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NEW NLRB MEMORANDA CALL FOR INCREASED PROTECTION OF WORKER RIGHTS IN FIRST CONTRACT BARGAINING CASES AND FOR EXPEDITED SECTION 10(j) INJUNCTIVE RELIEF HEARINGS

On April 19, 2006, the Office of the General Counsel (“OGC”) for the National Labor Relations Board (“NLRB”) issued two memoranda to all of the NLRB’s Regional Directors, Officers-in-Charge, and Resident Officers regarding “First Contract Bargaining Cases” and “Section 10(j) Cases and Expedited Hearings.”

These memoranda suggest a significant new NLRB remedial initiative, which will undoubtedly affect employers faced with newly certified union representatives, as well as employers faced with union organizing efforts in their workplaces.

The memoranda indicate a more aggressive stance by the NLRB including, of potentially great significance, increased use of Section 10(j) injunctive relief against employers that the NLRB finds are interfering with their employees’ rights to engage in collective action and other steps to assist newly certified unions in negotiating first contracts.

In GC Memorandum 06-05, General Counsel Robert Meisburg directs the Board’s Regional Offices to “routinely consider” Section 10(j) injunctive relief as well as the pursuit of “special remedies” in cases involving violations by employers in the negotiation of initial contract bargaining agreements.

In the second memo, Associate General Counsel Richard A. Siegel directs the Regional Offices to expedite ULP hearings before Administrative Law Judges, so that they take place not later than eight weeks from the issuance of the complaint, in those cases in which the GC finds that Section 10(j) injunctive relief should be pursued.

FIRST CONTRACT BARGAINING CASES – GC MEMORANDUM 06-05

In this General Counsel Memorandum, it is observed that, “when employees are bargaining for their first collective bargaining agreement, they are highly susceptible to unfair labor practices intended to undermine support for their bargaining representative.” In support of this conclusion, the memorandum cites statistics showing almost one-half of all ULP charges alleging employer refusals to bargain or bargaining in bad faith and half of the Section 10(j) cases dealing with unfair labor practices that allege conduct undermining a newly certified or recognized union, involve the negotiation of an initial collective bargaining agreement.

In order to foster such new bargaining relationships, the NLRB’s General Counsel has directed the agency’s Regional Offices to focus particular attention on remedies for violations that occur “during the period after certification when parties are or should be bargaining for an initial collective bargaining agreement.” Specifically, in order to promote bargaining of first contracts, the Regional Offices have been instructed to consider Section 10(j) temporary injunctive relief and to request special remedies, such as extending the time of the union’s certification as the employee bargaining representative, notice reading and publication by senior employer officials, and the granting of union access to company bulletin boards, periodic reports on the status of bargaining, and employer reimbursement of union bargaining and litigation expenses.

Since ULP cases involving negotiation of a first contract often closely follow NLRB conducted representation elections, the General Counsel has also instructed the Regional Offices to consider pursuing Section 10(j) injunctive relief in union organizing campaign cases, to ensure that employees are able to vote promptly in Board elections in an atmosphere free from unlawful interference and coercion. In deciding whether Section 10(j) relief is appropriate, Regional Directors are told to ascertain whether the union is prepared to file a “Request to Proceed” to an election, notwithstanding the pendency of its unfair labor practice charges if the Board obtains 10(j) relief against the employer’s conduct.

In an effort “to assure consistent analysis and use of appropriate remedies in union organizing and initial contract bargaining cases,” the General Counsel has also directed the Regional Offices to submit all of the following cases to the Division of Advice through October 20, 2006:

- All cases in which Regional Directors have found merit in allegations of interference or restraint in the exercise of employees’ organizing rights and/or a refusal to bargain after a union has been certified and has requested bargaining for an initial collective bargaining agreement; and
- All meritorious cases in which a union is actively engaging in an organizational campaign and the Region concludes the unfair labor practice activity has undermined employees’ right to make a free and informed choice.



SECTION 10(j) CASES AND EXPEDITED HEARINGS – OPERATIONS MANAGEMENT MEMORANDUM 06-06

In Operations Management (“OM”) Memorandum 06-06, Regional Offices are instructed that when they submit a case to the NLRB’s Injunction Litigation Branch for 10(j) authorization and such relief is authorized, they should seek an early date for a ULP hearing on the merits before an Administrative Law Judge, with the hearing to be held no later than eight weeks from the issuance of the complaint. The memorandum explains that “our experience in potential 10(j) cases in which we proceed first to an expedited hearing has shown that proceeding to hearing quickly when 10(j) injunctive relief may be warranted substantially enhances our ability to obtain such relief from a district court if injunction proceedings are thereafter necessary.”

The memorandum also encourages Regional Offices, where appropriate, to commit additional resources to cases in which Section 10(j) injunctive relief has been authorized. Doing so, noted the Associate General Counsel, “will likely save the Regions considerable time in responding to and defending against any discovery requests in connection with petitions for Section 10(j) injunctive relief. In addition, using the administrative record should substantially limit the number of witnesses to be called in support of the 10(j) petition.”

CONCLUSION

These memoranda suggest a significant and aggressive initiative on the part of the NLRB’s General Counsel to seek judicial intervention, in the form of Section 10(j) injunctive relief and/or extraordinary remedies, to empower and protect union organizing and to nurture and protect new collective bargaining relationships. In furtherance of this goal, the first memorandum, GC Memorandum 06-05, “First Contract Bargaining Cases,” directs Regional Offices to consider Section 10(j) injunctive relief and other special remedies for cases involving initial contract bargaining violations. The second memorandum, “Section 10(j) Cases and Expedited Hearings,” directs Regional Offices to seek expedited injunctive hearings for all cases in which such relief is warranted to prevent remedial failure.

The full text of the NLRB memoranda are available online from the [NLRB’s website](#):

- *First Contract Bargaining Cases*
- *Section 10(j) Cases and Expedited Hearings*

If you have any questions regarding the NLRB memoranda or their impact upon your workplace, please contact **Steven M. Swirsky** at (212) 351-4640, sswirsky@ebglaw.com.

Matthew S. Banner, an associate in **EBG’s New York office**, assisted with the preparation of this alert.

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