OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 19-04 February 22, 2019

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

FROM: Peter B. Robb, General Counsel

SUBJECT: Unions' Duty to Properly Notify Employees of Their *General Motors/Beck* Rights and to Accept Dues Checkoff Revocations after Contract Expiration

Certain issues regarding employees' statutory rights involving compulsory union dues deductions and dues checkoff authorizations have been presented to the General Counsel for guidance. These issues involve failures (1) to provide adequate information to employees in order for them to make informed decisions as to whether to become a union member or a core dues member and (2) to provide legal and clear requirements for dues checkoff revocation. As a result, to ensure the protection of employees' statutory rights in these areas, the following information is provided.

Employees subject to compulsory dues payment under the Act have rights to be informed of their ability to be less than full union members, object to paying for union activities not germane to unions' representational duties, to revoke dues checkoff authorizations at certain times; and to receive the information necessary to make those choices. Consequently, the Board and courts have required unions to take certain actions. To assist Regions with processing charges alleging unions' violations of those duties, this memorandum details policy positions concerning unions' duties to: (1) properly notify represented employees, at the time of the first dues collection attempt, of their *General Motors* right to be non-members and *Beck* right to be objectors, including by providing employees with the reduced amount of dues and fees in the initial *Beck* notice so that an employee can make an informed decision as to whether to become a

Beck objector; and (2) clearly and unambiguously notify employees of the specific anniversary and/or contract expiration dates on which employees may timely revoke their dues authorization checkoffs and honor employees' requests to revoke dues checkoff authorizations annually and upon cessation of the governing collective-bargaining agreement.

I. A Union's Obligation to Properly Notify Represented Employees of their *General Motors/Beck* Rights

The Supreme Court held in *General Motors*[1] and *Beck,*[2] respectively, that employees subject to a union-security clause have the right to be non-members, and that a union has a corresponding duty of fair representation that extends to not spending an objecting non-member's dues and fees on non-representational activities. When a union initially seeks to collect dues and fees under a union-security clause, it must first inform employees of their right to be or remain non-members.[3] It must also inform them of their *Beck* rights, namely, that non-members have the rights to: (1) object to paying for union activities not germane to the union's representational duties and to obtain a reduction in fees for such activities; (2) be given sufficient information to intelligently decide whether to object; and (3) be apprised of any internal union procedures for filing objections.[4] These notices must be provided to an employee concurrently with the union's first attempt to collect dues from the employee and not, for instance, in a periodic publication.[5] Additionally, a union's separate obligation to provide an annual notice to

[1] *NLRB v. Gen. Motors Corp.*, 373 U.S. 734 (1963).

[2] *CWA v. Beck*, 487 U.S. 735 (1988).

[3] *NLRB v. Gen. Motors Corp.*, 373 U.S. at 743; *California Saw & Knife Works*, 320 NLRB 224, 233, 235 & n.57 (1995), *enforced*, 133 F.3d 1012 (7th Cir. 1998).

[4] *California Saw*, 320 NLRB at 233.

[5] *Id.* at 235 & n. 57.

represented employees of their *General Motors/Beck* rights must be reasonably prominent and not "hidden in a lengthy publication."[6] Under current law, the union need only apprise employees of the percentage of the *Beck* reduction if they decide to become *Beck* objectors.[7]

In the General Counsel's view, it is difficult for an employee to make an informed decision about whether to become a *Beck* objector without first knowing the amount of savings that would result from that decision.[8] The General Counsel agrees with the D.C. Circuit that an initial *Beck* notice must apprise potential objectors of the percentage of union dues chargeable to them in order for potential objectors to gauge the propriety of a union's fee.[9] In *Penrod*, the D.C. Circuit found the question of initial *Beck* requirements to be "squarely controlled by" the

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[6] *Id.* at 234 (annual *Beck* notice posted in union's newsletter gave employees sufficient notice where it appeared in color, apart from other text, and under the bolded word, "Notice").

[7] *Id.* at 233; *Food & Commercial Workers Local 700 (Kroger Limited Partnership)*, 361 NLRB 420 (2014) (adhering to the precedent in *California Saw & Knife* regarding the requirements for initial *Beck* notices), *order vacated by Sands v. NLRB*, 825 F.3d 778 (D.C. Cir. 2016). Unions must also provide *Beck* objectors with the basis for the calculation and inform them of their right to challenge the calculation.

[8] *See e.g., Penrod v. NLRB*, 203 F.3d 41, 47 (D.C. Cir. 2000) (potential objectors must be told the percentage of dues chargeable to them, "for how else could they 'gauge the propriety of the union's fee,'" citing *Chicago Teacher's Union, Local No. 1 v. Hudson*, 475 U.S. 292, 306 (1986)); *Kroger*, 361 NLRB at 426 (acknowledging that information about the precise reduction in dues and fees may be motivating certain employees' decisions about whether to become *Beck* objectors) and at 429 & n.5 (Members Miscimarra and Johnson, concurring in part and dissenting in part) (noting that employees need information directly relevant to the exercise of their rights and that the percentage of nonrepresentational expenses may affect an employee's decision to object). *Cf. Teamsters Local 579 (Chambers & Owen Inc.)*, 350 NLRB 1166, 1168 (2007) (employees must be given the breakdown by major category of chargeable versus nonchargeable expenditures and a description of how the allocations were calculated before they challenge the calculations so that they can determine *whether* to file a challenge).

