

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 22-01

November 8, 2021

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

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Ensuring Rights and Remedies for Immigrant Workers Under the NLRA

From the inception of the National Labor Relations Act, the NLRB and reviewing courts have widely recognized that the Act's statutory protections are afforded in equal measure to all covered workers, regardless of their status as immigrants to this country.<sup>1</sup> As far back as 1984, the Supreme Court in *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 891-892 (1984), confirmed that undocumented workers are statutory employees entitled to protection under the NLRA. In order for all workers to be able to exercise their rights under the Act, we must zealously guard the right of immigrant workers to be free of immigration-related intimidation tactics that seek to silence employees, denigrate their right to act together to seek improved wages and working conditions, and thwart their willingness to report statutory violations. I am resolved to hold fully accountable those entities that, by targeting immigrant workers and their workplaces, undermine the policies of the NLRA and the nation's immigration laws.

In this memorandum, I will lay out the policies and procedures related to effectively serving the particularized needs of immigrant communities and to ensuring that the NLRB is not only accessible to all workers who seek our assistance, but is also a safe place where they are treated with dignity, without regard to immigration status or work authorization.

I. Safe, Accessible, and Dignified Engagement with the NLRB

A. Seeking and Obtaining Immigration Relief For Witnesses and Victims of Unfair Labor Practices

A cornerstone of the NLRB's capacity to protect the rights of all immigrant workers—documented and undocumented—is our ability to gain meaningful immigration-related relief on a case-by-case basis by working with the Department of Homeland Security (DHS) and its constituent agencies. In his October 12, 2021, memorandum, *Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual*, DHS Secretary Alejandro Mayorkas

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<sup>1</sup> See, e.g., *Logan & Paxton*, 55 NLRB 310, 315 n.12 (1944) ("The Act does not differentiate between citizens and non-citizens. In order to effectively carry out the purposes of the Act, we conclude that no distinction should be drawn on such a basis.").

stated the Department's goal to, "adopt immigration enforcement policies to facilitate the important work of the Department of Labor and other government agencies to enforce wage protections, workplace safety, labor rights, and other laws and standards." Specifically, Secretary Mayorkas directed U.S. Immigration and Customs Enforcement (ICE) and U.S. Citizenship and Immigration Services (USCIS) to develop plans to alleviate the concerns associated with cooperating with labor enforcement agencies by "provid[ing] for the consideration of ... available relief for noncitizens who are witnesses to, or victims of, abusive and exploitative labor practices." I applaud Secretary Mayorkas' commitment to engaging with labor enforcement agencies, such as the NLRB, to protect workers from continued abuse and to encourage their full participation in agency processes. Therefore, upon request by a charging party or witness, the NLRB will seek immigration relief including deferred action, parole, continued presence, U or T status, a stay of removal, or other relief as available and appropriate, to protect these workers in the exercise of their statutory rights and allow for vigorous enforcement of the Act. Individuals or their representative can indicate the need for such relief to the NLRB Regional Office investigating the case, or to the Agency's Immigration Team.

#### B. Certifying Petitions for U and T Visas (or Status)

The NLRB will continue to support victims of labor exploitation in obtaining U and T visas (or status) by certifying applications in appropriate cases. Congress created the U visa program with the passage of the Victims of Trafficking and Violence Protection Act in 2000 as a means to strengthen the ability of law enforcement agencies to investigate and prosecute cases involving certain abusive practices against undocumented individuals (including certain workplace violations) while, at the same time, offering protections to the victims. U visa relief—including interim protection in the form of deferred action and work authorization for successful petitioners and their immediate family—may be available to victims of qualifying crimes through a petition submitted to USCIS, where a law enforcement agency, such as the NLRB, certifies that the individual has been helpful to the investigation or prosecution of unlawful conduct. A sister program offers temporary immigration relief under the T visa classification, which may be issued to certain victims of a severe form of trafficking in persons, including labor trafficking.<sup>2</sup>

The NLRB has long recognized that an employer's abuse of members of vulnerable communities who engage in protected, concerted activities under the Act provokes concern among them about seeking the assistance of, or providing evidence to, the NLRB. It is for this reason that the Agency has been a USCIS-recognized certifying law enforcement agency for many years. I remain committed to this role and, as such, I will

