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ALERT

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NLRB General Counsel Requires Mandatory Language in Settlement Agreements

Apparently continuing the National Labor Relations Board's (NLRB) recent aggressive pro-union agenda, the NLRB's General Counsel has directed Regional Directors to include in every document settling an NLRB proceeding mandatory language where the employer in effect agrees in advance that if it is even *accused* of violating the agreement, all of the prior charges against it have merit. While the NLRB purports that this provision is an appropriate disincentive against violating agreements, in fact it seems most likely to discourage settlements by employers and/or serve as unfair leverage against them.

The NLRB's General Counsel is appointed by the President and confirmed by the Senate for a four-year term of office. He is charged with overseeing the investigation and prosecution of unfair labor practice cases and periodically issues memoranda to Directors of NLRB Regional Offices, which processes most charges and other NLRB cases. Those memoranda contain rules that instruct Regional Directors in how to handle certain matters.

The mandatory language in this most recent memorandum provides:

- If either party breaches the agreement, and after 14 days notice from the Regional Director the breach is not cured, the Regional Director will issue/reissue the complaint/compliance specification that was previously issued in that same case.

- The General Counsel can then file a motion for summary judgment with the Board and the breaching party agrees that its Answer (i.e. response) to the original complaint/compliance specification will be withdrawn.

- The breaching party will automatically admit allegations of the re-issued complaint/compliance specification.

- The only issue that may be raised with the Board is whether the party breached the settlement agreement.

- The Board may then, "without the necessity of trial or any other proceeding," find against the breaching party on all allegations raised in the complaint/compliance specification.

- The Board is empowered to issue an order providing for full remedies for the violations.

The apparent effect of this memorandum is troubling. While the directive technically applies to all parties to a settlement agreement, as a practical matter it is employers who are most likely to be victimized by false accusations of breaching the agreement. Settlement agreements are entered into for many reasons. Often the employer makes a practical business decision to settle a disputed matter, even one involving allegations that are simply wrong, to avoid the cost and distraction of fighting the matter in the often unfriendly forum of the NLRB. The prospect of agreeing to allow the Board, especially given its current direction, to make findings of fact without holding a hearing, without sworn witness testimony, and without the benefit of post-hearing briefs simply because somebody *alleges* that the employer has violated the Agreement is alarming indeed. Employers presented with this provision should proceed very cautiously and consult with legal counsel before agreeing to this provision.

To obtain more information, please contact the Barnes & Thornburg Labor and Employment attorney with whom you work, or a leader of the firm's Labor and Employment Law Department in the following offices: Kenneth J. Yerkes, Chair (317) 231-7513; John T.L. Koenig, Atlanta (404) 264-4018; Norma W. Zeitler, Chicago (312) 214-8312; William A. Nolan, Columbus (614) 628-1401; Eric H.J. Stahlhut, Elkhart (574) 296-2524; Mark S. Kittaka, Fort Wayne (260) 425-4616; Michael A. Snapper, Grand Rapids (616) 742-3947; Peter A. Morse, Indianapolis (317) 231-7794; Tina Syring-Petrocchi, Minneapolis (612) 367-8705; Janilyn Brouwer Daub, South Bend (574) 237-1139; and Teresa L. Jakubowski, Washington, D.C. (202) 371-6366. Visit us online at www.btlaw.com/laborandemploymentlaw.