[9] *See, e.g., Penrod*, 203 F.3d at 47 (new employees and financial core payors must be informed of dues percentage that would be chargeable if they objected).

Supreme Court's decision in *Chicago Teacher's Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), where the Court said, in a case dealing with public sector employees, that "[b]asic considerations of fairness…dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee."[10] In *Kroger*, the Board considered *Penrod* and acknowledged that "basic considerations of fairness" inform a union's duty of fair representation in providing sufficient *Beck* notice to employees,[11] but nevertheless declined to follow the D.C. Circuit in requiring the additional information at the initial notice stage, finding that such a requirement was neither compelled by the earlier cases nor comprehended within the majority's view of a union's duty of fair representation.[12]

It is the General Counsel's position that the analysis applied by the Board majority in *Kroger* was flawed, and failed to give appropriate weight to employees' Section 7 rights and related interests. One of the core purposes of the Act is to protect the right of employees to choose whether they will become or remain members of a labor organization. In this respect *General Motors* rights and *Beck* rights are inextricably intertwined, *Weyerhaeuser Paper Co.*, 320 NLRB 349, 350 (1995), rev'd on other grounds, sub nom. *Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), vacated, 525 U.S. 979 (1998). Because under *General Motors* an initial

[10] *Id.* at 47.

[11] *See Chambers & Owen Inc.*, 350 NLRB at 1170 ("we believe that the concept of 'fairness' fits comfortably within the duty of fair representation"); *Kroger*, 361 NLRB at 423-24 (stating that the "fairness" rationale of *Hudson* is not irrelevant to the Board's balancing the competing interests at stake in considering the union's initial notice obligations under the duty of fair representation).

[12] *See Kroger*, 361 NLRB at 422 (holding that a union does not need to inform employees in the initial *Beck* notice of the specific details of the reduced fees and dues for objectors, despite acknowledgement of the D.C. Circuit's holding otherwise).

discussion of membership, initiation fees (where applicable) and periodic fees falls squarely within a union's existing fiduciary obligation, it is appropriate that *Beck* adjustments also be made known at the same time, before an employee is effectively required by law to make a membership decision, as the reduction in periodic payments may be determinative of the employee's choice in that regard.

For these reasons, the Board should overrule *Kroger* and require that a union must provide the reduced amount of dues and fees for objectors in the initial *Beck* notice so that an employee can make an informed decision as to whether to become a *Beck* objector. It is obvious that employees will be better able to make informed decisions about whether to become *Beck* objectors if they know the amount of savings that will result from that decision. It should not be burdensome for unions to provide that figure. In many cases, the union will have that amount easily at hand, because there is a *Beck* system in place and there are other objectors for whom the appropriate fee has been determined. If the union does not yet have the exact fee calculated (because it has, as yet, no objectors), it can make a good faith determination as to what the amount will be. This good faith determination need not be based on precise calculations or an independent auditor's report, but the union must have utilized a reasoned analysis to determine the figure and the union must explain to the employee how it derived the figure should the employee ask. Naturally the estimates must be reasonable. Employees do not need a precise or audited figure to make an informed decision about whether to object -- requiring such detail would be an expensive and time-consuming undertaking for a union that has not yet done it.[13]

[13] *See e.g.*, *Kroger*, 361 NLRB at 427 (describing the burden to unions in creating the calculations, especially for unions who have not previously had *Beck* objectors).

II. Employees' Right to Revoke Dues Authorization Annually and at Contract Expiration

Section 302(c)(4) of the Labor Management Relations Act (LMRA) permits dues-checkoff arrangements for employees only if employees have the opportunity to revoke their authorizations: (1) at least once per year, and (2) upon expiration of the applicable collective-bargaining agreement. Section 302 of the LMRA was devised as an anti-corruption measure to prohibit the direct payment of moneys from an employer to a union except in limited circumstances.[14] Section 302(c)(4) was added to ensure that dues-checkoff arrangements are made with valid employee consent, and that employees be given the right, at least annually, to revoke that consent.[15]

The language of Section 302(c)(4) of the LMRA thus creates an unconditional statutory right for employees to revoke their dues-checkoff authorizations upon cessation of the governing collective-bargaining agreement, whether by expiration or termination.[16] The legislative history of Section 302(c)(4) suggests a congressional intent fully consistent with that interpretation.[17]

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[14] *See Lockheed Space Operations Company, Inc.*, 302 NLRB 322, 325-27 (1991).

