



NLRB Expands Regional Authority in First Contract Claims

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With a new General Counsel's Memorandum, the NLRB has increased the autonomy of Regional Offices to seek remedies against Employers in "first contract" charges. On February 18, 2011, Acting General Counsel Lafe E. Solomon issued memorandum GC 11-06 to each of the Regional Offices of the NLRB. The memo, which represents a shift from the NLRB's prior policy, instructs the Regions that they no longer need to seek NLRB approval before seeking certain remedies in unfair labor practice charges involving first contracts.

"First contract" refers to the period after a Union is certified, during which the Union and the Employer are negotiating their first collective bargaining agreement. The first contract period has long been a focus of the Board. In its view, Unions are particularly vulnerable during this initial period and require special protection.

In the past, however, the Board had authorized Regional Offices to seek additional remedies (beyond the traditional bargaining order) in first contract cases only after getting prior approval from the NLRB's Division of Advice. In this way, seasoned NLRB staff attorneys would evaluate the facts in each charge, and determine what remedies, if any, might be appropriate. The process normalized the Board's responses (among the Regional Offices) to first contract charges, and provided an important check on over-zealous Regions. Under the new memo, Regions may now skip this step.

As of now, Regions can seek the following additional remedies without prior approval:

- **Notice reading.** The Region can seek to force the Employer to post, and even read aloud to employees, a notice that informs employees of the rights the Employer allegedly violated.

- **Bargaining on a fixed schedule.** The Region can seek to enforce a fixed bargaining schedule. For instance, Employers may be required to bargain in six-hour sessions, four times a month, until an agreement is reached.

- **Certification year extensions.** Under the statute, a newly-certified Union may not be challenged or decertified during the initial "certification year." The Region may now seek to extend this certification period, typically for a full additional year (and no less than six months).

The Region may also seek to have the Employer reimburse the Union for its bargaining and litigation expenses, or even seek immediate injunctions against the Employer in federal court (though these remedies still require prior approval from the General Counsel's Office).

The Region's ability to seek these remedies can be triggered by "first contract" unfair labor charges involving certain types of allegations. These may include allegations that the Employer:

- refused to bargain, or engaged in "surface" bargaining;
- rejected too many of the Union's proposed bargaining dates or otherwise delayed negotiations;
- refused to provide requested and relevant information;
- made unilateral changes to terms or conditions of employment;
- discriminated against Union members;
- dealt directly with employees (bypassing the Union);
- unlawfully subcontracted work; or
- similar allegations of discrimination or bad faith bargaining.

Employers in the "first contract" stage should beware if any of these allegations are brought against them. Although the available remedies might seem appropriate for legitimate violations, Unions negotiating first contracts frequently bring offensive charges with little foundation to gain bargaining leverage. That is, even if it has little or no evidence, a Union may file an unfair labor practice charge raising the above allegations simply to gain an advantage in the negotiations. The Regions can now seek remedies based on such charges without any additional internal checks.

The streamlining of these pro-Union remedies could have a significant impact on Employers. The "first contract" period is a critical time, and the first CBA between the Union and the Employer will establish the baseline for future negotiations. By taking advantage of the charge process, and the Regions' new autonomy, Unions can strengthen their position and severely limit the Employer's flexibility during these crucial early stages.

For more information about this topic, please contact the authors or any member of the Williams Mullen Labor & Employment Team.

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