OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 18-02 December 1, 2017

TO: All Regional Directors, Officers-in-Charge, and Resident Officers
FROM: Peter B. Robb, General Counsel
SUBJECT: Mandatory Submissions to Advice

As some of you know, I have worked as a field attorney in Region 5, a supervisor for the FLRA, and Chief Counsel to a Board Member where I also worked on budget and labor relations issues. My many years in private practice dealt primarily with NLRA issues. I have sat where many of you now sit. I have not forgotten what that was like, and I remember the lessons learned. It is great to be back. My primary objective will be to assist you in fulfilling the mission of the Agency.

As you know, the last eight years have seen many changes in precedent, often with vigorous dissents. The Board has two new members who have not yet revealed their views on many issues. Over the years, I have developed some of my own thoughts. I think it is our responsibility to make sure that the Board has our best analysis of the issues. To that end, I have developed the following guidelines which will serve as my mandatory Advice submission list, in the tradition of my predecessors as General Counsel. For convenience, I have tried to group the issues. If you have further questions, please contact Advice.

First, we will base decisions on extant law, regardless of whether I may agree with the legal principles. Cases should be processed and complaints issued according to existing law. No new theories will be presented on cases that have been fully briefed to the Board in order to avoid delay.

Second, again in order to avoid delay, the General Counsel will not be offering new views on cases pending in the courts, unless directed to by the Board or courts.

Third, cases that involve significant legal issues should be submitted to Advice. Significant legal issues include cases over the last eight years that overruled precedent and involved one or more dissents, cases involving issues that the Board has not decided, and any other cases that the Region believes will be of importance to the General Counsel. Regions should submit these cases through brief memoranda that provide the key procedural dates, the relevant facts, a synopsis of the significant legal issue(s), and a list of other allegations in the case. Cases where complaint issuance is appropriate under current Board law, but where we might want to provide the Board with an alternative analysis, may be submitted at any time after the complaint issues, but must be submitted prior to the Region filing a brief or other statement of position to the Board on that issue. Advice will then provide appropriate guidance on how to present the issue to the Board. Examples of

these kinds of issues are set forth below. These examples do not represent all such legal issues and also do not imply how the General Counsel will ultimately argue the case.

Examples of Board decisions that might support issuance of complaint, but where we also might want to provide the Board with an alternative analysis, include:

- Concerted activity for mutual aid and protection
  - Finding conduct was for mutual aid and protection where only one employee had an immediate stake in the outcome (e.g., *Fresh & Easy Neighborhood Market,* 361 NLRB No. 12 (2014) – individual sexual harassment claim)
  - Finding no loss of protection despite obscene, vulgar, or other highly inappropriate conduct (e.g., *Pier Sixty, LLC,* 362 NLRB No. 59 (2015))

- Common employer handbook rules found unlawful
  - Rules prohibiting "disrespectful" conduct (e.g., *Casino San Pablo,* 361 NLRB No. 148 (2014))
  - Rules prohibiting use of employer trademarks and logos (e.g., *Boch Honda,* 362 NLRB No. 83 (2015))
  - No camera/recording rules (e.g., *Rio-All Suites Hotel & Casino,* 362 NLRB No. 190 (2015); *Whole Foods Market,* 363 NLRB No. 87 (2015))
  - Rules requiring employees to maintain the confidentiality of workplace investigations (e.g., *Banner Estrella Medical Center,* 362 NLRB No. 137 (2015))
  - Other rules where the outcome would be different if Chairman Miscimarra's proposed substitution for the *Lutheran Heritage* test was applied (see dissent in *William Beaumont Hospital,* 363 NLRB No. 162 (2016))

- *Purple Communications*
  - Finding that employees have a presumptive right to use their employer's email system to engage in Section 7 activities (361 NLRB No. 126 2014)

- *Quietflex*
  - Finding work stoppages protected under the *Quietflex* standard in a variety of contexts (including the retail sales floor) and giving heavier weight to those factors that tend to favor protection (e.g., *Los Angeles Airport Hilton Hotel & Towers,* 360 NLRB No. 128 (2014); *Nellis Cab Company,* 362 NLRB No. 185 (2015); *Wal-Mart Stores, Inc.*, 364 NLRB No. 118 (2016))

- Off-duty employee access to property
    - Applying *Republic Aviation* to picketing by off-duty employees (e.g., *Capital Medical Center*, 364 NLRB No. 69 (2016), equating picketing with handbilling despite greater impact on legitimate employer interest (including patient care concerns))
    - Finding that access must be permitted under *Tri-County* unless employees are excluded for all purposes, including where supervisor expressly authorized access (e.g., *Piedmont Gardens*, 360 NLRB No. 100 (2014))

