OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 25-02 **November 26, 2024**

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

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Ensuring Settlement Agreements Adequately Address the Public Rights at Issue in the Underlying Unfair Labor Practice Allegations

Since the earliest days of my tenure as General Counsel, I have emphasized the importance of ensuring that any settlement agreements entered into by Regional personnel "provide the fullest and most effective relief possible to the victims of unfair labor practices."[1] Recently, the Board ended the practice of accepting, over the objection of both the General Counsel and the charging party, so-called "consent orders" based on terms proposed only by respondents and approved by the presiding administrative law judge.[2] As a consequence of both that decision, and of Regional staff's insistence on seeking full remedies in settlement agreements, respondents may more readily seek to settle directly with charging parties, over the objection of the General Counsel, once the administrative hearing has commenced.[3] The purpose of this memorandum is to ensure that the general public, Regional personnel, parties to unfair labor practice claims, and administrative law judges are aware of the Board's decades of insistence that such agreements adequately address the "public rights" implicated by the underlying unfair labor practice allegations, and to encourage Regional personnel to vigorously object to any settlement agreements that fail to do so.

The standard used to analyze the terms of a proposed settlement agreement once the administrative hearing has commenced comes from the Board's decision in *Independent Stave Co*.[4] In that case, the Board clarified that, despite its "strong commitment to

[1] Memorandum GC 21-07, Full Remedies in Settlement Agreements; *see also* Memorandum GC 22-06, Update on Efforts to Secure Full Remedies in Settlement Agreements; Memorandum GC 24-04, Securing Full Remedies for All Victims of Unlawful Conduct.

[2] *Metro Health, Inc. d/b/a Hospital Metropolitano Rio Piedras*, 373 NLRB No. 89, slip op. at 1 (Aug. 22, 2024).

[3] Prior to the start of the hearing, the General Counsel has full prosecutorial discretion to dismiss a charge, including through settlement, or to issue complaint. *Fairmont Hotel*, 314 NLRB 534, 534 n.4 (1994) ("The General Counsel's authority not to prosecute includes settlement of a case over the Charging Party's objections where a complaint has issued but the hearing has not opened."); *see also NLRB v. UFCW*, 484 U.S. 112, 125-26 (1987) (confirming that Section 3(d) of the Act grants the General Counsel authority to "withdraw the complaint before hearing" and holding that, before a hearing occurs and evidence is entered into the record, "dismissal determinations are prosecutorial"). Guidance governing non-Board settlements in this context is set forth in OM 07-27, Non-Board Settlements (Dec. 27, 2006).

[4] 287 NLRB 740 (1987). The presiding judge applies the *Independent Stave* standard and can either reject the settlement agreement or else approve it and dismiss the complaint. *See, e.g., Frontier Foundries*, 312 NLRB 73, 73 (1993). If any party disagrees with the judge's decision, they can file a request for special permission to appeal to the Board, after which the Board can choose to grant the request and either affirm or reverse the judge based on application of the *Independent Stave* standard. *Id*.

settlements," it is "not required . . . to give effect to all settlements reached by the parties to a dispute," for the Board's "function is to be performed *in the public interest and not in vindication of private rights . . .*"[5] The Board further found it "unnecessary to provide an exhaustive list of all the factors which may become relevant in individual cases" but stated that, in considering settlement agreements, it would "examine all the surrounding circumstances including, but not limited to" (1) which parties have agreed to the settlement, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement "is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation"; (3) whether the settlement itself has been induced by fraud or coercion; and (4) the respondent's history of violations of the Act or breach of prior settlement agreements.[6] In approving the settlement at issue in *Independent Stave*, the Board noted that the settlement "serv[ed] the public interest," in part because the reinstatement of seventeen discharged strikers helped to "demonstrate to other employees a recognition of their statutory rights involved."[7]

The Board has repeatedly referenced public rights and the public interest in its decisions involving *Independent Stave's* four prong standard. In so doing, the Board has insisted that settlement agreements address the financial and chilling effects of unfair labor practices on unnamed individuals, including non-charging party discriminatees and a respondent's workforce as a whole. The Board has addressed these concerns most directly as part of the second *Independent Stave* factor, given a settlement that fails to address all of the harms caused by the unfair labor practices may not be "reasonable in light of the nature of the violations alleged."[8] The Board also considers the public interest as part of its analysis of the first factor, specifically "the position taken by the General Counsel," given the General Counsel's duty to "vindicate[] the public interest" in enforcing the Act.[9]