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<sup>2</sup> For further information regarding U and T visa benefits see [Victims of Criminal Activity: U Nonimmigrant Status](#); [Victims of Human Trafficking: T Nonimmigrant Status](#); recent [Updated and Comprehensive Guidance on T Visa Adjudications](#); and a [resource guide from the Center for Countering Human Trafficking on continued presence](#), which is a temporary designation for trafficking victims who may be potential witnesses. See also [Updated Procedures in Addressing Immigration Issues that Arise During NLRB Proceedings](#), OM Memorandum 11-62 (issued on June 7, 2011).

certify requests for U and T petitions for individuals who have been helpful to a NLRB investigation or litigation, and have suffered harm as a victim of a qualifying crime.<sup>3</sup>

Pursuant to USCIS's newly announced "Bona Fide Determination" process, a bona fide U visa petitioner before USCIS, who attains law enforcement certification by an agency such as ours, will have the means to secure timely deferred action and employment authorization, which will assist in their ability to continue to cooperate with the NLRB as we move forward with our case processing.<sup>4</sup> Notably, even if an individual does not qualify for a U or T visa, the NLRB may still request prosecutorial discretion from DHS, including deferred action and an employment authorization document, in appropriate cases.

NLRB Board Agents will be provided with documentary information to share with charging parties, witnesses, and their representatives on the processes by which to seek U and T visa certifications from the Agency. The Immigration Team will also be developing a related NLRB public website page, as well as training for NLRB Board Agents on these processes.

### C. Responding to Coercive Tactics Directed Against Immigrant Workers

The Board has long recognized that immigration-related intimidation tactics are often used to silence employees and thwart their willingness to report statutory violations. Immigration-related threats are particularly coercive and "evoke the most intense fear" because, in addition to threatening possible loss of employment, they also place in jeopardy employees' ability to remain in their homes. See *Viracon, Inc.*, 256 NLRB 245, 247, 252-53 (1981). The Board has noted that, "threats touching on employees' immigration status warrant careful scrutiny," because, "they are among the most likely to instill fear among employees." *Labriola Baking Co.*, 361 NLRB 412, 413 (2014). Absent safeguards, immigration-related threats and retaliation directed at workers who have come forward and assisted an NLRB investigation or litigation may chill, "even authorized employees . . . from exercising their Section 7 rights if it means they might be questioned about their actual or perceived immigration status." *Farm Fresh Co.*, 361 NLRB 848, n.1 (2014). And when an employer targets immigrant employees in this way, it can undermine the labor rights of all employees by interfering in mutual aid, organizing efforts, and the effective enforcement of labor and employment laws.<sup>5</sup>

Thus, we will continue to be vigilant and take very seriously any threat or retaliatory conduct by a charged party or respondent in an unfair labor practice case that is related

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<sup>3</sup> Common qualifying crimes uncovered during an unfair labor practice investigation include obstruction of justice, witness tampering, extortion, and felonious assault. See 8 C.F.R. 214.14(a)(9) (2008).

<sup>4</sup> See [USCIS Issues Policy Providing Further Protections for Victims of Crime](#), USCIS press release dated June 14, 2021.

<sup>5</sup> See Ruben J. Garcia, *Marginal Workers: How Legal Fault Lines Divide Workers and Leave Them Without Protection* (2012).

to immigration status or work authorization.<sup>6</sup> Regions should seek full and immediate remedies regarding such conduct at every stage of the case, including seeking Section 10(j) injunctive relief and amending existing complaints, if warranted. If charged party counsel is involved in such unlawful conduct, Regional management should consider referring counsel for misconduct under Section 102.177 of the Board's Rules and Regulations, and should also consider referral to a state bar association for appropriate sanctions.

## II. Investigation and Litigation Practices that Fully Effectuate the Act in Matters Involving Immigrant Workers

### A. Effective Investigatory Practices

We are unable to effectuate the Act when discriminatees and witnesses are unwilling to file charges and present evidence, including affidavit testimony, to a Board Agent. Employee concern about testifying against their current or former employer's interests is intensified if they also fear involvement in our case processing procedures and protocols. Thus, Regions should seek to understand the challenges that arise in investigations involving immigrant workers and be flexible and empathetic.

