

NLRB Chief Counsel Seeks New Penalties for Labor Law Violations

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With a newly minted Democratic majority on the National Labor Relations Board (“NLRB”), the General Counsel of the NLRB, who directs enforcement of federal labor law, has ordered her staff to seek broad remedies - many of which would be unprecedented - for workers subjected to unfair practices, including reimbursement for “consequential damages” such as health care expenses, credit card late fees, or loss of a home or car as a result of being unlawfully terminated.

In a memo issued September 8, General Counsel Jennifer Abruzzo instructed regional offices to “avail themselves of all remedial tools to ensure discriminatees are restored as nearly as possible to the status quo they would have enjoyed but for the unlawful conduct” including compensation for consequential damages, front pay, and liquidated backpay. She also directed regional offices to seek additional remedies for undocumented workers, such as employer sponsorship of work authorizations.

The NLRB has never authorized consequential damages similar to those outlined by Abruzzo. The NLRB has “broad discretionary” authority under the National Labor Relations Act, however, to fashion remedies to ensure victims of unfair labor practices are actually made whole and has ordered employers to pay for search-for-work and interim employment expenses, compensate employees for excess income tax liability as a result of receiving lump-sum backpay, and reimburse employees for damage while removing their toolboxes. It is also unclear whether the NLRB could order an employer to obtain work visas for an employee who had violated immigration laws by working without authorization.

Abruzzo also outlined several remedies regional offices should take in cases involving unlawful conduct committed during a union organizing drive, noting that restoring conditions that are “necessary for a free and fair election are often difficult ... in the face of unlawful firings, threats of retaliation, surveillance, and other coercive tactics designed to root out and squelch union support among employees.” Among those are requiring employers to reimburse unions for the cost of re-running elections, publicizing notices in newspapers and websites to reach all current and former affected and future employees, and giving NLRB agents access to facilities and records to ensure compliance with orders.

The memo comes two weeks after Democratic members took control of the NLRB when President Biden’s pick, David Prouty, was sworn in to replace President Trump appointee William Emanuel, and the NLRB issued a decision signaling that it would be willing to consider adopting the types of consequential damages outlined by Abruzzo.

Abruzzo's memo also reiterated a previous directive to identify cases that can be used to overturn employer-friendly doctrines adopted under the Trump Administration. That directive, issued August 12, required regional offices to submit cases to her office on topics ranging from employer handbook rules and confidentiality and non-disparagement provisions in separation agreements to the definition of protected concerted activity and an employer's duty to recognize and bargain with a union.

Finally, Abruzzo warned that she's not done yet in taking a harder line against employers who commit unfair labor practices. She intends to issue another order shortly that outlines the types of remedies that regional offices should incorporate into settlement agreements with employers.

Takeaways

The memo outlines the ongoing volatility at the NLRB that accelerated when the NLRB under the Obama Administration overturned several long-standing precedents and then continued during the Trump Administration when the NLRB sought to revert to the pre-Obama era standards. Unsurprisingly, the Biden Administration NLRB signals its intentions to return to the Obama-era changes.

Thus, employers should take seriously Abruzzo's push to seek all remedies available and to overturn employer-friendly precedent created under the Trump Administration as it merely continues the swinging pendulum at the NLRB for the last decade. As such, employers should continue to monitor the latest decisions and guidance from the NLRB to ensure ongoing compliance.

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