace racial discrimination is inherently concerted); Press Release, NLRB, Region 18 complaint alleges Home Depot fired employee who refused remove Black Lives Matter slogan from apron (Aug. 16, 2021), https://www.nlrb.gov/news-outreach/region-18-complaint-alleges-home-depot-fired-employee-who-refused-to-remove-black.

[29]Alan Blinder & Billy Witz, *In Push to Play, College Football Players Show Sudden Unity*, N.Y. Times, Aug. 10, 2020 (updated Apr. 29, 2021), https://www.nytimes.com/2020/08/10/sports/ncaafootball/coronavirus-college-football-players.html.

[30] *Id.*

conferences, and the NCAA,[31] and this increased activism and demand for fair treatment has been met with greater support from some coaches, fans, and school administrators.[32] Players at Academic Institutions who engage in concerted activities to improve their working conditions have the right to be protected from retaliation.[33]

[31] Alex Kirshner, *The Impact and Evolution of College Football Player Protest*, The Ringer (June 30, 2020, 9:45 AM), https://www.theringer.com/2020/6/30/21307518/college-football-player-protests-black-lives-matter-movement; Alan Blinder & Billy Witz, *College Athletes, Phone in Hand, Force Shift in Protect Movement, N.Y. Times, June 12, 2020,* https://www.nytimes.com/2020/06/12/sports/ncaafootball/george-floyd-protests-college-sports.html. Prior to the NCAA suspending NIL restrictions, Division I basketball players spoke out using the hashtag #NotNCAAProperty to protest those restrictions. Laurel Wamsley, *Before March Madness, College Athletes Declare They Are #NotNCAAProperty*, NPR (March 18, 2021, 4:42 PM), https://www.npr.org/2021/03/18/978829815/before-march-madness-college-athletes-declare-they-are-notncaaproperty.

[32]Alan Blinder & Billy Witz, *In Push to Play, College Football Players Show Sudden Unity*, N.Y. Times, Aug. 10, 2020 (updated Apr. 29, 2021), https://www.nytimes.com/2020/08/10/sports/ncaafootball/coronavirus-college-football-players.html.

[33] Although some coaches, colleges, and universities are more supportive of activism by Players at Academic Institutions than in the past, the concern for retaliation is very real. For example, a scholarship football player filed a lawsuit on August 20, 2021, alleging that his coach cut him from the team when the coach learned of his support for the #weareunited movement. Associated Press, *Former player sues Washington State, football coach over dismissal*, ESPN (Sept. 2, 2021), https://www.espn.com/college-football/story/_/id/32134637/former-player-sues-washington-state-football-coach-dismissal. See Alex Kirshner, The Impact and Evolutions of College Football Player Protector, The Ringer (June 30, 2020, 9:45 AM), https://www.theringer.com/2020/6/30/21307518/college-football-player-protests-black-lives-matter-movement (recognizing increased support for student-athlete activism, while acknowledging that institutional structures in college football can be slow to change). Because that player attended a state university, he would not be protected by the Act, which expressly excludes state and local governments from the Board's jurisdiction. Nevertheless, it demonstrates the importance of protecting Players at Academic Institutions.

In sum, it is my position that the scholarship football players at issue in *Northwestern University*, and similarly situated Players at Academic Institutions, are employees under the Act. I fully expect that this memo will notify the public, especially Players at Academic Institutions, colleges and universities, athletic conferences, and the NCAA, that I will be taking that legal position in future investigations and litigation under the Act.[34] In addition, it notifies them that I will also consider pursuing a misclassification violation.

/s/

J.A.A.

[34] Because Players at Academic Institutions perform services for, and subject to the control of, the NCAA and their athletic conference, in addition to their college or university, in appropriate circumstances I will consider pursuing a joint employer theory of liability. Indeed, as one commentator has explained, the NCAA exercises strict control over certain Players at Academic Institutions, beginning with establishing eligibility standards and terms pursuant to which they may enter the workforce (athletic team), including unilateral contract terms in the "Student-Athlete Agreement" and detailed recruitment rules, and through extensive compliance requirements, which can result in termination if violated. *See* Jay D. Lonick, Bargaining with the Real Boss: How Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer, 15 Va. Sports & Ent. L.J. 135, 161-67 (2015). Similarly, it may be appropriate for the Board to assert jurisdiction over the NCAA and an athletic conference, and to find joint employer status with certain member institutions, even if some of the member schools are state institutions. As explained in *Northwestern University*, where an athletic conference is an "independent, private entity, created by the member schools," exerting jurisdiction over the conference is appropriate even where some member institutions are public. 362 NLRB at 1354 n.17, citing *Big East Conference*, 282 NLRB 335, 340-42 (1986) (asserting jurisdiction over athletic conference where two of nine member institutions were state institutions, because those two institutions "cannot control the operations" of conference). Therefore, I will consider pursuing charges against an athletic conference or association even if some member schools are state institutions.