Starting today, Board Agents should advise every person giving affidavit testimony that an individual's immigration or work authorization status is not relevant to the investigation of whether the Act has been violated, and that the Board agent will not inquire about the individual's immigration or work authorization status. Further, Board Agents should refrain from asking for social security numbers or Individual Taxpayer Identification Numbers (ITINs) during the merits stage of a case. The Immigration Team will soon distribute a document in multiple languages that can be provided to any witness or party who expresses a concern related to immigration status and our case processing procedures.

Regions should review and update the procedures for witnesses' access to Regional Offices, including directions on how to locate their offices, and the security and safety procedures witnesses should expect to follow. Regions should share that information broadly with local immigrant communities and advocacy groups. As a federal agency, we also recognize that some immigrant witnesses may be uncomfortable or unable to visit our offices that are located in federal buildings. Where a witness expresses hesitancy or inability to come into a federal building, Board Agents should find a neutral place to meet to take the witness's affidavit.<sup>7</sup> Further, to facilitate access to our processes, we will continue to create and distribute bilingual materials, and to hire bilingual Board Agents.

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<sup>6</sup> A threat related to the immigration status of a participant in a Board proceeding may constitute the qualifying crime of obstruction of justice or witness tampering under the enabling U visa statute, as well as cause for consideration of Section 10(j) injunctive relief.

<sup>7</sup> Meeting by telephone or virtually should only be arranged if no other reasonable alternatives exist.

I recognize that privacy concerns also impact the public's willingness to file charges or to participate in NLRB investigations. For example, if a witness expresses concern about providing a home address in an affidavit, the Region should explore whether there is reliable alternative contact information that can be used, such as that of a family member. Notably, while the NLRB has a general policy to cooperate with other federal and state agencies that request Agency case information to assist in law enforcement efforts, such cooperation does not include sharing NLRB witness information with ICE, unless an individual requests that the Agency share their information to assist them with obtaining an immigration benefit.

I also recognize that there are a variety of reasons why a person may use a name at their workplace other than their legal name. Board Agents have no obligation to affirmatively inquire as to whether affiants use any names other than the name commonly used at the workplace.<sup>8</sup> However, if an affiant advises a Board Agent that they use a name different than their legal name, the Board Agent should indicate this in the affidavit by providing the following: "I, (legal name), also known as (other name(s))..." The affiant should sign the affidavit with their legal name. The Region should use the same practice in all communications with administrative law judges, the Board, or other tribunals, referring to the person as "(legal name), also known as (other name(s))..." Board Agents should also advise discriminatees who have used a name other than their legal name at work that, if the Region ultimately issues a complaint in their case, the complaint must refer to them by their legal name.

Furthermore, during investigations involving non-English speakers, Regions should be cognizant of the difference between comprehension and speaking skills.<sup>9</sup> A non-English speaker may credibly testify regarding a threat directed at them, even if the witness cannot repeat the exact words in English. Consistent with case-handling guidance, the Regions should not use this kind of discrepancy to discredit a witness's testimony or to decide not to issue complaint on allegations involving unlawful statements.<sup>10</sup>

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<sup>8</sup> If a person uses the name that they use at work in their NLRB affidavit, it is my view that this would not constitute a false material statement by the affiant for purposes of their obligation to provide truthful testimony.

<sup>9</sup> The concept that a person may comprehend a language without being able to speak it is well-recognized, and is sometimes referred to as "passive" or "receptive" bilingualism. See, e.g., Michael Erard, *The Small Island Where 500 People Speak Nine Different Languages*, *The Atlantic* (Nov. 26, 2018) <https://www.theatlantic.com/health/archive/2018/11/receptive-multilingualism-small-languages/576649/>; see also Hugo Baetens Beardsmore, *Bilingualism: Basic Principles* 16 (2d ed. 1986).

<sup>10</sup> See NLRB CASEHANDLING MANUAL, PT. 1, Unfair Labor Practice Proceedings (April 2021), Sec. 10064 ("If ... the Regional Office is unable to resolve credibility conflicts on the basis of objective evidence regarding matters which would affect the Regional Office's merit determination, a complaint should issue, absent settlement.").

