

Acting NLRB General Counsel Announces a “Renewed Agency-Wide Focus on Interim Injunctive Relief”

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Introduction

On September 30, the National Labor Relations Board’s (NLRB’s or the Board’s) Acting General Counsel Lafe E. Solomon outlined a new initiative to expedite the processing of Section 10(j) requests in cases involving alleged unlawful discharges during union organizing campaigns. The new “priority” initiative for the NLRB’s Section 10(j) program, as announced in a GC Memorandum to the Board’s Regional Offices (Memorandum GC 10-07) and a letter to Regional Directors, institutes new timelines and procedures to accelerate the review of unfair labor practice charges alleging an unlawful discharge occurring during a union organizing campaign. The aim of these new procedures and timelines is to expedite the process the NLRB uses to decide whether to seek a federal court injunction under Section 10(j) of the National Labor Relations Act (NLRA or the Act). Thus, the agencywide focus targets both early identification by the General Counsel of appropriate cases for Section 10(j) interim injunctive relief, and the timeline for attempting to obtain this relief, with an emphasis on obtaining it at the earliest possible stage. “My goal is to give all unlawful discharges in organizing cases priority action and a speedy remedy,” declared Acting General Counsel Solomon when outlining this initiative. “We need to ensure that the statutory rights of unlawfully fired employees are restored in real time.”

History of Section 10(j)

Since Congress amended the NLRA in 1947, the NLRB has had the authority under Section 10(j) of the Act to seek an injunction in a federal district court for interim relief while an unfair labor practice case is being processed by the Board. This mechanism is invoked when the Board believes expedited and interim relief is necessary so that the Act’s goals are not frustrated by delay associated with the litigation of the underlying unfair labor practice charge, which can take months, if not years.

The Board must first authorize the General Counsel to seek Section 10(j) relief. After receiving such authorization, the General Counsel on behalf of the Board files a complaint in the federal district court where the alleged unfair labor practice occurred. Examples of situations that can cause the Board to seek Section 10(j) relief include interference with an organizing campaign, undermining of the bargaining representative, mass picketing and violence, and a successor employer’s refusal to recognize a union and bargain with it. For decades, Section 10(j) has been used as an enforcement tool (albeit with varying frequency) by NLRB General Counsel. The various circuit courts of appeal have differing standards for granting Section 10(j) relief.

What Is the New Initiative?

Seeking to enhance the NLRB's current Section 10(j) program, and to ensure more timely court filings, Acting General Counsel Solomon set forth in the GC Memorandum an optimal timeline for processing "Nip-in-the-bud Discharge Cases," as well as additional best practice procedures to facilitate timely processing of "Nip-in-the-bud Discharge Cases." The optimal timeline includes the following directives to the Regional Offices:

- As soon as possible after a charge is filed, the Regional Office should identify whether the charge is a potential Section 10(j) organizing campaign discharge case.
- Where possible, the "lead" affidavit should be taken within seven calendar days of the filing of the charge.
- The Regional Office should attempt to obtain, within 14 calendar days of the filing of the charge, all of the charging party's evidence.
- If the charging party's evidence "points to a prima facie case on the merits and suggests the need for injunctive relief," the Regional Office should notify the charged party in writing that the region is seriously considering a petition for Section 10(j) relief, which would include a reinstatement order for discharged employees, and request that the charged party submit a position statement on that issue within seven calendar days of the Regional Office's letter.

As part of this process, consideration of Section 10(j) relief will now be expedited at the NLRB's Washington, D.C., headquarters, and Acting General Counsel Solomon will "personally review and decide whether Section 10(j) authorization should be sought in all cases."

In a statement also released on September 30, NLRB Chairman Wilma B. Liebman said that "[t]he Board recognizes that 10(j) injunctions are a vital enforcement tool and time is of the essence in this kind of case." The Board announced that it will post case names and status updates for all Section 10(j) injunction cases authorized by the Board on its website, www.nlr.gov, beginning October 5.

What Should Employers Expect?

This change in procedures does not mandate a change in the law. Presumably, the same evidence necessary to prosecute a discriminatory discharge case will still be required. But the NLRB's call for a "renewed Agency-wide focus on interim injunctive relief" and expedited timing and procedures for the NLRB's Section 10(j) program undoubtedly means employers can expect to see a dramatic increase in Board requests for injunctive relief when a charge alleging an unlawful discharge is filed during an organizing campaign. Upon receiving notice of the filing of such a charge, employers should conduct a privileged investigation of the circumstances that generated the charge, and quickly prepare to defend against a possible NLRB claim that Section 10(j) interim injunctive relief is necessary.

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