BARNES & THORNBURG LLP

Goodbye, Settlements: NLRB To Insist On Total Capitulation Conditions

September 17, 2021 | | Labor And Employment,National Labor Relations Board,Union Organizing

Keith J. Brodie
Partner

Grant T. Pecor
Partner

David G. Weldon
Partner

We previously detailed National Labor Relations Board (NLRB) General Counsel Jennifer Abruzzo's notice that her office intended to greatly expand the remedies available in unfair labor practice cases. However, we now know that was only the tip of the iceberg.

On Sept. 15, 2021, Abruzzo issued another memorandum to all Regional Offices instructing them to include those same remedies as a condition of entering into all formal and informal settlement agreements with charged parties. In doing so, Abruzzo instructed regions to "skillfully" craft settlement agreements to ensure they include the most full and effective relief possible, including all of the expanded remedies described in her prior memorandum.

Abruzzo's directives are a seismic shift and immense expansion of the Board's traditional remedies. The impact of the directive will likely be far fewer settlements and much more litigation. The memo also instructs regions to submit any potential settlement to the Board's Division of Advice before accepting a settlement over the objection of the charging party. This, too, will result in employers facing significantly greater obstacles when seeking to resolve disputes short of litigation.

RELATED PRACTICE AREAS

Collective Bargaining
Labor and Employment
Labor Relations
National Labor Relations Board (NLRB)

RELATED TOPICS

NLRB General Counsel
Back Pay
NLRB NLRA
Unfair Labor Practices

In fact, the memo instructs regions to seek “no less than 100 percent of the back pay and benefits owed” in addition to other direct and consequential damages attributable to an unfair labor practice. For instance, Abruzzo indicates that regions should determine if they need to include damages to an individual’s credit rating or for the loss of a home caused by the inability to keep up with loan payments in the damages required to settle claims of unlawful termination going forward. In addition, the memo instructs regions to include front pay as part of any settlement agreement where the allegedly unlawfully terminated individual no longer desires reinstatement.

Additional requirements such as letters of apology and the expanded distribution of notices are also outlined in the memo. The potential conditions to a settlement agreement could even require an employer to sponsor an individual whose work authorization expired as a result of the conduct in dispute.

Abruzzo’s memo also reinstates the requirement that regions include default language in all future settlement agreements, which essentially requires a charged party to agree that the allegations in the underlying dispute are admitted should it be found to have violated the terms of the settlement agreement. Without any cited authority and in contradiction of long standing practices, the memo instructs regions to specifically oppose the inclusion of non-admission clauses in informal settlement agreements. And thus, it appears employers will be required to essentially agree to the allegations contained in an unfair labor practice charge if they hope to resolve the disputes short of litigation.

The memo sends a clear message: the NLRB will now take a total capitulation approach to settlement agreements. Settlement will no longer be an option unless the charged party agrees to liability and all expanded remedies. As a result, employers need to prepare for the likelihood that settlement may not be a palatable option for disputes before the NLRB. Rather, litigation will likely become the norm.