

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 11-04

January 12, 2011

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

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Revised Casehandling Instructions Regarding the Use of Default
Language in Informal Settlement Agreements and Compliance Settlement
Agreements

The 2002 Best Practices Compliance Case Report, as set forth in GC Memorandum 02-04, recommended that Regions include default language in informal settlement agreements when there is a substantial likelihood that the charged party/respondent will be unwilling or unable to fulfill its settlement obligations. In OM 05-96, "Casehandling Instructions Regarding Use Of Default Language in Settlement Agreements," dated September 16, 2005, revised default language was set forth to address some concerns raised by then Chairman Battista in *Great Northwest Builders, LLC*, 344 NLRB 969 (2005).

Our experience is that the Board routinely has enforced these provisions when ruling on motions for summary judgment filed by counsel for the General Counsel when there has been a breach of the settlement agreement. Operations-Management recently surveyed all Regions about their use of default provisions in settlement agreements. This survey showed that five Regions routinely propose, and three of those Regions regularly insist upon, inclusion of default language in all informal settlement agreements. With a settlement goal of 95%, these five Regions achieved settlement rates in FY 2009 of 96.9, 98.3, 95.6, 96.5 and 93 percent, respectively, and in FY 2010 of 100, 96.2, 94.2, 91.6 and 95.1 percent, respectively. These Regions also achieved litigation "win rates" in FY 2009 of 100, 75, 83.3, 90 and 93.3 percent, respectively, compared to a national rate in FY 2009 of 89.9 percent, and achieved litigation "win rates" in FY 2010 of 100, 100, 87.0, 87.5 and 100 percent, respectively, compared to the national rate in FY 2010 of 91.4 percent. These statistics demonstrate that the Regions' policy on including default language in settlement agreements does not adversely impact on either their settlement rates or the success they enjoy in litigating cases they cannot settle.

Based on this experience and the input from our Regional Directors, I have decided to expand the use of default language. There is a potential for considerable savings of resources and avoidance of delays in the event of a breach of the settlement agreement in requiring the inclusion of default provisions in such agreements and enforcing such provisions in a summary proceeding in the event of a breach.

Accordingly, Regions are hereby instructed to routinely include default language in all informal settlement agreements and all compliance settlement agreements.¹

Regional Office experience under outstanding GC guidelines demonstrates that default language is an effective and appropriate means to ensure that a charged party/respondent will comply with the affirmative provisions of the settlement agreement. Since the default language simply requires a charged party/respondent to honor the commitments it made in the settlement agreement, it is a reasonable requirement that ensures that the Agency will not be required to litigate a settled issue. In many cases, the default language will have been agreed to by a charged party/respondent only after the Regional Office has expended government resources to prepare for an administrative hearing. Failure to abide by the terms of a settlement that does not contain default language would require that the government incur the expense of preparing again for the administrative hearing and delays the provision of remedial relief. Therefore, to avoid duplicative expenses and delay, it is especially appropriate to include summary default language in informal settlement agreements.

With respect to compliance settlements, such agreements are usually concluded only after the entry of a Board Order or Court judgment.² At that stage of the proceeding, the arguments are even more compelling for default language in the settlement to avoid any further delays in the provision of remedial relief.

Therefore, language such as that set forth below should be included in all settlement agreements to meet these concerns:

The Charged Party/Respondent agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party/Respondent, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party/Respondent, the Regional Director will [issue/reissue] the [complaint/compliance specification] previously issued on [date] in the instant case(s). Thereafter, the General Counsel may file a motion for summary judgment with the Board on the allegations of the [complaint/compliance specification]. The Charged Party/Respondent understands and agrees that the allegations of the aforementioned [complaint/compliance specification] will be deemed admitted and its Answer to such [complaint/compliance specification] will be considered withdrawn. The only issue that may be raised before the Board is whether

¹ Regions should alternatively consider utilizing “confessions of judgment” in cases involving backpay installment plans. See OM 09-58, “Confessions of Judgment,” dated April 10, 2009. In addition, Regions are reminded that in any settlement providing for installment payments, absent extraordinary circumstances, the Region should obtain some type of security from the respondent. See Casehandling Manual (Part III) – Compliance Proceedings, Section 10592.12.

² Regions are reminded of the outstanding directions regarding the consolidation, in appropriate circumstances, of compliance matters with the initial complaint. See, e.g., Casehandling Manual (Part III) – Compliance Proceedings, Sections 10506.2(c), 10508.3 and 10646.3.

the Charged Party /Respondent defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the [complaint/compliance specification] to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party/Respondent, on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is customary to remedy such violations. The parties further agree that the U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte.

While in most cases the complaint will have already issued, in situations where the complaint has not issued, the default language should provide that the Regional Director will issue complaint on all allegations of the charge(s) in the instant case(s) that were found to have merit and list all the allegations and any specific remedial relief sought and should provide that by signing the settlement agreement, the Charged Party/Respondent waives any right to file an Answer.

If the compliance specification has not issued in a compliance case, the default language should provide that the Regional Director will issue a compliance specification and list all liquidated backpay or other remedial provisions and should provide that by signing the settlement agreement, the Charged Party/Respondent waives any right to file an Answer.

Filing Motions for Default Judgment

When filing a motion seeking a default judgment with the Board, it is critically important that the Region should explicitly detail in its motion for default judgment the precise remedial relief that the Region wishes the Board to provide in its order. Similarly, in such a case, to obtain enforceable remedies, it is equally important to consider this issue when drafting the language of the settlement agreement and to detail any remedial acts or requirements that respondent is expected to undertake or with which it is expected to comply.

If a Region is seeking a default judgment based on a charged party/respondent committing an unfair labor practice in violation of the cease and desist provisions of the settlement, the Region should issue a complaint on the new unfair labor practice and seek to consolidate this hearing with its motion to the Board for a default judgment.³ If the Region prevails in showing that a new ULP was committed and that this violation breached the terms of the prior settlement agreement, the Region would seek to have the Board issue a default judgment on the prior settlement as well as remedying the new unfair labor practice.

³ When consolidating the Motion for Default Judgment with the hearing on the new unfair labor practice, the Region should not ask the Judge to rule on this Motion. Rather, the Region should request that the Judge refer the Motion for Default Judgment to the Board when the Judge issues a decision on the new alleged unfair labor practice.

Revisions to the ULP and Compliance Casehandling Manuals will be prepared to reflect the contents of this memorandum. If you have any questions regarding this memorandum, please contact your Assistant General Counsel.

/s/
L.S.

cc: NLRBU
NLRBPA
Release to the Public

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