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Electronically Transmitted

July 20, 2020

Re: GC 20-08

Dear Mr. Robb,

We write out of concern with your Memorandum GC 20-08 (June 17, 2020) guiding the staff in the NLRB Regional Offices in the conduct of investigations into alleged unfair labor practices. In order to provide "transparency" and "fairness" you direct the staff to do two things: if a former employee had held a position, as supervisor or manager, that placed him or her in a position of acting in the matter of a potential unfair labor practice and who might have firsthand knowledge to share, the staff is directed to alert that person's former employer that an interview with him or her was to be conducted and to allow a representative of the former employer to be present in it. The potential witness is to be alerted of the Board agent's obligation to do that. Second, when an employee has a recording of a conversation that she would like to proffer as evidence of an unfair labor practice, the staff is directed to warn the person of negative legal and extra-legal personal "repercussions" her forthcomingness may have.

The first should have an obvious chilling effect on the willingness of a former employee, possessed of first-hand evidence, to come forward. That consequence would be defensible if the notice were in furtherance of an established rule of professional ethics. As we will explain below, it has no such grounding. And as it does not all that remains to this directive is its chilling effect.

The second would be in aid of fairness if the person were to be given a full and accurate account of what those "repercussions" were and of the likelihood of them. The directive does not require the staff to do that. The partial and ominous nature of the required statement is in aid of neither transparency nor fairness. The only conceivable purpose is, again, to deter people with material evidence of an unfair labor practice to be forthcoming with it. Each of these is explained below.

Notice to the Prior Employer

The only predicate for requiring notice to a witness' former employer and allowance for a representative to be present in the Board agent's interview are the rules of professional ethics; but on this GC 20-08 is highly misleading. The Memorandum refers to the "skip counsel" rule – another way of describing what is more generally known as the "no contact" rule. However, the Memorandum does not actually quote the Rule, *i.e.* Rule 4.2 of the ABA Model Rules of Professional Conduct. (Every state has a version of Rule 4.2, and the Rule has sometimes been a bone of contention between the federal government, particularly the Department of Justice, and state bar regulators as well as the defense bar.) The only reason we can fathom for the absence of quotation is that the Memorandum is not supported by the text of Rule 4.2, the comments to the ABA Model Rule, or the position of the states that apply the Rule.

Rule 4.2 provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

NLRB attorneys are subject to this rule. Congress specifically said so in 28 U.S.C. § 530B (1998), which states in relevant part that "an attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where

such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C.§ 530B(a). This means that NLRB attorneys are subject to state ethics rules "to the same extent and in the same manner as other attorneys" in each state, but NLRB attorneys are not subject to restrictions in their investigations that go beyond those state ethics rules.

Critically, Rule 4.2 does not apply to contacts made with former employees of an organization that is the subject of an investigation. Comment 7 to ABA Rule 4.2 provides:

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. *Consent of the organization's lawyer is not required for communication with a former constituent*.

No doubt most or all of the persons who cannot be interviewed without notice to their employer under the Memorandum do not fall within the description of a person "who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." *Id*. Only a person whose own acts or omissions could create criminal or civil liability for the organization can possibly be within the scope of the no-contact rule, and only then if there is an active matter and the person is *currently* employed by the organization.

In sum, the Memorandum is disingenuous in failing to follow the text of the no-contact rule and in failing to inform NLRB attorneys that the restrictions it imposes on their investigations go well beyond Rule 4.2 as it is applied in the states where they are licensed to practice law. The Memorandum also goes well beyond the intent of Congress in enacting 28 U.S.C. § 530B, which was to require federal investigations to be conducted in compliance with

state ethics rules, not to go beyond those rules and impose undue hardships on federal government attorneys as they do their jobs. Absent that ethical ground all that remains of this directive is a chilling effect on witnesses.

Witness Warning

The directive attends to the proffer of a recording of a conversation in which arguably incriminating statements are made. If the recording were to have been made contrary to law, the Memorandum requires the staff to warn the person offering it that he or she may be subject to prosecution or to a civil claim. If it were to have been made lawfully but in violation of a "lawful employer work rule or policy" the person should be warned that the employer "might take action", otherwise unexplained. Despite the obvious chilling effect such a warning must have on the willingness of a witness to provide that evidence, the Memorandum grounds the need to provide a warning on transparency and fairness, that is, on the proposition that before a person provides such a recording to the Board the potential witness should know what negative consequences – "repercussion" – she is likely to face. The ostensible justification would be served if the potential witness were to be given a full account of the likeliness of these repercussions and of the legal context in which they operate. As that is not required, all that remains is a vaguely ominous inchoate threat that can only serve to deter the proffer of valuable evidence.

Resort to criminal or civil law. The Memorandum notes that under the federal law of oral interception, and the law of the vast majority of states as well, consent to the recording by one-person party to it renders the interception lawful. A very few states disallow a recording unless all persons to it consent, but those state laws do not constrain the General Counsel. The Board agent is to investigate that aspect of the recording in deciding whether it can be placed in

evidence should an unfair labor practice be heard, as federal not state law controls on that question. Yet the Regional staff, who are directed to investigate the lawfulness of the recording and are to warn the potential witness of legal consequences, criminal or civil, are not directed to provide information bearing on whether such action would be soundly grounded, information the staff is directed to acquire.

