## OFFICE OF THE GENERAL COUNSEL

**MEMORANDUM GC-** 15-03 February 27, 2015

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

FROM: Richard F. Griffin, Jr., General Counsel

SUBJECT: Updated Procedures in Addressing Immigration Status Issues that Arise During Unfair Labor Practice Proceedings

The NLRA protects all employees covered by the Act regardless of immigration status; however, immigration status issues may affect remedies and present certain obstacles for enforcing the Act. This memorandum provides updated procedures that will apply when immigration status issues are raised during NLRB investigations and proceedings.[1] The new procedures require that Regions immediately contact the assigned representative(s) in the Division of Operations-Management[2] as soon as they become aware, in any stage of a case, that immigration status issues may impact our ability to remedy or litigate a potential unfair labor practice violation. Operations-Management will: (1) provide technical assistance; (2) determine whether interagency engagement could assist in the effectuation of the Act; (3) discuss with the Region and/or request that the Region submit to Advice whether it is appropriate to seek certain additional remedies; and (4) coordinate the agency's response to these issues.

### I. Immigration Status Issues During the Investigation and Liability Stages of an Unfair Labor Practice Case

The law is well-settled that the National Labor Relations Act protects all statutory employees, regardless of their immigration status.[3] Accordingly, Regions should continue the current practice of explaining to witnesses, alleged discriminatees and parties that an individual's immigration status is not relevant to the investigation of whether the Act has been violated. Similarly, the Region should make a merit determination without considering

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[1] This Memorandum supplements GC Memorandum 02-06, *Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after Hoffman Plastic Compounds, Inc.*; OM Memorandum 11-62, *Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings*; and OM Memorandum 12-55, *Case Handling Instructions for Compliances Cases after Flaum Appetizing Corp.*

[2] Regions can find contact information for the assigned counsel for this area on the NLRB's Insider page. Currently, assigned counsel are AGC Aaron Karsh and DAGC David Kelly.

[3] *Concrete Form Walls, Inc.*, 346 NLRB 831, 833 (2006) ("based on longstanding Board law and the Supreme Court's and Congress' explicit approval of that law, undocumented workers remain statutory employees under Section 2(3)"), *enf'd* 225 F. App'x 837, 838 (11th Cir. 2007); *Agri Processor Co.*, 347 NLRB 1200 (2006), *enf'd* 514 F.3d 1 (D.C. Cir. 2008); *Sure Tan, Inc. v. NLRB,* 467 U.S. 883, 892 (1984).

employees' immigration status. Where the charged party's defense to an alleged unlawful discharge is that it was motivated by the need to comply with immigration laws, the relevant inquiry at the merit stage is only whether the charged party's asserted reason is the motivating cause for the adverse action.[4] Thus, even in these situations the investigatory focus should be on employer motivation and the Region should not investigate or determine the individual employee's actual immigration status. However, in these situations, it is important for the Region to contact Operations-Management for the reasons set forth herein.

## II. Interagency Engagement

In cases where immigration status issues may impact our ability to remedy or litigate a potential unfair labor practice violation, Operations-Management will work with the Region to determine whether:

- potential discriminatee(s) and/or witness(es) could be eligible for a U or a T Visa, or for deferred action and whether the NLRB should certify and/or facilitate this process;[5]
- it is appropriate to refer the case to the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices pursuant to the NLRB-OSC Memorandum of Understanding;[6]
- it is appropriate to engage with the Department of Homeland Security regarding their enforcement operations.[7]

## III. Remedies

In meritorious cases where immigration status issues may impact our ability to remedy or litigate a potential unfair labor practice violation, the Region, Operations-Management, and where appropriate, the Division of Advice will consider whether additional remedies should be sought to address the potential limitations on backpay and reinstatement that may arise in compliance.[8] In this regard, the Region should also explore and bring to the attention of

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[4] *Concrete Form Walls, Inc.,* 346 NLRB at 835 (even if employer's evidence was sufficient to show that employees it discharged were undocumented workers, its new-found concern with complying with immigration law was insufficient to excuse the termination of the only Hispanic employees who voted in the election); *Sure Tan,* 467 U.S. at 895, n.6 ("It is by now well established ... that if the reason asserted by an employer for a discharge is pretextual, the fact that the action taken is otherwise legal or even praiseworthy is not controlling").

[5] *See* OM 11-62 for more information on U Visas and T Visas including procedures guiding a Region's response to a request to certify a U visa application.

