

LABOR AND EMPLOYMENT LAW

INFORMATION MEMO

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National Labor Relations Board Stepping Up Penalties for Unfair Labor Practices

In a September 2021 memorandum, the National Labor Relations Board (NLRB) signaled its intent to exercise the full extent of its power to enforce stricter and more costly penalties for unfair labor practices (ULPs). The change was made evident in June 2022, when the Board issued a consequential damages award in a settlement agreement for the first time ever.

Employers should be aware that this calls for a heightened advocacy. Under Section 10(c) of the National Labor Relations Act (NLRA), when faced with a ULP, the Board has the power “to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act.” In the past, the Board has almost exclusively ordered remedies under Section 10(c) in the form of (1) reinstatement, (2) backpay, (3) injunctions, or (4) required posting of a board notice highlighting the ULP. The following highlights some of the relevant aspects of potential remedies:

I. Consequential Damages

In the context of the labor relations, consequential damages would seek to make employees and employers whole for economic losses suffered as a direct and foreseeable result of a ULP. This proposed change could open the door to financial penalties beyond backpay, substantially increasing employers’ and unions’ exposure to liability. Some examples of consequential damages include compensation for healthcare expenses that an employee incurred as a result of an unlawful termination of health insurance, or compensation for the loss of a piece of property that an employee could not afford because of an unlawful discharge.

This past June, the Board honored this proposed change by issuing a \$13.3 million consequential damages award against a union (United Mine Workers of America [UMWA]) for strike-related ULPs. UMWA announced last month that it would challenge this award, and, on Sept. 19, 2022, the NLRB Regional office in Atlanta reduced the damages award to approximately \$500,000. Notably, neither party contested the Board’s expansion of potential damages awards beyond backpay. Consequently, both employees and employers appear to now be equipped with a new make-whole remedy that has the ability to raise the stakes of labor relations to a point never seen in the history of this country.

II. Remedies Specific to Discrimination Cases

Proposed changes in the context of discrimination cases also have make-whole aims as they seek to restore individuals to the status quo they would have enjoyed but for the unlawful conduct. In order to achieve that goal, NLRB General Counsel Abruzzo encouraged Board Regions to seek compensation for consequential damages and front pay, on top of backpay.

III. Remedies Specific to Charges Involving Undocumented Workers

Sticking with the theme of make-whole remedies, in charges involving undocumented workers, Board Regions are urged to seek remedies that would prevent an employer from being unjustly enriched by its

unlawful treatment of undocumented workers. Some of the remedies mentioned in the memorandum include: (i) compensation for work performed under unlawfully imposed terms or conditions of employment, and (ii) employer sponsoring of work authorizations.

IV. Remedies Specific to ULPs Committed During Union Organizing Drives

The Board has consistently sought to ensure “free and fair elections.” In the event that elections are deemed to be unfair, General Counsel Abruzzo articulated a non-exhaustive list of proposed remedies, including: (i) increased union access to employees, (ii) reimbursement of organizing costs, (iii) increasing the length and reach of posted notices, (iv) increased Board monitoring of employer activity to ensure compliance with orders, (v) required training of employees on their rights under the NLRA, and (vi) broader cease-and-desist orders, etc.

V. Damages Specific to Unlawful Failures to Bargain

Regarding unlawful failures to bargain, General Counsel Abruzzo suggests a number of remedies that would raise the stakes for employers or unions that fail to bargain over terms and conditions of employment. Some of these remedies include: (i) Board required bargaining schedules, (ii) submission of progress reports on the status of bargaining, (iii) various extensions on a union’s certification period, (iv) reinstatement of prior bargaining proposals, (v) reimbursement of collective-bargaining expenses, and (vi) broader cease-and-desist orders, etc.

VI. Stricter Posting Requirements for Board Notices

The postings of board notices themselves typically are not longer than a couple of pages and are almost exclusively posted at the employer’s place of business. General Counsel Abruzzo seeks to strengthen this already existing remedy in ways that could spread employer notoriety far beyond the reach of the employees themselves. The changes that would accomplish this include distribution of notices through text messaging, posting on social media websites and posting on any internal apps used by an employer to communicate with its employees.

Bringing ULPs into the public eye is likely to expose employers to public scrutiny and could further educate workers on their rights under the NLRA. This, coupled with new make-whole remedies already put into action in the UMWA settlement, has the potential to usher in a new era of high stakes labor disputes.

If you have any questions or would like additional information regarding the potential scope of exposure, mitigation or other legal developments arising in labor relations, please contact [Samuel Dobre](#) or any attorney in Bond’s [labor and employment practice](#).

**Special thanks to Associate Trainee Michael Kratochvil for assisting with researching and drafting this memo.*