## B. Seeking Remedies Tailored to Anti-Immigrant Worker Retaliation

The Agency's remedial initiatives apply to all charging parties and discriminatees without regard to immigration status. These remedial initiatives call upon us to develop imaginative and robust remedies tailored to the specific circumstances of each case. Thus, the Regional Offices and Headquarters branches will continue to work together to develop significant remedies tailored to all discriminatees and their workplaces in order to remedy retaliatory and other unlawful conduct visited upon all members of the public, including immigrant workers.

In cases involving the unlawful discharge of an employee, Regions should seek a traditional make-whole remedy, including full backpay and the unconditional reinstatement of the discriminatee. In rare instances, a Region may believe that it has actual or constructive knowledge that a discriminatee does not currently possess work authorization required under immigration laws to return to the workplace. Establishing actual or constructive knowledge can be complicated. Therefore, as described in more detail below, the Region should not independently make such a determination and should contact the Immigration Team. The Immigration Team will assist the Region in assessing the question, and will work with the Region and the Office of Legal and Government Ethics to determine an appropriate remedy under the specific factual circumstances.<sup>11</sup>

If there is a determination that the Region cannot seek backpay or reinstatement in a particular case, the Region should consider a wide variety of alternative relief in order to avoid remedial failure. Where a discriminatee may not have work authorization, a conditional reinstatement order issued under the parameters articulated by the Board in *Mezonos Maven Bakery*, 362 NLRB 360, 363 (2015), would afford the discriminatee a "reasonable period of time" to complete forms and present appropriate documents allowing the respondent to meet its obligations under federal law to verify employee work authorization. Regions should also consider seeking an order of reinstatement of a qualified candidate referred by a labor organization, where support for that organization has been eroded and its bargaining strength negatively impacted by a respondent's unlawful conduct, as that would, "provide some way to remedy the chilling effect on unit employees' exercise of their Section 7 rights." *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB at 417-19 (Member Browning, dissenting in part).

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<sup>11</sup> The Agency is precluded from seeking *unconditional* reinstatement and full backpay only in the very limited circumstance where the Region has actual or constructive knowledge that a discriminatee is presently unable to work lawfully in the United States. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (Board foreclosed by immigration laws from awarding backpay to an individual who was not legally authorized to work in the United States during the backpay period); *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408, *enfd.* 134 F.3d 50 (2d Cir. 1997) (conditional reinstatement order appropriate where discriminatee presently is not work authorized).

More broadly, as I indicated in previous memoranda,<sup>12</sup> Regions should use all appropriate means to seek focused, yet robust, remedies for discriminatory conduct in all cases, including those involving unlawful retaliation relating to employees' immigration status or work authorization. This includes consequential damages making employees whole for economic losses suffered as a direct and foreseeable result of an employer's unfair labor practices;<sup>13</sup> the publication of the Notice to Employees designed to reach current and former affected employees, as well as potential future hires; a Notice reading in the presence of the respondent's supervisors and managers; an order that a respondent make a payment into a remedial monetary fund in lieu of backpay; and sponsorship of work authorization (including all associated fees) where an employer's unfair labor practice has caused an employee's loss of such authorization.<sup>14</sup> Moreover, Regions should routinely seek compensation for work already performed under unlawfully imposed terms, as that remedy does not implicate the Supreme Court's effort in *Hoffman Plastics* to harmonize the nation's immigration and labor laws.<sup>15</sup>

In appropriate cases, Regions should also seek an order requiring that a respondent's supervisors and managers undergo training on employee rights under the Act and compliance with Board Orders; an order requiring training of a respondent's supervisors and managers in non-discriminatory immigration practices offered by the Department of Justice's Immigrant and Employee Rights Section; or an order requiring training by the U.S. Citizenship and Immigration Services on the appropriate use of the E-Verify system, where the respondent manipulated that tool in a manner that violated the Act. Regions

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<sup>12</sup> [Seeking Full Remedies](#), GC Memorandum 21-06 (issued on September 8, 2021), and [Full Remedies in Settlement Agreements](#), GC Memorandum 21-07 (issued on September 15, 2021).

