

Labor Board General Counsel Mandates More Onerous Unfair Labor Practice Settlement Terms

By Jonathan J. Spitz & Richard F. Vitarelli

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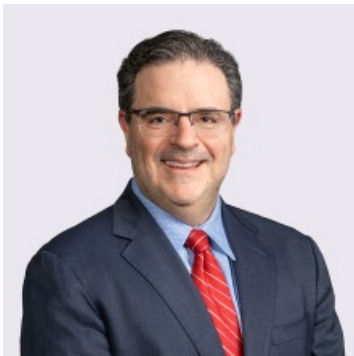
Jonathan J. Spitz

(He/Him • Jon)

Principal

(404) 586-1835

Jonathan.Spitz@jacksonlewis.com



Richard F. Vitarelli

Principal

860-331-1553

Richard.Vitarelli@jacksonlewis.com

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After less than two months in office, new National Labor Relations Board (NLRB) General Counsel (GC) Jennifer Abruzzo has urged broad pro-union changes in NLRB case law and has mandated more aggressive remedies in unfair labor practice (ULP) cases. In a September 15, 2021, memo Abruzzo has now taken aim at ULP settlement agreements.

The GC acts as the prosecuting arm of the NLRB. Board regions investigate ULP charges at the GC's direction. The region determines whether a charge has merit, and, if so, issues a complaint to be tried before an administrative law judge. The GC decides which legal theories regions should propound and the remedies to be sought at trial. Relatively few ULP charges actually go to trial. If not dismissed or withdrawn, most charges are settled. ULP settlement policies are also directed by the GC.

Thus, although the GC cannot unilaterally find a violation has occurred, she has a great deal of leverage to drive the terms of settlement. The September 15 memo directs regions to seek stronger than ever settlement terms.

Parties to any form of civil or agency employment litigation understand that pre-decision settlement of claims could provide complainants less than the full remedy they might obtain if successful at trial. The National Labor Relations Act provides for "backpay" and "reinstatement" to employment as sole remedies. In settlements, the NLRB has historically required close to full backpay of wages and reinstatement. The GC now seeks to insist on additional monetary and non-monetary remedies for settlement of ULP charges — without any actual finding that the respondent (generally, employers) violated the law. There is a real concern that demanding 100 percent of all possible remedies (including some that may ultimately be found to be beyond the NLRB's authority) will deter parties from settling matters before trial.

The GC has directed regions to add the following additional remedies (among others) to ULP settlement agreements:

- Seek no less than 100 percent of backpay and benefits lost by charging parties, including:
 - Health insurance premiums and accrued medical costs
 - Moving expenses
 - Legal fees
 - Front pay for employees who do not wish to be (or cannot be) reinstated to work
- Consequential damages "attributable to an unfair labor practice," including:
 - Interest and late fees on credit cards accrued to cover living expenses
 - Penalties for premature withdrawal of retirement savings
 - Liquidation of savings/investments
 - Foreclosure of property or repossession of vehicles for failure to pay

- Harm to an employee's credit rating
- Costs connected with obtaining new licenses or certifications
- Affirmative non-monetary terms, including:
 - Job placement services
 - Non-contesting of unemployment claims
 - Neutral employment reference
 - Letter of apology to the employee
 - Sponsorship of visas (and payment of attendant costs)
 - Confessions of judgment, promissory notes, or other security assurances that damages will be paid
 - Expanded notice posting requirements (more elaborate wording, longer time period, social media and intranet posting, physical monitoring by NLRB personnel)
 - Default language, settlement withdrawn if a party fails to abide by the agreement, and the respondent admits to all allegations

ULP settlement agreements routinely include “non-admissions” clauses stating that settlement does not imply the respondent admits violating the law. Despite the long-term and almost universal use of these clauses, the GC memo characterizes non-admissions language as an “exception” and that regions “should continue insisting on [their] exclusion.” Some regions have reportedly already begun refusing to include these provisions.

The scope of change promised by the new GC is unprecedented. It appears likely these stringent remedial and settlement terms — along with the anticipated changes in Board case law — will result in refusals to settle, and far more ULP litigation. Contact your Jackson Lewis attorney for more information.

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