For example, in *Flint Iceland Arenas*, the complaint alleged that, following a successful union organizing campaign in which the charging party union was certified as representative of respondent's employees, the respondent engaged in a calculated campaign of retaliation.[10] According to the complaint, the respondent's conduct included, among other things, threats of physical violence and discharge, interrogation, changes to

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[5] *Independent Stave,* 287 NLRB at 741 (internal quotations omitted) (emphasis added) (citing *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957)).
[6] *Independent Stave*, 287 NLRB at 743.
[7] *Id.*
[8] *Id. See, e.g., Flint Iceland Arenas*, 325 NLRB 318, 319 (1988) (stating that, "given the number and seriousness of the unremedied violations. . . we cannot find that avoiding the risks of litigation is a reasonable trade-off"); *Frontier Foundries*, 312 NLRB at 74 (in analyzing the second factor, noting the "serious nature of an 8(a)(3) violation"); *Michels Corp.*, Case No. 30-CA-081206, 2012 WL 6625274, at *2 (Dec. 19, 2012) (finding, as part of prong two analysis, that the settlement "fails to address in any manner the public interest in protecting statutory rights"); *Texas Transeastern*, Case No. 16-CA-280275, 2022 WL 21829070, at *1 (Dec. 8, 2022) (finding that "the proposed settlement is not reasonable in light of the serious nature of the allegations").
[9] *Lewis v. NLRB*, 357 U.S. 10, 16 (1958). *See, e.g., Frontier Foundries*, 312 NLRB at 74 (finding it relevant that the General Counsel "vigorously oppose[d]" the settlement); *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 619 (2007) (then-Member Liebman dissenting) (noting that "[t]he Board has traditionally given considerable weight to opposition by the General Counsel"); *Texas Transeastern*, 2022 WL 21829070, at *1 (stating that the General Counsel's opposition to the settlement is "an important consideration weighing against accepting" it).
[10] 325 NLRB at 319.

wages and hours that were explicitly tied to the employees' vote for unionization, bargaining in bad faith, and both assault on and discharge of union organizers.[11] The non-Board settlement, approved by the administrative law judge, provided that three discharged employees would receive a cash payment and waive reinstatement, and the union agreed to file a disclaimer of interest in representing the respondent's employees.[12] In reversing the Judge, the Board first took note that the General Counsel "vigorously oppose[d]" the settlement.[13] With respect to the second factor, the Board expressed concern that the "alleged unlawful conduct was directed at the entire workforce" but that the settlement "remedie[d] virtually no injury to employee rights" besides the payments to the three discharged employees.[14] Finally, the Board noted that "the settlement d[id] not even provide for any notices or assurances to employees against similar retaliatory conduct if they should involve themselves in another organizing campaign in the future."[15] In short, the Board concluded that "greater weight must be accorded the *need to vindicate the public interest implicated* in the many complaint allegations not addressed by the settlement."[16]

As another example, in *Michels Corporation*, the General Counsel alleged the discriminatee had been laid off as a result of seeking to enforce a provision of the collective bargaining agreement. The settlement, agreed to by the union charging party, the respondent-employer, and the discriminatee, provided the discriminatee with a cash payment and a neutral employment reference. [17] In return, the discriminatee agreed not to seek reinstatement, and the settlement also contained a broad confidentiality agreement.[18] In reversing the administrative law judge's approval of the settlement, the Board agreed with the General Counsel that the settlement "did not go far enough in protecting employees' rights."[19] The Board noted the lack of a notice posting assuring unit employees that "they could exercise their statutory rights without fear of reprisal," together with the lack of reinstatement (which itself would have provided some such assurance), plus the