[15] *Id.*

[16] *See Frito-Lay, Inc.*, 243 NLRB 137, 139-41 (1979) (Member Murphy, dissenting) (arguing that contractual window periods for cancelling dues checkoff authorizations do not negate Section 302(c)(4)'s statutory guarantee that an employee may cancel his or her checkoff authorization upon the expiration of the relevant collective-bargaining agreement); *Stewart v. NLRB*, 851 F.3d 21, 32-35 (D.C. Cir. 2017) (J. Silberman, concurring/dissenting) (noting that "[t]he difference between a right to revoke during a limited pre-termination window and a right to revoke at will upon termination of an agreement is not an insignificant difference. . …Employees might well decide to revoke their authorizations . . . only *after* termination of an applicable agreement because of the then-existing unsatisfactory status of relations between the union and employer").

[17] *See Lockheed Space Operations*, 302 NLRB at 325-27.

Accordingly, any dues-checkoff authorization that restricts the statutory right of employees to revoke their authorizations at expiration of a current contract or during a period in which no contract is in effect is improper and unlawful.

A. Dues-Checkoff Revocation Window Periods

A dues-checkoff authorization's pre-expiration window period that requires an employee seeking revocation to submit their revocation request 60-75 days *before* contract expiration is inconsistent with, and restricts, the right of an employee to seek and effectuate revocation immediately upon contract expiration. A clause containing the window requirement is therefore unlawful under Section 302(c)(4) of the LMRA. In the General Counsel's view, because such windows may operate to eliminate or cut short the employee's statutory right to revoke at contract expiration, they are facially invalid under the NLRA. The Board should therefore overrule *Frito-Lay*, 243 NLRB 137 (1979) inasmuch as it broadly permits pre-expiration revocation windows to supplant the statutorily-guaranteed revocation opportunity at a collective-bargaining agreement's expiration.

Window periods associated with an employee's *anniversary date* on which he/she signed the dues authorization are not in conflict with Section 302(c)(4) of the LMRA and the Board should continue to permit them.

Applying the foregoing analysis, Regions are directed to issue complaint where a dues-checkoff authorization purports to limit an employee's right to revoke that authorization at cessation of the contract term by imposing an earlier revocation window period. It is the General Counsel's position that an employer that continues to check off an employee's dues following receipt of the employee's written revocation request made at or following expiration of a governing contract, as well as a union that receives such dues, does so without employee

authorization in violation of Section 8(b)(1)(A) and 8(a)(3).[18] In addition, because an employee may reasonably rely on an authorization's otherwise unlawful language to request revocation during the window, he or she must be permitted to revoke during that earlier period as well.

B. Dues Checkoff Authorization Revocation Requirements

Some check off authorization revocation procedures impose additional requirements that result in impediments to the revocation process. Thus, a certified mail requirement, or a requirement that the union *must sign* for the certified mail for the request to be valid, create unnecessary impediments and restrain employees in their rights to revoke dues check-off authorizations. To certify mail a document, an employee must go to a post office or facility to fill out a form, pay money to mail it, etc. Employees may face language barriers, transportation issues and the absence of available facilities. An employee may also interpret language about a union needing "to receive and sign for" the notice to also suggest the union can reject the revocation letter by merely refusing to sign for it. Therefore, the General Counsel believes that a certified mail requirement unlawfully restrains and coerces employees in their rights to revoke dues checkoff authorizations.

C. Dues Checkoff Authorization Language

Section 302(c)(4) of the LMRA makes clear that the congressional policy protecting an employee's right to refrain from financially assisting a union includes the right of an employee,

[18] Revocation restrictions that violate Section 302(c)(4) of the LMRA also violate Section 8(b)(1)(A) of the Act. *See Atlanta Printing Specialties*, 215 NLRB 237, 237 (1974), *enforced* 523 F.2d 783 (5th Cir. 1975); *Stewart v. NLRB*, 851 F.3d at 24 (citing *Lockheed*, 302 NLRB at 325 n.8; *WKYC-TV, Inc.*, 359 NLRB 286, 289 n.13 (2012)).

at least annually, to revoke his/her dues-checkoff authorization. To exercise that right, it is critical that the employee clearly understands the exact date or dates when revocation requests can be submitted. In this regard, plain language to describe when revocation requests can be made is strongly encouraged so that employees understand the clear parameters around revocation. Even where a union lawfully asserts that a request to revoke is untimely, the employee often is not told when the open period for revocation occurs. This has led to employees filing multiple untimely revocation requests that are summarily denied. To remedy this situation, the General Counsel believes that the union must either inform the employee of the specific next period where revocation can be effectuated or inform the employee that the request will be honored at the next available revocation period and that failure to do so violates a union's duty of fair representation. Thus, Regions should find that a failure to do so should be considered a breach of the union's duty of fair representation, in violation of Section 8(b)(1)(A) of the Act. This is a minimal burden on the union, which has to determine the correct window period to deny the revocation request, will help avoid disputes over whether the revocation dates were clearly known to the employee and will be of great benefit to employees.

Any questions regarding the implementation of this memorandum should be directed to your AGC/DAGC in Operations.

P.B.R.