<sup>13</sup> Since *Hoffman*, the Board and lower courts have carefully limited its application by distinguishing between backpay awards for "work not performed," which runs counter to the policies underlying immigration law and therefore is not permissible, and other monetary awards. See, e.g., *Tuv Taam Corp.*, 340 NLRB 756, 759 n.4 (2003) (monetary award appropriate for work already performed under unlawfully imposed rate); *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1307-1308 (11th Cir. 2013) (holding that *Hoffman* precludes backpay remedies under the NLRA but not compensation for work performed under the FLSA); *Lucas v. Jerusalem Café, LLC*, 721 F.3d 927, 933 (8th Cir. 2013) (same), cert. denied, 134 S.Ct. 1515 (2014). Thus, where an employer has demonstrated that an employee is or has been unauthorized to work during the relevant backpay period, it is appropriate for the Board to award monetary damages directly resulting from an employer's unfair labor practice, other than those that are strictly for "work not performed." Such damages, unlike backpay, do not effectively reconstitute an unlawful employment arrangement. Instead, these damages compensate an employee for economic harms suffered directly because of the employer's unlawful conduct, but that do not relate to wages and benefits that would directly undermine the Immigration Reform and Control Act's (IRCA) prohibitions. Such damages could include, for example, those relating to out-of-pocket health, transportation, relocation or loss of housing expenses and certain legal or other costs.

<sup>14</sup> See [Seeking Full Remedies](#), GC Memorandum 21-06, at pp. 2-3, as well as remedies highlighted in [Updated Procedures in Addressing Immigration Status Issues that Arise During ULP Proceedings](#), GC Memorandum 15-03 (issued on February 27, 2015).

<sup>15</sup> *Tuv Taam Corp.*, 340 NLRB at 759 n.4.

are encouraged to seek assistance from the Immigration Team to determine if additional remedies are appropriate to ensure the fullest relief possible.

C. Preventing Abuses During Litigation and Through Injunctive Relief Under Section 10(j) of the Act

Regions should be vigilant in protecting the rights of witnesses to be free of intrusive and unfounded interrogation about their immigration status during the liability phase of an unfair labor practice proceeding when immigration status is irrelevant.<sup>16</sup> Attempts by a respondent to probe a witness's work authorization or immigration status undermines the integrity of the Board's processes by intimidating witnesses whose cooperation is crucial to our enforcement of the Act. *Flaum Appetizing Corp.*, 357 NLRB 2006, 2012 (2011) (noting that "[n]umerous Federal courts have recognized that such formal inquiry into immigration status and facts arguably touching on it is intimidating and chills the exercise of statutory rights.>").

For this reason, the Board has plainly stated that it will not allow its process to become an "open-ended inquiry" into a witness's immigration or work authorization status, which may devolve into a "fishing expedition [as] a method of discouraging employees from seeking back pay on meritorious claims." *Id.* at 2010. Rather, the Board imposes a requirement that the respondent have a "sufficient factual basis" that a discriminatee lacks work authorization before it is permitted to litigate an immigration-based affirmative defense in a compliance proceeding. *Id.* at 2011.

Accordingly, Counsel for the General Counsel (CGC) should generally oppose a respondent's intention to introduce evidence or question witnesses about their immigration status or work authorization during the liability phase of a ULP proceeding. To police this conduct, CGC should seek all safeguards, including by filing a motion *in limine*, a motion to quash an overreaching subpoena, or a motion for a bill particulars designed to examine a respondent's factual basis.<sup>17</sup> Through these efforts, CGC may preclude the respondent from turning a Board hearing into a fishing expedition regarding a witness's immigration status.

Regions should also consider whether a respondent's attempted inquiries into a witnesses immigration status or work authorization is itself an independent unfair labor practice. In *Lifeway Foods*, the Division of Advice concluded that the Employer violated

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<sup>16</sup> See *Intersweet, Inc.*, 321 NLRB 1, 1, n.2 (1996), enfd. 125 F.3d 1064 (7th Cir. 1997) (consideration of employer's contention that discriminatees were not entitled to backpay or reinstatement because they had no legal right to work in the United States left to the compliance stage). Successive General Counsels have relied on Board and court law to acknowledge this bedrock principle. See [Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after Hoffman Plastic Compounds, Inc.](#), GC Memorandum 02-06 (issued on July 19, 2002), at p. 1; [Reinstatement and Backpay Remedies for Discriminatees Who May Be Undocumented Aliens In Light of Recent Board and Court Precedent](#), GC Memorandum 98-15 (issued on December 4, 1998), at p. 4.