Moreover, even where not consented to, an unlawful interception under federal and cognate state law occurs only when the parties to it have a reasonable expectation of privacy. The recordings of what is said in meetings or within a group can accordingly stand on different grounds than a surreptitious recording of a one-on-one conversation. The staff is presumably to acquaint themselves with these considerations insofar as they might bear on lawfulness and so admissibility; but the staff is not enjoined to explore these considerations with the witness.

In sum, it is simply not enough to say that criminal or civil liability might be incurred without giving the person being warned any sense of how likely these legal repercussions really are. As to criminal liability, it should suffice to say that one of us has been compiling the law of workplace privacy for over thirty years: he has not found a single reported case of a criminal proceeding against an employee for making a surreptitious recording in an effort to secure evidence of an unfair labor practice.

As to civil liability, apart from litigation under the Computer Fraud and Abuse Act (CFAA), involving the accession of computer stored confidential business data, most commonly for competitive purposes, employees are rarely sued for wrongful oral interception. *See* the compilation, Matthew Finkin, *Privacy in Employee Law* Ch. 5, § III(C) (federal legislation), (D) (state legislation), and (3)(b) (common law of privacy) (Bloomberg Law 5th ed., 2018). In some states, surreptitious recording to secure evidence of an employer's violation of employment law

has been held to be protected. *Id*. Again, none of the reported cases concerning civil liability deal with the collection of evidence of an unfair labor practice though one, and only one, deals with a recording made by a union in a public school for the purpose of public embarrassment, not to submit in order to vindicate a legal right.

Employer Action. In contrast to the notable absence of resort to law, discharge for violation of an employer's non-recording rule is another matter. A "no recording" rule might be lawful under the Board's decision in *Boeing,* 365 NLRB No. 154 (2017), and invoking it would be an inexpensive expedient.

However, as *Boeing* acknowledged, the application of a lawful rule of conduct can be an unfair labor practice. (We note *Stephens Media, LLC* v. *NLRB*, 677 F.3d 1241 (D.C. Cir. 2012); *NLRB* v. *Rockline Indus*., 412 F.3d 962 (8th Cir. 2005).) In the situation addressed by CG 20-08, a discharge might well be in violation of § 8(a)(4) which protects not only the filing of charges and the giving of testimony to the Board, but also meeting with a Board agent and giving evidence to him or her, such being the strong policy of the law. *NLRB* v. *Scrivener*, 405 U.S. 117 (1972) *citing inter alia Nash* v. *Florida Indus. Comm'n*, 389 U.S. 235, 238 (1967) ("Congress had made it clear that it wishes all persons with information about such [unfair labor] practices to be completely free from coercion against reporting them to the Board."). As you well know, the law here parallels all other wrongful discharge cases.

> In determining whether discharge or discipline was motivated by an employee's recourse to the Board, rather than by an independent and legitimate work-related reason, the Board will find facts and draw inferences just as it commonly does in cases of discrimination arising under section 8(a)(3), and the courts will apply the usual review standard in section 10(e) of "substantial evidence on the record considered as a whole:" Thus, the Board's burden-of-proof formulae developed under its *Wright-Line* decision, as endorsed by the Supreme Court, will apply: the burden is on the General Counsel to make a prima facie showing that going to the Board was a motivating reason for discipline, and then the burden shifts to the employer to show that it would have imposed that discipline upon the employee anyway for legitimate business reasons.

Robert A. Gorman & Matthew Finkin, *Labor Law: Analysis and Advocacy* § 7.5 at p. 201 (2013) (footnotes omitted).

Yet the Board agent, instructed to warn a potential witness of possible "repercussions" by her employer for giving a recording of evidence of an unfair labor practice to the Board, is not instructed to inform that employee that if such action is taken and if the employee complains of it the Board will investigate and will pursue the discharge as an unfair labor practice where there is reasonable grounds to believe that such was the employer's motivation. Absent that, so partial a warning – of "repercussion" – can only deter the witness from coming forward with evidence that could be critical to the case. As the Board has long stressed, surreptitious recordings can well be "the best evidence of what was said". *Algreco Sportswear Co*., 271 NLRB 499 (1984) *citing East Belden Corp*., 239 NLRB 776 (1978). Yet, inexplicably, the Memorandum works against the Board's ability to secure it.

In sum, the ethical foundation for the notice rule is not just weak, it is non-existent. The vague warning to a witness with a recording of what actually went on, of "repercussions" should she produce it, is so partial as seriously to mislead and so vaguely ominous as to deter forthcomingness. In both these respects the directive is an *in terrorem* device that creates headwinds against the effective enforcement of the law. We urge you to rescind GC 20-08.

Sincerely,

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cc: Senator Lamar Alexander
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