[6] *Available at* http://www.justice.gov/crt/about/osc/pdf/MOU/NLRB.pdf; *see also*, OM 13-59, *Memorandum of Agreement with Office of Special Counsel for Immigration Related Unfair Employment Practices.*

[7] Immigration and Naturalization Service, Operating Instruction 287.3a, *Questioning Persons during Labor Disputes* (1996); John Morton, *Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs Memo* (June 17, 2011); U.S. Department of Labor, U.S. Department of Homeland Security, Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (Dec. 11, 2011).

[8] *See Mezonos Maven Bakery,* 357 NLRB No. 47, slip op. at 6 (2011) (Pearce, Liebman concurring) (explaining a willingness to consider any remedy within the Board's statutory powers that would prevent

Operations-Management any alternative remedies that the Region seeks and/or that a charging party advances as necessary or appropriate to the particular circumstances. The Region, Operations-Management, and/or the Division of Advice, should consider whether to seek any of the following:

- Notice reading;[9]
- Publication of the notice in newspapers and/or other forums;[10]
- Training for employees on their rights under the Act;[11]
- Training for supervisors/managers on compliance with the Act;[12]
- *Gissel* bargaining order;[13]
- Union access to employee contact information;[14]
- Reimbursement of organizing[15] or bargaining[16] expenses;
- Consequential damages;[17]
- Instatement of a qualified referred candidate;[18] and
- Any other remedies that may be appropriate in a particular case.

## IV. Formal Settlements

The Supreme Court's *Hoffman Plastic*[19] decision emphasized that even where backpay and reinstatement remedies are not available due to a discriminatee's immigration status, the

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an employer that discriminates against undocumented workers because of their protected activity from being unjustly enriched by its unlawful conduct).

[9] *See* GC Memorandum 02-06 at 4. *See also Fieldcrest Cannon Inc.*, 318 NLRB 470 (1995), *enf'd in relevant part*, 97 F.3d 65 (4th Cir. 1996).

[10] *See* notice publication orders in *Pacific Beach Hotel,* 361 NLRB No. 65 (Oct. 24, 2014), slip op. at 7; *Fieldcrest Cannon, Inc.*, 318 NLRB at 473; and *Three Sisters Sportswear Co.*, 312 NLRB 853, 854 (1993).

[11] Other federal labor enforcement agencies routinely incorporate mandatory training for supervisory and non-supervisory employees into their administrative orders, settlement agreements, and judicially-monitored consent decrees, including the Department of Labor, the Department of Justice's Office of Special Counsel, and the Equal Employment Opportunity Commission.

[12] *Id.*

[13] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). *See Concrete Form Walls, Inc.*, 346 NLRB at 839; *see also Michael's Painting, Inc.*, 337 NLRB 860, 861 (2002), *enf'd* 85 F. App'x 614 (9th Cir. 2004).

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

[15] *Id.*; *Texas Super Foods*, 303 NLRB 209 (1991).

[16] *See Pacific Beach Hotel*, 361 NLRB No. 65; *Regency Service Carts,* 345 NLRB 671 (2005); *Dish Network Service Corp.*, 347 NLRB No. 69 (July 31, 2006); *HTH Corp.*, 356 NLRB No. 182 (June 14, 2011), *enf'd*, 693 F.3d 1051 (9th Cir. 2012); *Whitesell Corp.*, 357 NLRB No. 97 (Sept. 30, 2011).

[17] *See, e.g.*, *Freeman Decorating Co.*, 288 NLRB 1235, n.2 (1988).

[18] *See A.P.R.A. Fuel Oil Buyers Group,* 320 NLRB 408, 417-419 (1995) (Browning, dissenting in part), *enf'd*, 134 F.3d 50 (2d Cir. 1997).

[19] *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002).

Board may utilize the federal courts' power of contempt to ensure compliance and to deter future violations. Therefore, in cases where immigration status issues may impact our ability to remedy or litigate a potential unfair labor practice violation, the Region should seek a formal settlement. This will enable the Agency to seek the immediate assistance of the federal courts in the event of noncompliance with the terms of the extant settlement and in the event of future violations.

## V. Training and Further Guidance

Operations-Management, in conjunction with other Divisions at Headquarters and with Regional representatives, will develop a training program on best practices in case handling with respect to immigration issues. Operations-Management will also provide further guidance on the issues discussed in this Memorandum. As these issues are constantly evolving, the new procedures will be revisited periodically, based on feedback from Regional offices, to ascertain the need for Regions to continue contacting Operations-Management and/or to make other modifications as needed.