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## National Labor Relations Board's General Counsel Issues Case Handling Memo On How To Handle Immigration Issues In Compliance Hearings

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In 2011, the National Labor Relations Board (“NLRB”) struck an employer’s affirmative defenses to a back pay specification in an unfair labor practice case and rejected the employer’s bid to subpoena extensive documentation from its unlawfully discharged employees about their immigration status in an effort to prove they were not entitled to back pay. *Flaum Appetizing Corp.*, 357 NLRB No. 162 (December 30, 2011). On Friday, May 4, the General Counsel’s office issued a case handling memo setting forth guidance to regional offices for investigating and litigating compliance issues under *Flaum*. GC MEMORANDUM OM 12-55 (May 4, 2012).

The memo notes that, in general, an employee’s work authorization status is irrelevant to the merits of an unfair labor practice (“ULP”) complaint; the General Counsel’s office will object to attempts to litigate the immigration status of discriminatees at the ULP hearing. Instead, the immigration status of a purported discriminatee only becomes a triable issue at the compliance stage.

Employers who intend to assert at the compliance stage that certain employees are ineligible for back pay due to their immigration status will be required to provide a full accounting of evidence that they plan to rely upon. When an employer fails to state in its answer sufficient supporting facts, the regions will file a pre-trial motion for a bill of particulars to obtain the employer’s position and specific evidence that the employee is ineligible to work in this country. If the bill fails to show sufficient evidence of work ineligibility, the regions will file a motion to strike the affirmative defenses. Should the employer fail to state in its answer other issues affecting its decision not to remit back pay, the regions are instructed to move for summary judgment. In accordance with *Flaum*, employers may not condition reinstatement offers on work re-verification.

The memo also takes aim at those employers who issue subpoenas for an employee’s work authorization documents in anticipation of the compliance stage. According to the General Counsel, an employer’s issuance of a subpoena for the employee’s work authorization documents may constitute a ULP if the subpoena is issued for purposes of harassing the employee. ■

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