- Conflicts with other statutory requirements
    - Finding racist comments by picketers protected under *Clear Pine Mouldings* because they were not direct threats (*Cooper Tire & Rubber Co.,* 363 NLRB No. 194 (2016))
    - Finding social media postings protected even though employee's conduct could violate EEO principles (e.g., *Pier Sixty, LLC,* 362 NLRB No. 59 (2015))

- *Weingarten*
    - Expanding range of permissible conduct by union representatives in *Weingarten* interviews (e.g., *Fry's Food Stores,* 361 NLRB No. 140 (2015); *Howard Industries,* 362 NLRB No. 35 (2015))
    - Application of *Weingarten* in the drug testing context (e.g., *Manhattan Beer Distributors,* 362 NLRB No. 192 (2015))

- Disparate treatment of represented employees during contract negotiations
    - Finding unlawful the failure to give a company-wide wage increase to newly represented employees during initial contract bargaining, even though there was no regular, established annual increase and the employer was concerned that it would violate the Act if it unilaterally provided the increase to represented employees (*Arc Bridges, Inc.,* 362 NLRB No. 56 (2015))

- Joint Employer
    - Finding joint employer status based on evidence of indirect or potential control over the working conditions of another employer's employees (*Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery,* 362 NLRB No. 186 (2015))

- Successorship
    - Finding *Burns* successorship based on the hiring of predecessor employees that was required by local statute (e.g., *GVS Properties,* 362 NLRB No. 194 (2015))

  - Finding "perfectly clear" successorship where employer had effectively communicated its intent to set new terms prior to inviting existing employees to accept employment (e.g., *Creative Vision Resources,* 364 NLRB No. 91 (2016))
  - Finding "perfectly clear" successorship where predecessor employer (but not successor) had communicated to employees that they would receive comparable wages and benefits from successor (*Nexeo Solutions*, 364 NLRB No. 44 (2016))

- Unilateral changes consistent with past practice
  - Finding unlawful unilateral changes after contract expiration where changes were similar to employer's earlier practice (e.g., *E.I. Dupont de Nemours*, 364 NLRB No. 113 (2016), overruling *Courier-Journal,* 342 NLRB 1093, 342 NLRB 1148 (2004))

- *Total Security*
  - Establishing duty to bargain before imposing discretionary discipline where parties have not executed initial collective bargaining agreement (364 NLRB No. 106 (2016))

- Duty to provide witness statements to union
  - Finding that witness statements must be disclosed if that would be appropriate under the *Detroit Edison* balancing test (*Piedmont Gardens*, 362 NLRB No. 139 (2015), overruling *Anheuser-Busch,* 237 NLRB 982 (1984))

- Dues check-off
  - Establishing that the dues check-off obligation survives expiration of the collective-bargaining agreement (*Lincoln Lutheran of Racine,* 362 NLRB No. 188 (2015))

- Remedies
  - Search for work and interim employment expenses recoverable regardless of whether discriminatee had interim earnings (*King Soopers,* 364 NLRB No. 93 (2016))
  - Employer required to remit dues unlawfully withheld without being able to recoup them from employees (*Alamo Rent-a-Car*, 362 NLRB No. 135 (2015))

Fourth, new General Counsels have often identified novel legal theories that they want explored through mandatory submissions to Advice. I have not yet identified any such initiatives, but I have decided that the following memos shall be rescinded:

GC 17-01 (General Counsel's Report on the Statutory Rights of University Faculty And Students in the Unfair Labor Practice Context)

GC 16-03 (Seeking Board Reconsideration of the Levitz Framework)

GC 15-04 (Report of the General Counsel Concerning Employer Rules)

GC 13-02 (Inclusion of Front Pay in Board Settlements)

GC 12-01 (Guideline Memorandum Concerning Collyer Deferral)

GC 11-04 (Default Language)

OM 17-02 (Model Brief Regarding Intermittent and Partial Strikes) (Regions should submit cases involving intermittent strikes to Advice)

Likewise, the following initiatives set out in Advice memoranda are no longer in effect:

- seeking to extend *Purple Communications* to other electronic systems (e.g., internet, phones, instant messaging) if employees use those regularly in the course of their work

- seeking to overturn the Board's *Tri-cast* doctrine regarding the legality of employer statements to employees, during organizing campaigns, that they will not be able to discuss matters directly with management if they select union representation

- seeking to overturn *Oil Capitol* and put the burden of proof on respondent to demonstrate that a salt would not have remained with the employer for the duration of the claimed backpay period

- arguing that an employer's misclassification of employees as independent contractors, in and of itself, violates Section 8(a)(1) (but Regions should submit to Advice any case where there is evidence that the employer actively used the misclassification of employees to interfere with Section 7 activity)

- seeking to overturn *IBM* and apply *Weingarten* in non-union settings

I hope this guidance is helpful, and I look forward to working with you.

/s/
P. B. R.