CLIENT ALERTS & INSIGHTS

NLRB Expands Remedies to Address Repeat Offenders

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The National Labor Relations Board (the "Board") has traditionally been limited in ways to remedy violations of federal labor law. Often, the Board is constrained to ordering "make-whole" relief like backpay and employee reinstatement. However, as we reported in December 2022, recent Board decisions have expanded available remedies, including the addition of consequential damages, in the agency's adjudication of unfair labor practice charges. Last week, in Noah's Ark Processors, LLC, the Board enlarged its cache of possible remedies where an employer has a history of unfair labor practices.

In that case, the employer was found to have bargained in bad faith after making "deeply regressive" proposals and unlawfully declaring impasse in negotiations after the union refused to accept a final offer that the union had also refused the year prior. The employer's conduct was enjoined by the U.S. District Court for the District of Nebraska and culminated in the employer being found in contempt and sanctioned for subsequently violating that court's order.

Based on the totality of the employer's actions, which the Board described as showing "a proclivity to violate" the National Labor Relations Act (the "Act"), consideration of several "established, potential remedies" to "encourage compliance with the Act and offer better protection of employees' Section 7 rights" was warranted. These "extraordinary" remedies include, but are not limited to:

- Adding a notice and explanation of rights ("Notice") to remedial orders that comprehensively inform employees of their rights;
- Requiring a reading of the Notice to employees, including possibly requiring the participation of managers or supervisors at the reading;
- Mailing the Notice to employees' homes;
- Mandating that an official of the employer sign the Notice;
- Publishing the Notice via local media;
- Extending the period of time that the Notice must be posted;
- Granting Board personnel access to visit the employer's facilities and assess compliance; and
- Reimbursing expenses associated with bargaining, including making whole any employees who lost wages due to their attendance at bargaining sessions.

In a statement given after the agency's 2-1 ruling on April 20th, Board Chairwoman Lauren McFerran explained that "[t]he Act gives the Board broad discretion to exercise its remedial authority, and it

can and should tailor the remedies to the violations, including to their nature, severity, and extent." Dissenting Member Marvin Kaplan predicts that with the Board's expansive discussion of such extraordinary remedies it "seems likely that extraordinary remedies are about to become far less extraordinary." While he agreed with the majority that the *Noah's Ark* employer committed numerous unfair labor practices, Kaplan argued that the decision "tacitly encourages the General Counsel to seek broad orders more frequently in order to put those remedies in play."

The Biden-era Board continues to add to its toolbox of remedies when evaluating unfair labor practice charges. Employers should therefore be particularly mindful of their conduct at the bargaining table to avoid facing unfair labor practice charges and potential extraordinary remedies.

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