OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 12-55 May 4, 2012

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

FROM: Anne Purcell, Associate General Counsel

SUBJECT: Case Handling Instructions for Compliance Cases after Flaum Appetizing Corp., 357 NLRB No. 162 (December 30, 2011)

This memorandum sets forth guidance to Regions for investigating and litigating compliance issues under Flaum Appetizing Corp., 357 NLRB No. 162 (December 30, 2011).

The Supreme Court in Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002), concluded that the Immigration Reform and Control Act (IRCA) bars the Board from awarding backpay to any individual who was not legally authorized to work in the United States during the backpay period. However, an employee's work authorization status generally is irrelevant to the merits of an unfair labor practice complaint; it only becomes a triable issue at the compliance stage. See GC Memo 02-06, "*Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after Hoffman Plastic Compounds, Inc.*" at p. 1.

Nonetheless, a respondent may not use the compliance phase as a means to fish for disabling employee conduct under IRCA, i.e., no legal authorization for its employees to work in the United States. In Flaum Appetizing Corp., the Board struck the respondent's affirmative work authorization-based defenses under IRCA to the extent that they were entirely unsupported by evidence. The respondent alleged that none of the discriminatees were entitled to work in the United States under IRCA, and thus none were entitled to backpay under Hoffman Plastics. The respondent provided no evidence with regard to 11 employees it attempted to disqualify. However, it grounded its allegations concerning four other employees on record evidence elicited at the underlying unfair labor practice hearing, in which the employees testified that the green cards they had presented to the employer at the time of their hire were not their own. Concurrent with the hearing, the employer attempted to uncover disabling evidence on all employees by serving identical subpoenas duces tecum demanding their work authorization and identity documents under IRCA, such as passports, alien registration cards, driver's licenses, and social security cards. The Board granted the Acting General Counsel's pre-trial motion to strike respondent's affirmative defenses as to the 11 employees who did not testify against their interests. The Board concluded that, "IRCA does not require that the Board permit baseless inquiry into immigration status in every case in which reinstatement or backpay is granted." Id., slip op. at p. 7.

Rather, "permitting such re-verification [of work authorization status] … without sufficient factual basis … would invite a form of abuse expressly prohibited by IRCA, and would contravene ordinary rules of procedure and undermine the policies of the Act." Id. However, the Board allowed the respondent to elaborate on its immigration-related defenses as to the four discriminatees who testified that their green cards were not their own. It directed respondent to provide an amended bill of particulars to provide adequate elaboration of its claims, without which the administrative law judge would strike the defenses upon a motion by the Acting General Counsel.

Applying Flaum to Protect Board Processes and Employees' Statutory Rights

The decision in Flaum instructs that the Board will not allow a respondent to use Board processes to launch a fishing expedition aimed at discovering unanticipated evidence that might mitigate its backpay liability under Hoffman Plastics. Flaum, slip op. at p. 5, n.8. It is well-settled that a party against whom an affirmative defense is asserted is entitled to a more definite statement or a bill of particulars when those pleadings contain insufficient detail to permit the party against whom the defense is asserted to meet those issues at trial. Thus, in the compliance phase, Regions should demand a full accounting of evidence a respondent intends to rely upon in order to assert that employees are ineligible for backpay under Hoffman Plastics.
In all compliance cases in which respondent fails to state in its Answer sufficient supporting facts for its work-authorization defense to a discriminatee's backpay eligibility, the Region should file a pre-trial motion for a bill of particulars eliciting the respondent's position and specific evidence in support of its assertion that the employee is not eligible to work in this country.

Upon review of the bill, if respondent's pleadings continue to be deficient, the Region should file a motion to strike the affirmative defenses and, if the Answer raises no other issues, a motion for summary judgment.

If subpoenas *duces tecum* have been served on discriminatees in a pending compliance proceeding in which such an affirmative defense has been pled, Regions should move to revoke the subpoenas conditionally, subject to a ruling on the motion for a bill of particulars and a review of the bill produced.

After Flaum, Reinstatement Offers Should Not be Conditioned on Re-verification

Prior to Flaum, Section 10560.7 of the Case Handling Manual permitted an employer to "require that discriminatees complete the appropriate portion of the I-9 form and submit appropriate documentation as a condition of reinstatement." A reinstatement offer will no longer be considered valid if it is conditioned on re-verification of employment status. The Case Handling Manual will be modified to reflect this change in policy.

Counsel for General Counsel Should Object to Attempts to Litigate Immigration Status at ULP Hearing

Although not the Board's focus in Flaum, it is settled that an employee's work authorization status is irrelevant to the underlying question of the employer's liability under the Act. See, e.g., Tuv Taam Corp., 340 NLRB 756, 760 (2003); Intersweet, Inc., 321 NLRB 1, 1 n.2 (1996), enfd. 125 F.3d 1064 (7th Cir. 1997). See also GC Memo 98-15, "*Reinstatement and Backpay Remedies for Discriminatees Who May Be Undocumented Aliens In Light of Recent Board and Court Precedent*," at p. 4. Consistent with outstanding instructions, counsel for General Counsel should object to a Respondent's attempt to litigate a discriminatee's or a witness's immigration status at the liability phase, and should take a Special Appeal to the Board on any adverse ALJ ruling. See GC Memo 02-06 at p. 1.

Unsupported Assertions of Immigration Status as Potential ULPs

Further, Regions may consider whether a charged party commits an independent violation of Section 8(a)(1) where, without evidence of an employee's disabling status, it issues Board subpoenas for the employee's work authorization documents for purposes of harassing the employee. In a case litigated by Region 3 - Buffalo, an ALJ granted the Region's Motion to Strike and Petition to Revoke Subpoena. The Region successfully argued that courts:

> have recognized the *in terrorem* effect of discovery requests for immigration status, and have issued protective orders to protect employees' access to the courts. As noted in EEOC v. First Wireless Group, Inc., 2007 WL 586720 (E.D.N.Y.), slip op. at *3, "in most cases, the *in terrorem* effect of the proposed inquiry outweighs the probative value of the discovery." Likewise, the United States District Court for the Southern District of New York has precluded the discovery of documents related to immigration status where the claimed material is "irrelevant to any material claim because it presents a 'danger of intimidation [that] would inhibit plaintiffs in pursuing their rights.'"

Rengifo v. Erevos Enterprises, Inc., 2007 WL 8943276, slip op. at 1 (S.D.N.Y.), quoting Liu v. Donna Karan International, Inc., 207 F.Supp.2d 191, 193 (S.D.N.Y. 2002).

The Division of Advice would need to authorize complaint alleging that an Employer's misuse of the Board's hearing subpoena process constitutes a violation of Section 8(a)(1). However, on this or any other issue concerning the interpretation or application of the instructions in this memorandum, Regions should first contact DAGCs Aaron Karsh or David Kelly for guidance.

/s/
A. P.

cc: NLRBU