LABOR LAW

Biden NLRB poised to expand remedies for unfair labor practice violations

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When the National Labor Relations Board (NLRB) finds an employer's unlawful action caused economic damage to employees, "make- whole" relief is the normal remedy, intended to restore aggrieved employees to the position they had before the employer's unlawful action. Over the past 80 years, the NLRB has gradually expanded the scope of relief well beyond the traditional remedies of reinstatement and back pay with interest. The Board, however, has consistently declined to accept the broader concept of "consequential damages."

Five separate pronouncements by the Biden NLRB and its General Counsel between September and November 2021 have taken this issue to a new level, all but assuring the Biden Board will embrace consequential damages as an appropriate remedy for proven violations of the National Labor Relations Act (NLRA).

Vorhees Care and Rehabilitation Center

On August 25, 2021, the NLRB issued its decision in The Vorhees Care and Rehabilitation Center. In that case, the employer's unlawful unilateral change on health benefits issues left employees without medical coverage for six months, saddling them with thousands of dollars in medical bills. An employee who had emergency surgery had to pay hundreds of thousands of dollars in medical bills, and others had bills go to collections.

Appropriately, the NLRB's remedial order directed the employer to make employees whole for their losses. But the Board went further: NLRB Chair Lauren McFerran, joined by Member Jon Ring, seized the opportunity for the Board to seek public input on whether to adopt a new and more expansive make-whole remedy that would "make employees whole for economic losses (apart from the loss of pay or benefits) suffered as a direct and foreseeable result of an employer's unfair labor practice."

In an obviously coordinated move less than two weeks later, the NLRB's newly appointed General Counsel issued a series of detailed memoranda directing Board offices nationwide to expand substantially the reach of remedies they would askthe NLRB to confer in unfair labor practice cases.

Memo GC 21-06

Memorandum GC 21-06 (September 8, 2021), the General Counsel catalogued at least 18 broad-ranging remedies for regions to seek based in a variety of contexts.

In discrimination cases, regions were directed 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 back pay, front pay, and liquidated back pay. The memo referenced other examples of consequential damages cited by the Vorhees Board: compensation for healthcare expenses incurred due to an unlawful termination of health insurance, credit card late fees, or even loss of a home or a car an employee suffers because of an unlawful discharge.

The memo gave special treatment to cases involving unlawful employer conduct during union organizing drives. It directed that regions propose a broad range of remedies, including:

- Requests for union access; Reimbursement of organizational costs;
- Reading of the notice to employees and the explanation of rights by a principal or Board agent;
- Video recording and distribution of the reading of the notice and the explanation of rights;

- Publication of the notice in newspapers and/or other forums chosen by the regional director and paid for by the employer so as to reach all current and former affected employees and future potential hires;
- Visitorial and discovery clauses to assist the agency in monitoring compliance with its order;
- Extended posting periods for NLRB notices;
- Broadened distribution of notices to current and new supervisors and managers;
  Training of employees, supervisors, and managers on employees' rights under the National Labor Relations Act (NLRA); and
- Compliance with the Board's orders.

The memo prescribed heightened remedies to be sought in cases justifying an order to bargain in good faith, including requiring bargaining schedules, periodic progress reports to the NLRB on the status of bargaining, insulation against decertification petitions, reinstatement of unlawfully withdrawn bargaining proposals, reimbursement of collective bargaining expenses, engagement of a mediator from the Federal Mediation and Conciliation Service (FMCS), and training of supervisors and managers in cases involving failures to bargain.

Memo GC 21-07

Memorandum GC 21-07 arrived one week later. It provided similar detailed directions to the regions about settlement agreements between the NLRB and respondents. In settlement discussions, Board attorneys typically have the upper hand because of the costs and risks to employers of proceeding to trial. The memo noted that in the settlement context, regions have more latitude (because Board approval isn't required), so regions "should skillfully craft settlement agreements that ensure the most full and effective relief is provided to those whose rights have been violated."

