

AN “EITHER OR” APPROACH: NLRB GENERAL COUNSEL PUSHES FOR EXPANDED REMEDIES AGAINST EMPLOYERS REGARDLESS OF PRO ACT’S FATE

Insights
Sep 13, 2021

While organized labor continues to hope that Congress will pass legislation that would tilt the labor relations playing field in their favor, the National Labor Relations Board’s (NLRB’s) newly appointed General Counsel has made clear that the Board will not wait around for lawmakers to implement new remedies against employers. Less than a month after being sworn in as General Counsel, Jennifer Abruzzo made clear to Regional Offices through a September 8 [memo](#) that they have the Board’s full support to request any and all available remedies against employers liable for committing unfair labor practices or unlawfully terminating employees. Regardless of whether [the Protecting the Right to Organize Act \(PRO Act\)](#) ever becomes law, employers can expect the NLRB to begin to fashion creative remedies for workers that might include consequential damages such as healthcare expenses on top of the usual remedies such as back pay, front pay, and reinstatement. What do employers need to know about this troubling development?

General Counsel’s Call to Action: What New and Alternative Remedies Does the Board Have in Its Toolbox?

Abruzzo’s memo listed various expansions of available consequential damages, such as compensation for health care expenses incurred as a result of losing health insurance, late credit card fees, or the loss of a home or a car as a result of the unlawful termination. On top of these new interpretations of available damages, Abruzzo encouraged regional officials to also consider a list of

Related People



Micah Dawson

Partner

303.218.3665

Service Focus

Labor Relations

available remedies, depending on the employer violation. Some of the suggested remedies encouraged include:

- **Union Access During Union Organizing:** The Board could require employers to provide a union with employee contact information, equal time to address employees when convened by their employer for a “captive audience” meeting about union representation, and reasonable access to an employer’s bulletin board and all other places where notices to employees are posted.
- **Reimbursement of Organizational Costs:** Employers may be required to pay for organizational costs a union incurs in a re-run election when the employer’s unlawful conduct was so egregious as to cause the results of the prior election to be set aside.
- **Reading of the Notice to Employees and the Explanation of Rights:** This requirement aims to educate victims of ULPs about the Board, its mission, and workers’ rights under the NLRA.
- **Publication of Notice in Newspapers and/Social Media:** A Regional Director may choose a forum at the employer’s expense to post notices sufficient to reach all current and former affected employees, as well as future potential hires.
- **Visitorial and Discovery Clauses for Monitoring:** Employers may be required to grant Board agents access to its facility to produce records for the agent to determine whether an employer complied with posting, distribution, and mailing requirements, or possibly permitting discoverable materials under the FRCP for compliance purposes.
- **Extended Posting Periods:** In the event of pervasive ULPs over a significant period of time, employers may be required to extend their posting period.
- **Instatement:** Qualified applicants of the union’s choice could be instated in the event an unlawfully discharged employee is unable to return to work.
- **Skip the Election, Strait to Bargaining:** Abruzzo advised Regional Offices to actively seek *Gissel* bargaining orders in cases involving an ongoing union organizing drive.

- **Bargain Schedules:** Respondents would be required to bargain not less than twice a week, at least six hours per session, until an agreement or a bona fide impasse is reached.
- **Submission of Periodic Progress Reports:** Respondents would need to submit sworn written reports every 30 days, over the course of a specified period, showing in detail the nature and course of a bargaining with the union and attaching any written communications between the parties.
- **Reimbursement of Collective-Bargaining Expenses:** Respondents would be required to reimburse an opposing bargaining party for negotiation expenses incurred during the entire period in which it fails to bargain in good faith.
- **Trainings:** Current and/or new supervisors and managers would be required to undergo training in cases involving failures to bargain.

To allow the NLRB to provide workers with full relief, Abruzzo left the door open for further discussions involving remedies available under the Board's power and invited regional officials to explore "new and alternative remedies" in addition those proposed in her memo.

Hoping and Waiting: The Reconciliation Bill and Penalties Seeks Similar Remedies Under the PRO Act

On the same day Abruzzo issued her memo, the House Committee on Health, Education, Labor, and Pensions released text covering respective areas under the \$3.5 trillion budget reconciliation bill, including penalties under the [PRO Act](#). [You can read our latest legal alert about the PRO Act here.](#)

The PRO Act's reconciliation language mirrors Abruzzo's memo in proposing amendments to the National Labor Relations Act (NLRA). The reconciliation language adds in penalties available under the Board's discretion, as well as prohibitions against ULPs.

- Civil penalties up to \$50,000 per violation for ULPs
- Civil penalties up to \$100,000 per violation for ULPs resulting in discharge of or "serious economic harm to an employee" if the employer committed ULPs within the previous five years

- Personal liability against directors and officers for ULPs to be assessed at the discretion of the Board

The PRO Act's reconciliation language highlights the relationship between Board members and lawmakers. While NLRB members can decide the level of aggression regarding penalties and available remedies, it cannot initiate them. Meanwhile, lawmakers can propose various violations under the NLRA to be enforced with the possibility of imposing civil money penalties.

What's Next?

For now, we wait for the Senate's vote on the House Committee's language under the PRO Act and its proposed penalties, but it is likely that its added penalties under the reconciliation bill won't survive on the Senate side. On the other hand, we can expect Abruzzo to continue the aggressive expansion of the NLRB's power in issuing remedies and overturning Board cases from the last administration. She in fact telegraphed her next move when she announced that she would issue another memo regarding settlement agreements and negotiations.

Fisher Phillips will continue to monitor any further developments in this area as they occur, so you should ensure you are subscribed to [Fisher Phillips' Insight system](#) to gather the most up-to-date information. For guidance and support in preparing for these developments, we would encourage you to contact your Fisher Phillips attorney, the authors of this Insight, or any member of our [Labor Relations Practice Group](#).