

NLRB GC Issues Guidance Memo on “Securing Full Remedies for All Victims of Unlawful Conduct”

Law and the Workplace on April 17, 2024

On April 8, 2024, National Labor Relations Board (“NLRB”) General Counsel (“GC”) Jennifer Abruzzo released a Memorandum providing guidance to Regional Directors, Officers-in-Charge, and Resident Officers concerning the GC’s continued efforts to secure full remedies for all victims of unlawful conduct—pushing Regions to turn their focus towards employees harmed by violations under Section 8(a)(1) of the National Labor Relations Act (“NLRA”).

The GC stated that an employee who has experienced unlawful employer discipline or the effects of an unlawful rule or contract term cannot be made whole through the mere rescission of the rule, contract term, or disciplinary decision. The GC reasoned that where “lingering effects” of the employer’s conduct remain in place, simple rescission “falls short of the [NLRB]’s capacity to fully redress violations.”

Further, according to the GC, rescission alone for violations of Section 8(a)(1) creates an “unwarranted disparity” where the NLRB “regularly orders the employer *both* rescind the [rule] *and* to expunge any discipline instituted under the rule and make disciplined employees whole” for unlawful unilateral change violations under Section 8(a)(5).

The GC provides in the Memorandum that “[t]he assessment of whether an unlawful work rule or contract term has been enforced against any employees should be shifted to the compliance stage.” Accordingly, the GC encourages Regions to “seek settlements that include make-whole relief for employees who were disciplined or subject to legal enforcement as a result of an unlawful work rule or contract term since the start of the Section 10(b) period”—i.e., 6-months prior to the filing of an unfair labor practice charge.

Where Regions do not have the full information as to affected employees, they should “seek and obtain such information from the employer during settlement efforts,” or in cases that do not settle, Regions should urge the NLRB to “adopt a similar remedial procedure” to ensure that all employees entitled to receive make-whole remedies are able to do so.

Takeaways

It’s always important to remember that, unlike NLRB precedent or rulemaking, GC Memoranda—like the one discussed here—do not have the effect of changing the law. However, GC Memoranda provide important insight into the GC’s policy agenda and the manner in which the Regions likely will prosecute unfair labor practices.

We have seen a consistent effort during the GC’s tenure of the Regions seeking complete make-whole relief in settlement discussions for employer violations of the Act, and this Memorandum expands upon those efforts.

Whereas previously, the potential downside to an overbroad and unlawful employer rule or contract term could be an order requiring a rescission of the rule (assuming no union election petition has been filed, where more serious penalties, such as a bargaining order could now be issued), employers should now be aware of broader penalties that can be imposed, such as monetary awards. The impact of this Memorandum certainly bears watching with respect to existing and newly-filed charges before the NLRB.

We will continue to update these developments as Regions act on the GC’s Memorandum.

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