

SUCCESSFULLY PROCESSING YOUR NLRB CASE



THE DO'S AND DON'TS

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This outline and the accompanying presentation will provide you with practical information that should help you in processing an unfair labor practice charge, whether as a Charging Party or a Charged Party. The information herein is primarily derived from the Board's Rules and Regulations (R & R), Casehandling Manual for Unfair Labor Practice Cases (CHM), and memoranda from the Division of Operation (OM), which are all available on the NLRB website, www.nlr.gov.

The Information Officer Program (CHM – 10012)

- While unfair labor practice charge forms are available to the public on the NLRB website, it is advisable that you contact an Information Officer (IO) in the Regional Office to discuss your issues and seek assistance in filing a charge.
- The IO will assist:
 - in determining whether your allegations fall within the parameters of the Act;
 - in making sure the proper sections of the Act are set forth on the form;
 - in phrasing the allegations such that the Charged Party is given adequate notice of the basis for the charge, without specifying evidence or witnesses.

A Charge is Filed

- May be filed by any person or entity in person, by mail, and by facsimile. May be filed with a Board agent in the field. (CHM 100118.1-10018.3)
- Do not refer to or attach to the charge affidavits or other documents which are intended as evidence (CHM 10020)
- Service of the charge is the responsibility of the Charging Party, **not the Board.** Service may be in person, by registered, certified or regular mail, or by other methods agreed to by the Charged Party (R& R Sec. 102.14) Charge must be served on the Charged Party within the six month period as defined by Section 10(b) of the Act.

The Investigation

Timeliness

- Understand the time sensitive nature of cases. The Board uses an “Impact Analysis” system to prioritize cases based on the relative impact on the public and the Agency’s mission, which dictates the time goals for completion of the investigation. Time goals are most stringent for Category III cases and least stringent for Category I cases. (CMH 11740 – 11740.4)
 - Category III – Exceptional impact. Includes issues related to the 9(a) bargaining status of a union, relocation/transfer of work, test of certification, strike issues, discrimination during organizing campaigns, discriminatory referral practices, injunctive relief cases.

- Category II – Significant Impact. Includes issues that affect the core rights of the Act: discrimination not involving permanent loss of employment; refusal to hire, picket line misconduct, refusal to provide information, unilateral changes, refusal to provide information, duty of fair representation, threats, and intimidation.
- Category I – Important impact. Includes issues where there are alternative means of redress, i.e. through the parties' grievance procedure and federal courts.

Expectations of the Charging Party. (CHM 10054.1)

- Be prepared – understand the factual elements necessary to sustain your allegations.
- Organize your evidence based on the allegations.
- Have the names, contact information and witnesses' statements readily available.
- Make witnesses available promptly.
- Have all relevant documents available.
- Do legal research and share it with the Board agent
- Don't present only part of the story
- Don't delay the investigation. Charge can and will be dismissed for failure to cooperate.
- If not prepared to go forward with your evidence, withdraw the charge and re-file when prepared, being mindful of the 10(b) limitations.

Expectations of the Charged Party (CHM 10054.5):

- Full and complete cooperation in the investigation. Anything short of allowing your witnesses to give Board prepared affidavits is not full and complete cooperation.
- Board will consider your position even if presented in a position letter or through non-affidavit interviews of the witnesses, but may not give the same weight as it would to affidavit supported evidence. Efforts to restrict the use of the position letter will not be honored.
- Do not delay the investigation. Provide a preliminary position on the issues to the Board agent early in the investigation, this often helps focus the investigation with respect to the evidence that the Board agent will seek from the Charging Party.
- Promptly give position on the need for 10(j) injunctive relief.
- No due process right during the administrative investigative stage. Due process attaches only with the issuance of a complaint. Under Sec. 3(d) of the Act, the General Counsel possesses “final authority, on behalf of the Board, in respect of the investigation of charges.” Moreover, regional directors “may exercise discretion to dispense with any portion of the investigation.” (R & R Sec. 101.4)
- Don’t present witnesses for group affidavits/interviews.
- Don’t expect to sit in on affidavits/interviews of non-agent witnesses.

The Disposition of Charges

- Upon completion of the investigation, the Regional Director, along with other Regional managers and agents, reviews the evidence, the controlling legal authority and decides whether further proceedings are warranted on some or all of the allegations.
- Regional Director may decide to issue complaint, seek withdrawal of the charge, or defer a final determination pending the outcome of alternative proceedings.
- If there is no basis to prosecute, the Charging Party will be notified first of the determination not to proceed on the charge and will be given the option to withdraw the charge, which effectively closes the case and forecloses an appeal, or have the charge dismissed, which preserves the right to appeal.
- Dismissal can be either by a “short form” letter, which simply states that the charge has been withdrawn, without stating the reasons; or by a “long form” letter, which details the investigation and the rationale for not prosecuting.
- Deferral to the grievance procedure pursuant to the policy set forth in *Collyer Insulated Wire*, 192 NLRB 837, *United Technologies Corp.*, 268 NLRB 557 (1984) will require the Charged Party to agree in writing to waive any timeliness defenses and to promptly process the underlying grievance. Region will check on status every 90 days.
- Disposition letters are sent to the Charging Party and the Charged Party.

