NLRB GC Abruzzo Ordered Up 'New Make-Whole Remedies' for Victims of Unfair Labor Practices – and the Regional Offices Are Delivering

Labor & Employment Law Update

By Beverly Alfon on July 6, 2022

Recap of 2021 Directives

A discussed in a previous article, on September 8, 2021, the National Labor Relations Board General Counsel, Jennifer Abruzzo, issued a memorandum to all NLRB Regional Directors notifying them (and the rest of us) of her directive to them to explore "new make-whole remed[ies]," as opposed to those "traditionally ordered," that would "make employees whole for economic losses, in addition to loss of pay or benefits, suffered as a "direct and foreseeable result of an employer's unfair labor practice." She provided specific examples of damages to consider, depending on the employer conduct at issue. The General Counsel directed all Regional Directors to submit all cases concerning potential make-whole remedies.

A week later, Abruzzo issued another memorandum, pointing out that Regions could seek broader remedies in settlement, versus what they could currently seek from the Board. Abruzzo highlighted ideas for remedies and encouraged Regions to expand on them when appropriate. She also made clear that she expected the following with respect to settlement agreements: (1) the inclusion of default language that would "provide for expedient issuance of Board orders in the event of noncompliance" (i.e., the language would allow the Region to quickly obtain a Board order without the necessity for trial); (2) the exclusion of language that states that the employer is not admitting to do any wrongdoing; and (3) that Regions "strongly consider the inclusion of admission language for repeat violators."

Update

Late last week, NLRB General Counsel Abruzzo issued yet another memorandum that she identified as an "Update on Efforts to Secure Full Remedies in Settlements." She congratulated the Regional Directors for an "excellent job" implementing settlements in line with her September 2021 directives. The memorandum listed the various examples of the new make-whole remedies that Regions have secured through settlement agreements, including but not limited to:

- Letters of apology to reinstated employees.
- Reimbursement of fees for late car loan payments and late rent.
- Payment of monthly interest on a loan that an employee obtained to cover living expenses.
- The cost of baby formula due to the loss of a workplace breast pumping station.
- Requiring that job application forms and recruitment ads include a statement of employee rights.
- Providing employee contact information to the union.
- Requiring the employer to report bargaining schedules and bargaining progress to the Region.
- Requiring the employer to pay for the union's bargaining costs during the period of bad faith bargaining.

The NLRB GC further instructed Regions to be "proactive in the ensuring compliance with settlement agreements," and expanded on her prior directives by now requiring new default language in settlement agreements that states that the employer agrees that the Board can issue default judgment against it based on the allegations in the related unfair labor practice charge "and/or an order requiring the Charged Party to perform terms of this settlement agreement." Basically, Regional Directors now have the discretion to determine what relief to ask for in the event of an employer's failure to comply with the agreement – including forcing employers to comply with the specific terms of the agreement rather than seeking a default judgment.

Bottom line for Employers: Now more than ever, an employer faced with an unfair labor practice charge must carefully consider the potential extent of damages at issue – in addition to the potential breadth of consequences that may come if the employer does not/cannot fully comply with the terms of a Board settlement agreement. Employers would be wise to seek and secure experienced labor law counsel as they navigate settlement waters with the current Board. While settling disputes is usually in everyone's best interests, the prospects of doing so to any reasonable satisfaction of the employer will be decidedly more difficult.

NLRB GC Abruzzo Ordered Up 'New Make-Whole Remedies' for Victims of Unfair Labor Practices – and the Regional Offices Are Delivering

[NOTE: In November 2021, the 5-member Board issued a Notice and Invitation to the public to file briefs regarding whether it should change its traditional make-whole remedies to include consequential damages, including what circumstances should warrant that type of relief and how those damages should be proven. Numerous third parties filed amicus briefs. We are still awaiting the Board's decision.]