

NLRB Continues to Take Control From Employers Resisting Union Efforts

Labor & Employment Law Update

By Michael Hughes on April 25, 2023

The National Labor Relations Board, as currently constituted, continues its efforts to kneecap employers who dare to resist unionization efforts. We have already seen NLRB General Counsel, Jennifer Abruzzo's, scorched-earth approach to promote unionization through enforcement activities targeting employer conduct that for decades has been perfectly lawful, and then suddenly finding the same conduct to be unlawful and unfair labor practices (including attempting to remove employers' rights to require a secret-ballot election, instead of accepting authorization cards, to determine union support by a majority of employees; and making it unlawful for employers to hold group meetings with employees during union organizing campaigns to educate employees about the union and the collective bargaining process). Now, not only is conduct that previously has been considered lawful been deemed unlawful, the NLRB is promoting enhanced penalties and damages for employers who commit unfair labor practices.

In the case of *Noah's Ark Processors*, decided April 20, 2023, the Board found that the employer had engaged in several unfair labor practices, including bad-faith bargaining, delayed bargaining, unlawful declaration of impasse in bargaining, and unilateral implementation of employer proposals. In fashioning remedies for those violations, the Board struck new ground by ordering enhanced remedies, and signaled that it expects such remedies to be sought, and ordered, in future cases. While the Board considered *Noah's Ark Processors* to be a case where a "broad remedy" was appropriate because of repeated and egregious conduct, it further stated that the remedies it was ordering were not necessarily to be confined to such "broad remedy" cases. Importantly, the Board meticulously outlined a laundry list of remedies that it did not even order in the case before it, as a road map for its expectations in future cases. Specifically, the Board outlined that depending on the circumstances in any given case, that the following remedies be considered and ordered (unless not doing so was specifically explained or justified in a particular case):

- *Issuance of a Broad "Explanation of Rights" to employees.* This is not a notice related to any particular issue in a case, but is rather an explanation to employees of their rights to unionize and engage in other protected, concerted activities. It reads as an endorsement by the NLRB of unionization.

- *Requiring that a Notice related to the issues in the case, as well as the Explanation of Rights, be distributed to employees and read aloud to employees by a company official.* While a typical remedy has been that a notice be posted for 60 days advising employees of the corrections the company must take, and that it will not engage in future misconduct of the kind alleged in the case, the NLRB now is increasingly ordering the notice must be read aloud to employees. In *Noah's Ark Processors*, the Board required the notice and explanation to be read by a specifically named company official. If that company official declines, the Board mandated that an NLRB official read the notices to employees while the company official is present. The Board also stated that remedies should contemplate that individual supervisors or managers, if they were involved in the alleged unfair labor practices, also be present.
- *Mailing of the Notice and Explanation of Rights to workers' homes.* Posting, distributing, and reading the notice may not be enough. The Board ordered that those items also be sent by certified mail, with return receipt, to each employee. This adds a potentially significant expense to the employer, as such mailings can cost over \$8.50 for each employee.
- *Requiring a specific company official to personally sign the notice.* In the past, the Notice typically would be required to be signed by an authorized company official. Now, the Board seeks to require a specific person, if involved in the alleged ULPs, to sign the Notice.
- *Publication of the notice with outlets that have broad circulation and local appeal.* This would involve potential publication of the Notice in local newspapers, both print and electronic, etc., at the expense of the employer.
- *Extending the period during which Notices must be posted.* Traditionally, a notice is required to be posted in the employer's facility for 60 days. In *Noah's Ark Processors*, the Board required the Notice to be posted for one year.
- *Authorizing NLRB personnel to enter the employer's premises to assess compliance.* This mandate requires the employer to allow NLRB personnel to access the employer's facility, at reasonable times, to assess whether the Notice is posted during the notice period. Coupled with the extension of the Notice period, this is especially concerning, as it fails to consider employer's property rights, to allow government officials to enter its facility unannounced.
- *Reimbursement of union bargaining expenses, including payments to employees who attended bargaining sessions.* In situations where the employer is alleged to have engaged in unfair bargaining, it will be ordered to pay any expenses of the union, including paying employees on the union bargaining committee directly, for time spent at the bargaining table.

What is even further troubling is that the NLRB GC recently has taken the position that maximum remedies must be included even in voluntary settlement agreements. Accordingly, where an employer wishes to settle an unfair labor practice charge, for purpose of not having to spend money and resources litigating the allegations, the NLRB regional offices are directed to exact many of these very remedies and will not negotiate over them. We have already seen this

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play out in many cases in the last year or so, which have required the reading aloud of notices by specific company officials in the presence of union and NLRB personnel; the requirement that a specific company official sign letters of apology, with wording prepared by the NLRB, and send to individual employees, etc. The motivation is clear: promote increased unionization by stripping employers of their rights to resist union organizing, and then hammer employers with a dizzying array of damages, penalties, and public shaming.

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