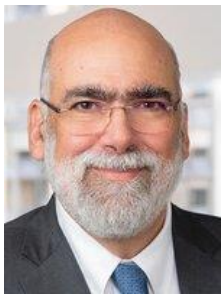
# Employer Takeaways From NLRB Top Cop Immigration Memo

By **Steven Swirsky and Erin Schaefer** (December 15, 2021)



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On Nov. 8, National Labor Relations Board General Counsel Jennifer A. Abruzzo issued General Counsel Memorandum 22-01, titled "Ensuring Rights and Remedies for Immigrant Workers Under the NLRA."[1]

The memorandum restated the NLRB's long-held view that the National Labor Relations Act applies and affords its protections to all individuals in an employer-employee relationship, regardless of their immigration status or work authorization.

In the memorandum, the NLRB's general counsel, who functions as the agency's chief enforcement officer, recommitted to "zealously guard[ing] the right of immigrant workers to be free of immigration-related intimidation tactics" designed to prevent employees from engaging in protected concerted and union activities and to deter employees from reporting violations under the NLRA.

The memorandum is not so much a departure from previous NLRB policy as a restatement of existing policy and a public recommitment to conduct outreach to immigrant communities . It is also a message to the business and legal communities that the current general counsel is committed to this policy in all aspects of the NLRB's investigation, litigation, enforcement and remedial activities.

The NLRB has long had an agreement with the U.S. Department of Homeland Security so that the two agencies can communicate with each other when appropriate.

For example, the NLRB and DHS can communicate and ensure that employees' rights to organize are not infringed upon if an employer contacts Immigration and Customs Enforcement seeking to have employees who may be engaged in union organizing or other forms of activity that are protected by the NLRA deported.

Similarly, the NLRB has long sought U and T visas where appropriate to protect unauthorized employees from deportation as a result of protected concerted activities.

Abruzzo also committed to requesting deferred action from DHS where appropriate, even in the absence of a visa.

The memorandum is also consistent with Abruzzo's previously announced policy of seeking all available remedies to address unfair labor practice violations.[2] In the memorandum, Abruzzo reaffirmed that "the [board's] remedial initiatives apply to all charging parties and discriminates without regard to immigration status."

The NLRB operates in a "don't ask, don't tell" environment as it relates to an employees' immigration status.

Board agents who conduct NLRB investigations and unfair labor practice litigation do not ask employees about their immigration status.

Unless the board has actual or constructive knowledge of an employee's immigration status, an investigation and litigation proceeds as if the employee is lawfully eligible to be employed in the U.S., and thus entitled to reinstatement and full back pay if the board can establish that the employee was the subject of unfair labor practices.

Under the NLRBs view, the question of whether the NLRA was violated is a totally separate issue from the question of what the remedy for such a violation may be. Therefore, an employee's ability to be reinstated is irrelevant during the investigation and initial litigation phase of an unfair labor practice case.

As noted in the memorandum, if the NLRB concludes that it has actual or constructive knowledge that an alleged discriminatee is not authorized to work in the U.S., the board is precluded from seeking unconditional reinstatement and full back pay.

In those instances, the board routinely will resolve this issue by ordering an employer to make a position available to such an individual for a period of years such that if the employee is able to obtain work authorization during that period of time, the employer must reinstate the employee.

These conditional offers of reinstatement are commonplace in settlement agreements as well as in compliance proceedings.

Consistent with Abruzzo's instructions, employers should expect the NLRB to be aggressive in fashioning remedies where back pay and reinstatement are not available due to an individual's lack of work authorization.

For example, Abruzzo suggests that

> [r]egions 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.

In other words, the general counsel is arguing that in cases where an individual cannot lawfully be reinstated, the union — typically one engaged in organizing the employer's workforce — should be given the right to designate another individual to fill the spot of the terminated employee that it believes will support its efforts.

Another type of remedy the memorandum indicates the board is likely to seek is consequential damages. While the NLRA does not allow the board to seek or award back pay for employees without work authorization, the general counsel has indicated that the office will seek consequential damages on behalf of employees who suffer unfair labor practices.

For example, where an employee is found to have been terminated unlawfully but is not eligible for an award of back pay because he or she lacks employment authorization, the general counsel is taking the position that the NLRB should seek other forms of economic relief for such an individual.