Appeal Rights (CHM 10122.4)

- Dismissal or deferral of a charge carries a right to appeal.
- Typically, the appeal must be filed within 14 days of the disposition letter.
- File the appeal with the Office of Appeal in Washington, D. C., with a copy served on the Regional Office.

Settlements/Non-Board Adjustments (CHM 10124-10170)

- The Board's policy is to actively encourage parties to reach a mutual resolution of their disputes.
- The Board may broach settlement at any point during the investigation, even before a final determination on the merits is made.
- Nationally, the Board settled about 90% of merit cases prior to a decision by an administrative law judge in 1995. Region 17's settlement rate in FY 06 was 86.3%.
- After a merit determination, but before the issuance of a complaint, typically the parties will be provided with a settlement proposal from the Board.
- A Board settlement, as opposed to a non-Board adjustment, will typically include a requirement of the posting of a Notice To Employees or Notice to Members.

Non-Board Adjustments (CHM 10140-10142.5)

- Private settlement agreement between the Charging and Charged Parties, usually stipulates that charge will be withdrawn. Board is not a party but must

approve the terms therein. In FY 2006, 80% of pre-complaint settlements and 46% of post-complaint were non-board adjustments.

- Regional Director needs a written account of the agreement, the terms of which will be scrutinized, particularly to protect the rights/interest of individuals who are not represented by counsel.
- Factors to be considered before approval include: 1. is settlement reasonable in light of the allegations; 2. have the charging party, charged party and affected individuals agreed to the terms; 3. is there evidence of fraud or coercion; 4. is the Charged Party a recidivist violator.
- Closer scrutiny will be exercised when the non-Board adjustment occurs subsequent to a merit finding by the Board.
- Terms that will raise concerns with the Board (OM 07-27):
 - Waiver of the right to file NLRB charges on future unfair labor practices; with the exception that an employee may knowingly waive the right to seek employment with a named employer in the future;
 - Prohibition of a discriminatee from providing assistance to other employees;
 - Prohibition of discussions about the Charged Party, with the exception of defamatory statements; or discussion about the terms of the settlement agreement, except for the specific amount of backpay.
 - Unduly harsh penalties for breach of the agreement (e.g. repayment of backpay, payment of Charged Party's attorney's fees);
 - Questionable tax treatment of monetary payments to discriminatees.

- Monetary payments to alleged discriminatees that exceed the arguable backpay owed.
- Board is not responsible for policing and enforcing a non-Board adjustment. However, the Board will consider a request to revoke a withdrawal of the charge when the Charged Party has reneged on substantial aspects of the non-Board adjustment.

Board Settlement Agreements

The Board, the Charged Party and the Charging Party are typically the parties to a Board settlement. However, a settlement agreement may be accepted and approved by the Regional Director without the acquiescence of the Charging Party. Within the framework of certain basic principles, the Regional Director has considerable discretion in fashioning a settlement agreement that effectuates the purposes and policies of the Act.

There are two types of Board settlements – Formal and Informal.

Formal Settlements (CHM 10164 – 10166.8/ Rules and Regulations

101.9(b(1))

- Not often used. Typically warranted where the Charged Party is a recidivist violator, has failed to comply with prior settlement agreements, violations are unusually egregious or where the Charged Party wants a protracted backpay installment schedule.
- Issuance of a complaint is a necessary precursor to the approval of a formal settlement agreement

- Includes a stipulation of facts sufficient to establish the alleged violations, consent to a Board order and to a court judgment enforcing that order.

Informal Settlement Agreements

- Must be tailored to remedy the particular allegations
- A standard form is typically used to set forth the basic boilerplate terms of the settlement, with the appropriate backpay amounts added thereto. The standard form language may be supplemented with additional terms related to the settlement.
- A Notice to Employees and/or Members is an essential part of the settlement agreement
- A Notice restates the Section 7 rights afforded employees, sets forth language specifying that the Charged Party “will not” engage in certain alleged violative conduct and “will” undertake specific affirmative actions to remedy the alleged conduct.
- A Notice will not include language of guilt or a non-admission clause. (A non-admission clause may be appropriately included in the Settlement Agreement form)
- A Notice will not include the amounts of backpay
- A Notice must be typically posted at the facility involved for a period of 60 days. The Notice is usually posted “in conspicuous places including all places where notices to employees customarily are posted”.

- Depending on particular circumstances, the information in the Notice may need to be communicated to the employees in alternative manners:
 - Mailing directly to employees
 - Being read to the employees
 - Electronic posting when the charged party “communicates with its employees via an intranet” (*Nordstorm, Inc.*, 347 NLRB No 28 (2006))