<sup>17</sup> Model motions are maintained by the Agency's Immigration Team.



Section 8(a)(1) and 8(a)(4) of the Act when it questioned two discriminatees about their immigration documents during an unfair labor practice proceeding, where the discriminatees' immigration status was not relevant, because it constituted an implied threat of reprisal and interfered with witness testimony. *Lifeway Foods*, Case 13-CA-169510, Advice Memorandum dated June 7, 2016.

Of course, any potential impediment to reinstatement may be relevant when assessing a respondent's obligation to reinstate or pay backpay; however, these issues arise only at the compliance stage of an unfair labor practice proceeding. Regions should not independently assess a respondent's assertion of a work authorization issue, and should consult with the Agency's Immigration Team, as the intricacies of work authorization are complex. For example, it is clear that a "no-match" letter issued by the Social Security Administration (SSA) does not shed light on the ability of an individual to work lawfully in this country. The no-match letter itself states that it does not make any statement about an employee's immigration status, and there is [guidance](#) and legal authority stating that inclusion of a worker's name on an SSA no-match letter makes no statement about the worker's immigration status.

As I stated in [GC 21-05](#), I believe that Section 10(j) injunctions are one of the most important tools available to effectively enforce the Act, and this is especially true in cases involving particularly coercive conduct like immigration-related threats or retaliatory conduct. The Board has recognized that threats or retaliatory conduct on the basis of employees' immigration status are especially coercive and often risk irreparable harm to employees' exercise of their protected rights. See *Viracon, Inc.*, 256 NLRB at 247 ("...fears of possible trouble with the Immigration Service or even of deportation must remain indelibly etched in the minds of any who would be affected by such actions on Respondent's part. Such fears would, in our view, be extremely resistant to efficacious dissipation through the use of traditional remedies.").<sup>18</sup>

Thus, to safeguard access by all workers to the protections afforded by the Act, I will consider Section 10(j) relief in all cases where illegal intimidation regarding immigration status threatens the exercise of Section 7 rights and the Board's remedial authority.<sup>19</sup> I will also consider the propriety of seeking Section 10(j) relief in all appropriate cases, regardless of the immigration status of any employee or discriminatee,<sup>20</sup> and will seek

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<sup>18</sup> See *Ahearn v. Beckley Mechanical, Inc.*, 1999 WL 328775 (S.D.W.V. Mar. 29, 1999) (Section 10(j) relief warranted where employer threatened employees with job loss and the closure of the business, interrogated employees, and promised them benefits).

<sup>19</sup> See, e.g., *Rubin v. American Reclamation, Inc.*, 2012 WL 3018335, at \*3 (C.D. Cal. July 24, 2012) (interim Section 10(j) relief obtained where, among other things, employer made a veiled threat to call immigration authorities because employees were supporting the union).

<sup>20</sup> See, e.g., *Pate v. Bodega Latina Corporation*, 2015 WL 12661924, at \*10-11 (C.D. Cal. July 30, 2015) (court ordered reinstatement where discriminatee obtained work authorization during the pendency of

deferred action, parole, or other immigration relief for employees whose interim reinstatement is appropriate under Section 10(j).

### III. Meaningful Interagency Engagement

While we have many tools at our disposal to effectuate the Act for all employees regardless of immigration status, our ability to protect immigrant workers is greatly enhanced by our collaboration with other government agencies. In 2016, the NLRB entered into a [Memorandum of Understanding](#) with the Department of Homeland Security and other labor agencies that provides for a process of deconfliction. Deconfliction is the process of preventing conflicting enforcement actions between immigration agencies and labor enforcement agencies. Specifically, under the deconfliction MOU, ICE will refrain from enforcement activities at a worksite that is the subject of an existing investigation of a labor dispute and during the pendency of the investigation and any related proceeding, subject to a few limited exceptions. Deconfliction helps ensure that individuals who cooperate with labor investigations can do so without fear of retaliation, and that the enforcement of immigration laws is not manipulated to thwart effective enforcement of employment and labor laws.