According to the memorandum, these other forms of economic relief may include reimbursement for additional health care costs due to loss of insurance and compensation for other forms of harm an individual has suffered as a result of the discharge.

As an example of the latter, the memorandum notes that if an employee without work

authorization must move because she cannot afford her home due to loss of income, the general counsel has indicated that the board may seek to have the cost of moving and transportation costs paid by the employer.

The general counsel and courts have distinguished these damages as separate from wages and benefits that the NLRB is not permitted to seek for workers without authorization.

Because threats of deportation and threats to call immigration authorities are considered by the NLRB to be inherently coercive, the general counsel will consider seeking injunctive relief under NLRA Section 10(j) early in an appropriate case, regardless of the alleged discriminatees' immigration status.

The NLRB's creative remedies will likely be included in any injunctive relief sought.

Attorneys should also be aware of a more defensive posture from the general counsel during litigation as it relates to immigration status.

It has long been the policy of the NLRB's general counsel to bifurcate unfair labor practice proceedings from subsequent compliance proceedings. Compliance proceedings are the proper forum where the question of damages — both entitlement and amount — are decided.

Whether an employee has work authorization and is eligible to collect back pay or accept reinstatement are questions that go to the remedy for an unfair labor practice.

For that reason, during an unfair labor hearing that is concerned with whether an unfair labor practice has in fact been committed, questions regarding an employee's work authorization generally draw objections that are sustained by administrative law judges as not germane to the issues being litigated in an unfair labor practice proceeding.

Similarly, subpoenas that seek proof of work authorization or touch on entitlement to back pay are generally quashed if they are outside the compliance process.

Employers' counsel can expect more strident objections and anticipatory motions to preclude any questions from counsel about such topics during an unfair labor practice proceeding.

Further, the memorandum reiterates the general counsel's position that attempts to inquire into an employee's work authorization may be pursued as conduct that interferes with such employees' rights to engage in concerted activity protected by the NLRA, and thus independent unfair labor practices.

Again, this is not altogether new.

In Deep Distributors of Greater NY in 2017,[3] the board held that an attorney violated the NLRA where he announced that "immigration is here" as he walked into an NLRB hearing room full of employee witnesses, and later said loudly in the hearing of employees that

> they are not going to get a penny from my client. This is a waste of time. They are a bunch of immigrants … if they get up to the stand and give a statement they will be committing perjury so I'm going to take it to the grand jury so they can be deported.

Such statements were held to violate the NLRA because they "had a tendency to interfere

with the employees' uninhibited right to freely appear at the Board's hearing and give testimony." The U.S. Court of Appeals for the Second Circuit upheld the ruling in 2018.

Moreover, as the NLRB held in 2011 in Flaum Appetizing Corp.,

> [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.[4]

Employers should be aware of these restrictions and make sure that any discussion with the board about potential employee work authorization is only in the context of a discussion about settlement or the remedy for an unfair labor practice.

Moreover, an employer that decides to challenge a board remedy should be armed with actual and constructive knowledge of an employee's lack of work authorization.

For example, a no-match letter issued by the Social Security Administration is not sufficient to demonstrate that the individual employee does not have authorization to work in the U.S.

The board has also made a splash with its Nov. 10 announcement of a joint initiative[5] between the U.S. Department of Labor, the NLRB and the U.S. Equal Employment Opportunity Commission that is devoted to vigorous enforcement of laws against retaliation through closer interagency cooperation.

The NLRB will be conducting outreach with these sister agencies targeted at immigrant communities to advise these communities of their rights and to train staff at each agency.

Such initiatives are nothing new, but the renewed emphasis on outreach will ensure that employees are aware of their rights under the NLRA.

The initiative also may signal increased cooperation by government agencies. Typically, there are multiple federal statutes implicated in cases involving employees without work authorization, and renewed cooperation could mean more coordinated federal agency response.

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[1] https://apps.nlrb.gov/link/document.aspx/09031d45835cbb0c.

[2] https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-seeking-all-available.

[3] Deep Distributors, 365 NLRB No. 95, at 20 (2017).

[4] Flaum Appetizing Corp., 357 NLRB 2006, 2012 (2011).

[5] https://www.nlrb.gov/news-outreach/news-story/the-national-labor-relations-board-us-department-of-labor-us-equal.