EMPLOYERS BEWARE: PRO-UNION PRIORITIES ADVANCE AT THE NLRB

Labor & Employment Law Update

By Jeffrey Risch on October 25, 2021

Good, bad or otherwise… no matter your own personal or professional viewpoint, the fact is the National Labor Relations Board (NLRB) is poised to usher in new reforms and implement pro-labor priorities with the intent of reversing the modern-day trend of unions losing members in the private sector and penalizing employers under the National Labor Relations Act (NLRA) who attempt to push back against labor unions and related union organizing. While Big Labor continues to push the PRO-Act in Washington, D.C., there are many changes being implemented at the NLRB by recently appointed former union labor attorney Jennifer A. Abruzzo — as its General Counsel and top policy maker.

Recently, Ms. Abruzzo issued MEMORANDUM GC 21-06 titled "Seeking Full Remedies" that raised a lot of eyebrows. GC Abruzzo is encouraging all NLRB Regional Offices to seek remedies designed to decidedly help unions in their activities directed at employers. In the weeks that followed the initial memo, GC Abruzzo has issued additional directives *designed in many ways to accomplish much of what the PRO-Act is designed to do.*

As a reminder, it is the NLRB that administers and enforces labor law for the private sector. All private employers must take notice regardless if they have a union workforce or not.

The most significant instructions and directives given by the NLRB's General Counsel, at this time, include:

- In settlements involving unfair labor practice charges that result in economic harm to an employee pursuing and insisting on "consequential damages": While traditional remedies in such matters have been focused on back pay and loss of benefits, as well as possible reinstatement of employment, an award of consequential damages could include medical, legal or moving expenses, damages to credit ratings, liquidating investment accounts to cover living expenses and **any other award to make an employee whole for all economic losses as a result of an employer's unfair labor practice**. Such settlements may also require the employer to actually ADMIT TO WRONGDOING.
- In cases involving unlawful conduct committed during a union organizing drive, remedies could encompass the following, amongst other remedies:
  - Requiring an employer to provide a union with employee contact information, equal time to address employees if they are convened by their employer for a "captive audience" meeting about union representation, and reasonable access to an employer's bulletin boards;
  - Requiring an employer to pay for organizational costs that a union incurs in a re-run election because the employer has engaged in unlawful conduct sufficiently egregious as to cause the results of the prior election to be set aside;
  - Requiring a reading of the "Notice to Employees and the Explanation of Rights" to employees by a principal of the employer or, in the alternative, by a Board Agent, in the presence of supervisors and managers, with union representatives being permitted to attend all such readings; **and (most concerning)**
  - **Ordering an employer to recognize and bargain with a union where the union presents evidence of a card signing majority and the employer cannot establish a good faith doubt of such majority status.**
- In cases involving unlawful failures to bargain (challenges to certification, withdrawals of recognition, first-contract negotiations, and any other situations where disruptions in collective bargaining have occurred), the following remedies could be sought:
  - Requiring an employer to bargain on a specified schedule (i.e. not less than twice a week, at least six hours per session), until an agreement or a bona fide impasse is reached;
  - Requiring the submission of periodic detailed bargaining progress reports to the NLRB on the status of bargaining;
  - Creating 12-month insulation periods, including extensions, from the date an employer commences compliance with its bargaining obligations, during which a union's status as bargaining representative may not be challenged;

- Requiring the reinstatement of previously withdrawn proposals;
- Requiring the engagement of a mediator from the Federal Mediation and Conciliation Service (FMCS) to help facilitate good-faith bargaining between parties; **and (most concerning)**
- **Requiring an employer to reimburse the union for bargaining expenses in which the employer is found to have not bargained in good faith.**

The Takeaway: Private employers, in all industries, who are currently unionized or not, need to be on top of labor law developments. Intimately knowing and understanding the rules of engagement in all things labor law, and what could trigger an unfair labor practice charge or the ire of the NLRB, is critical. From c-suite executives to frontline supervisors, employers need to know the law — as it develops and evolves in a very pro-union environment under the current NLRB. Dedicated management training along with competent labor law counsel navigating the stormy waters ahead is a "must have" during these times.