

NLRB Issues Guidance Limiting Deferral to Arbitration Awards and Grievance Settlements

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On January 20, the Acting General Counsel for the National Labor Relations Board (NLRB or Board) issued a “guideline” memorandum advocating more limited deferral to arbitration awards and grievance settlements in cases involving Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act (NLRA or Act). These cases often allege that an employer’s discharge or discipline decision constitutes unlawful antiunion discrimination or interference with protected rights. Consequently, the new standards may substantially affect cases involving significant backpay liability. The new standards also increase the risk that employers must defend employment actions in NLRB litigation simultaneously with grievance arbitration challenging the same decisions, possibly with different outcomes.

The new approach also includes possible Board review of settlement agreements entered into between the bargaining parties prior to conclusion of the arbitration process. Such settlements would be evaluated as “non-Board settlements” and may be rejected by the Board in determining whether to continue prosecution of a deferred Section 8(a)(1) or 8(a)(3) case.

Background

The Acting General Counsel’s memorandum reconfigures the balance between the protection of NLRA rights and the acceptance of arbitration as an alternative to adjudicating claims before the Board. As the memorandum explains:

[I]n Section 8(a)(1) and 8(a)(3) statutory rights cases, the Board should no longer defer to an arbitral resolution unless it is shown that the statutory rights have adequately been considered by the arbitrator. This includes not only cases involving Section 8(a)(1) and 8(a)(3) discipline and discharge, but also all other cases involving Section 8(a)(1) conduct that is subject to challenge under a contractual grievance provision.

The guideline memorandum does not have the force of law, but it will determine how unfair labor practices brought pursuant to Section 8(a)(1) and 8(a)(3) of the Act will be handled by the Board’s Regional Offices. It defines more limited circumstances under which the Board should defer to arbitration awards involving conduct alleged to violate Section 8(a)(1) and 8(a)(3).

The memorandum sets forth the following processes for cases where the Charging Party alleges violations of an employee’s rights arising under Section 8(a)(1) and 8(a)(3) of the Act:

1. Prior to deferring any matter to the arbitration process, and before making any arguable merit determination, Regions should take affidavits from the Charging Party and from all witnesses in control of the Charging Party.
2. If there is arguable merit to the charge, and the case is otherwise deferrable under Board precedent, the Region should defer the charge. If there is no arguable merit, the Region should dismiss the charge, absent withdrawal.
3. When the arbitral award issues, the Region should determine if the party urging deferral can demonstrate that deferral to the arbitrator's award is appropriate.

The memorandum indicates that postarbitral deferral of Section 8(a)(1) and 8(a)(3) cases should be analyzed as follows:

1. The party urging deferral should have the burden of demonstrating that (a) the contract incorporated the statutory right alleged to have been violated in the charge or that the parties presented the statutory issue to the arbitrator and (b) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue.
2. If the party urging deferral makes this showing, the Board should defer unless the award is "clearly repugnant" to the Act. The award should be considered clearly repugnant if it reached a result that is "palpably wrong," i.e., the arbitrator's award is not susceptible to an interpretation consistent with the Act.

According to the memorandum, where a Section 8(a)(1) or 8(a)(3) case is initially deferred to a contractual arbitration process, but the matter is resolved through a settlement before an award is issued by an arbitrator, the Board is not to defer to that settlement agreement unless the parties themselves intended the settlement to also resolve the unfair labor practice issues. Where the evidence demonstrates that the parties intended to settle the unfair labor practice charge, the Board should continue to apply current non-Board settlement practices and procedures by examining all the surrounding circumstances including, but not limited to, the following:

1. Whether the parties have agreed to be bound by the General Counsel's position
2. Whether the settlement is reasonable in light of the alleged violations, risks of litigation, and stage of litigation
3. Whether there has been any fraud, coercion, or duress
4. Whether the respondent has a history of violations or of breaching previous settlement agreements

Grievance Settlements

The treatment of grievance settlements suggested in the Acting General Counsel's memorandum implicates issues that were also addressed in a 2006 General Counsel memorandum regarding non-Board settlements. The 2006 memorandum stated that Regions should not approve non-Board adjustments if they do any of the following:

1. Include a provision requiring an employee to release future rights, with the exception that an employee may knowingly waive the right to seek employment with a named employer in the future.
2. Prohibit a discriminatee from providing assistance to other employees.
3. Prohibit a discriminatee, absent special circumstances, from engaging in discussions about the employer or the terms of the settlement with other employees, except that defamatory statements

John F. Ring
Joseph E. Santucci, Jr.

202.739.5096
202.739.5398

jring@morganlewis.com
jsantucci@morganlewis.com

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