The deconfliction process has become an important tool for preventing abuse and providing protection to employees who are participating in Board processes, and I am committed to further strengthening and expanding it. I fully support DHS Secretary Mayorkas' recent memo on worksite enforcement that puts DHS's focus where it belongs—on unscrupulous employers, who exploit the vulnerability of undocumented workers through threats of deportation, which undermines the nation's labor standards, and disadvantages law-abiding employers. As discussed in the DHS memo and above, I am committed to asking DHS to exercise prosecutorial discretion in all appropriate cases involving workers who are victims of, or witnesses to, violations of our Act. Regions should contact the Immigration Team if there is an indication that such a request would aid in enforcement of the Act.

With respect to unscrupulous employers that violate labor law through the abuse of immigration laws, we will collaborate with federal and state agency partners to seek joint enforcement activity against employer abuse. An example of such collaboration is the NLRB's [Memorandum of Understanding](#) with the Immigrant and Employee Rights Section of the Department of Justice, an agency that enforces the anti-discrimination provisions of immigration law.

Regional Offices should work with the NLRB's Immigration Team to refer cases to federal and state agencies for prosecution in the following circumstances: (1) an employer

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Section 10(j) proceedings, conditioned on discriminatee's presentation to the respondent of proper work authorization documents consistent with USCIS Form I-9); *Drew-King v. Deep Distributors of Greater NY, Inc.*, 194 F.Supp.3d 191, 201-202 (E.D.N.Y. 2016) (ordering interim reinstatement under Section 10(j) where respondent produced no evidence that discriminatees were not authorized to work in the U.S., noting that respondent presumably complied with IRCA when it hired them).

asserts that employees it terminated did not have work authorization where there is evidence that the employer had prior constructive or actual knowledge of this lack of work authorization in violation of IRCA; (2) there is evidence of discrimination or violation of IRCA's civil rights provisions; (3) there is evidence that an employer was not complying with its obligations regarding nonimmigrant work visas; or (4) there is evidence that an employer misused E-Verify.

Regional Directors and Regional Immigration Coordinators should also build interagency relationships at the local level with DHS and its subagencies to strengthen deconfliction principles and practices, cross-train staff to identify abuses of labor law that involve a worker's immigration status or work authorization, and better protect immigrant workers.

#### IV. Training Opportunities Within the NLRB and With Our Partners

The ability to fulfill our mission to protect the labor rights of all workers in the United States, without regard to immigration status, is contingent on our committed field staff having the training and resources they need. Accordingly, both our cadre of Regional Immigration Coordinators and our Board Agents will be asked to undergo updated training designed to familiarize them with issues involving the immigrant communities across the country and the policies discussed in this memo. Furthermore, for the Agency to establish meaningful partnerships with sister agencies at the federal, state, and local level, we must cross-train respective investigators and enforcement staffs. We will continue interagency collaboration, with both immigration-related and labor-enforcement agencies, to further our respective missions and ensure they do not conflict.

I also intend to continue to partner with foreign embassies and consulates that serve the needs of their communities, with the goal of supporting and expanding our joint efforts to inform all workers from those communities about our services.<sup>21</sup> Cross-training with the dedicated embassy and consular staff will serve to advance these goals, and it is imperative that we do so. Finally, as part of our robust outreach efforts, NLRB staff should continue to partner with advocacy groups, labor unions, and employer groups to offer training on the NLRB and the rights and obligations that underlie our statute.

I believe this memorandum will advance the NLRB's ability to fully enforce the rights of *all* covered workers in this country, without reference to immigration or work authorization status. I look forward to working with all of you to implement and strengthen these policies.

/s/  
J.A.A.

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<sup>21</sup> The Agency's recent [Letter of Arrangement with Mexico](#), which Ambassador Moctezuma and I signed on September 2, 2021, is but one example of my intention to broaden outreach efforts to immigrant communities.