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[11] *Id.* at 318.
[12] *Id.*
[13] *Id.*
[14] *Id.* at 319. This appears to be a reference, at least in part, to the changes in wages and hours which likely caused financial harm to other members of the workforce, but which the settlement failed to address. *See also International Shipping Ass'n*, 297 NLRB 1059, 1070 (1990) (affirming ALJ's rejection of settlement agreement which provided no backpay to twenty discriminatees who were not charging parties); *Frontier Foundries*, 312 NLRB at 74 (reversing ALJ approval of settlement which provided a "very small percentage of backpay"); *cf. American Pacific Pipe Co.*, 290 NLRB 623, 624 (1988) (affirming judge's approval of settlement agreement, which provided approximately half of the purported $40,000 owed in backpay, on the basis that "no overriding public-policy interest would be served" by addressing the dispute as to interim earnings).
[15] *Flint Iceland Arenas*, 325 NLRB at 319. *See also Frontier Foundries*, 312 NLRB at 74 (reversing administrative law judge and noting, in analyzing the second *Independent Stave* factor, that "the settlement does not provide for any notices and does not contain assurances against future misconduct"); *Texas Transeastern*, 2022 WL 21829070, at *1 (reversing approval of settlement agreement that provided full back pay to charging party terminated for breaking rule prohibiting wage discussion because settlement "provide[d] no mechanism for informing Respondents' employees of their statutory rights and would do nothing to prevent the Respondents from continuing to maintain and enforce a rule that infringes upon those rights").
[16] *Flint Iceland Arenas,* 325 NLRB at 319 (emphasis added).
[17] *Michels Corp.*, Case No. 30-CA-081206, 2012 WL 6625274, at *1 (Dec. 19, 2012).
[18] *Id.*
[19] *Id.*

inclusion of the confidentiality clause, meant that the "unit employees have no way of knowing whether they would be subjected to threats of adverse consequences and retaliatory actions, should they, like the alleged discriminatee, seek to enforce their rights under the collective bargaining agreement."[20]

The Supreme Court has long acknowledged that "[t]he Board acts in a public capacity to give effect to the declared public policy of the Act . . . by encouraging collective bargaining and by protecting the 'exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment.'"[21] In *Independent Stave* itself, and for more than three decades since, the Board, in accordance with the Supreme Court's directive, has reiterated that, while it is firmly committed to "encouraging mutually agreeable settlements without litigation," it is "equally committed to performing that function 'in the public interest and not in vindication of private rights.'"[22] Regions should therefore ensure that parties who are engaged in settlement negotiations are aware of the Board's ability and inclination to reject private settlements that are repugnant to the Act, and encourage them to address the financial and coercive effects of the underlying unfair labor practices on those who may not be parties to the Board proceeding in any proposed settlements.[23] Where respondents and charging parties attempt to obtain approval of inadequate agreements from the presiding judge, Board agents should ensure judges are aware of this relevant caselaw applying *Independent Stave*. Indeed, judges have the first opportunity to reject unreasonable agreements, a result which could, in some cases, lead to settlement agreements that more adequately address the public rights at issue. Finally, where appropriate, Regions should vigorously object to a judge's approval of an inadequate settlement agreement, including, if necessary, by filing a request for special permission to appeal with the Board.

/s/
J.A.A.

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[20] *Id.*

[21] *National Licorice Co. v. NLRB*, 309 U.S. 350, 362 (1940); *see also NLRB v. Fant Milling Co.*, 360 U.S. 301, 307-308 (1959) ("The Board was created not to adjudicate private controversies but to advance the public interest . . ."); *cf. Robinson Freight Lines*, 117 NLRB at 1485 (the Board's power to prevent unfair labor practices "is to be performed in the public interest and not in vindication of private rights").

[22] *Michels Corp.*, 2012 WL 6625274, at *2 (citing *Independent Stave*, 287 NLRB at 742).

[23] Importantly, the Board also applies the *Independent Stave* standard when considering settlements wherein the General Counsel and the respondent agree but the charging party objects. *See, e.g., Iron Workers Local 433 (AGC of California)*, 303 NLRB 22, 22-23 (1991) (remanding to administrative law judge for application of *Independent Stave* factors where charging party objected to settlement); *see also McDonald's USA, LLC*, 368 NLRB No. 134, slip op. at 15 (2019) (then-Member McFerran dissenting) (noting under the circumstances that the charging parties' "opposition to the settlement—and their commitment to pursuing enforcement of current law—suggests a greater commitment to the public interest"), *petition for review denied sub nom. Fast Food Workers Committee v. NLRB*, 31 F.4th 807 (D.C. Cir. 2022).