Regions were directed to seek no less than 100 percent of back pay and benefits owed and compensate employees for "any and all damages, direct and consequential," attributable to an unfair labor practice. These include employer payment for a variety of expenses incurred by victims of discrimination or other unlawful employer actions, including:

- Interest on late fees on credit cards ;
- Penalties incurred from having to prematurely withdraw IRA money to cover living expenses;
- Loss of a home or car;
- Damages from reduced credit rating;
- Financial losses from liquidating a personal savings account or an investment account;
- Costs of reinstating licenses or certifications; and
- Compensation to wrongfully fired employees who do not want to return to work

Letters of apology from the employer to affected employees were also on the list.

The memo provided model "default language" to be included in all informal settlement agreements. In a default agreement, the employer agrees it has violated the NLRA and agrees that in the event of noncompliance, an expedited process resulting in an enforceable judgment would occur. Indeed, the memo also reminded regions to ordinarily refrain from including "non-admission" clauses and to "strongly consider" including admissions clauses for repeat violators.

Memo GC 21-07

Next, Memorandum GC 22-01 enacted directives to "zealously guard the right of immigrant workers to be free of immigration-related intimidation tactics that seek to silence employees, denigrate their right to act together to seek improved wages and working conditions, and thwart their willingness to report statutory violations." Its goals included:

- "Safe, Accessible, and Dignified Engagement with the NLRB," including immigration relief for

witnesses and victims, supporting victims of labor exploitation in obtaining visas or status, providing "full and immediate remedies" against coercive tactics directed against immigrant workers, and referring charged party counsel involved in such unlawful conduct for appropriate sanctions;

- "Effective Investigatory Practices" to address immigrant employees' concerns and fears about testifying against their current or former employer's interests and ensure the comfort, safety, and security of immigrant workers who participate in NLRB proceedings as parties or witnesses;
- Remedies tailored to address anti-immigrant worker retaliation;
- Requiring errant employers to provide mandatory training to supervisors and managers on employee rights and compliance with Board orders and nondiscriminatory immigration practices; and
- Facilitating interagency engagement with the Department of Homeland Security to enable "Deconfliction," prevent conflicting enforcement actions between immigration agencies and labor enforcement agencies, and help ensure against retaliation.

Thryv Inc

On November 10, 2021, the NLRB issued Thryv, Inc., which involved an unlawful unilateral layoff of six employees. The Board found the case was a fitting vehicle for advancing the concept of consequential damages. It observed it historically has declined to address the merits of General Counsel requests for consequential damages, but two members of the NLRB panel in Vorhees indicated an interest in receiving public input on the question of whether the Board should award consequential damages to make employees whole for economic losses.

The NLRB accordingly invited interested parties to address whether it should modify its policies to afford full make-whole relief in all pending and future cases and address further "what ifs" pertinent to that subject. A deadline of December 27, 2021, was set for receipt of briefs on the listed issues.

Bottom Line

The listed remedies may pass the "smell" test in the abstract. The key will be whether such creative remedies will be carefully and cautiously applied in live situations. Bear in mind that many of these remedies can be applied not only in instances of unlawful discrimination or wrongful conduct during union organizing drives but also in connection with challenged conduct at the bargaining table.

Although these are private-sector developments, they will surely bleed over into public-sector labor law. Public employers under Public Employment Relations Board (PERB) jurisdiction have already seen how remedial principles can be arbitrarily applied, with serious consequential damage to public employers. The PERB's conferral of 10 years of back payments of a longevity premium stemming from truthful and noncoercive employer statements in negotiations is a good example (Contra Costa Fire Protection District). The PERB's rendering "unenforceable" voter-approved charter changes due to bargaining table conduct is another (County of Sonoma, City of Palo Alto, and City of San Diego).

The developments above were predictable follow-ups to a February 1, 2021 memo, from the NLRB's Acting General Counsel, who rescinded a variety of General Counsel directives that had been issued under the Trump administration. The memo stated that rescission was necessary because the prior directives under the Trump General Counsel were either inconsistent with the NLRA or Board law or were no longer necessary. Taking into account Vorhees, the General Counsel's clear and comprehensive directives, and the invitation for briefing in

Thryv, Inc., change is coming fast.

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