

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 21-07

September 15, 2021

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Full Remedies in Settlement Agreements

Last week, I issued GC Memorandum 21-06, Seeking Full Remedies, in which I urged Regions to seek from the Board “the full panoply of remedies available to ensure that victims of unlawful conduct are made whole for losses suffered as a result of unfair labor practices.” In that memorandum, I encouraged Regions to take into account and employ new and alternative remedies to plead in their complaints to ensure that Board Orders provide full relief to those harmed. This memorandum continues the discussion of remedies, focusing on the types of remedies that Regions should seek in their informal and formal settlement agreements.¹

A settlement fully effectuates the mission of the National Labor Relations Act (the Act) when the Agency can deliver timely, effective, and full relief to discriminatees and the public we serve. Settlement agreements that provide complete relief to charging parties and victims of an unfair labor practices, as well as that offer charged parties quick resolution of legal actions that reduce litigation expenditures, are highly beneficial to all.

Because Regions are less constrained by the remedies that they may seek in settlement, as opposed to those they may currently seek from the Board, Regions should skillfully craft settlement agreements that ensure the most full and effective relief is provided to those whose rights have been violated.² And, if a settlement fails to materialize, Regions should seek from the Board all appropriate remedies but not limited to the guidance set forth in GC Memorandum 21-06.

¹ All of the relevant remedies discussed in GC Memorandum 21-06, Seeking Full Remedies, should be sought by Regions in settlement agreements. This memorandum will highlight remedies that I believe are likely to be implicated more frequently in settlement negotiations. However, Regions should understand that the remedies cited in this memo are illustrative and should be expounded upon in all appropriate cases.

² As you know, unilateral settlements are the exception, not the rule, and Regions are asked to send recommendations for approval of such to the Division of Advice.

Remedies for Non-Backpay Economic Harm – Compensation for Consequential Damages

A monetary remedy comprised only of backpay and lost benefits often fails to truly make whole victims of an unfair labor practice, particularly those who have been unlawfully discharged and struggle afterwards to find comparable employment in order to mitigate their loss of earnings. Therefore, in negotiating settlement agreements, in addition to seeking no less than 100 percent of the backpay and benefits owed, Regions should always make sure to seek compensation for any and all damages, direct and consequential, attributable to an unfair labor practice.

As I discussed in GC Memorandum 21-06, in *The Voorhees Care and Rehabilitation Center*, the Board recently signaled a willingness to explore an award of consequential damages to 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.³ In that decision, the following examples of such economic losses were provided:⁴

- Interest or late fees on credit cards incurred by an unlawfully fired employee to cover living expenses;
- Penalties incurred by an unlawfully fired employee from having to prematurely withdraw money from a retirement account to cover living expenses; and
- Loss of a home or a car suffered by an unlawfully fired employee because of an inability to keep up with loan payments.

I certainly agree with Board Chair McFerran's observation that "[t]here are a myriad of other possible examples." The following are further examples where relevant compensation would be appropriate:

- Compensation for damages caused to an employee's credit rating following an unlawful firing;
- Compensation for financial losses suffered by an unlawfully fired employee from having to liquidate a personal savings account or an investment account to cover living expenses; and

³ 371 NLRB No. 22, slip. op. at 4 fn. 14 (2021).

⁴ Id.

- Fees and/or expenses for training or coursework required to obtain or renew a security clearance, a certification, or a professional license that had been denied or lost as a result of an unfair labor practice.⁵

And, I remind Regions of remedies supported by existing Board law, including:

- The cost of obtaining comparable health insurance coverage following an unlawful firing, or the cost of medical expenses incurred through loss of medical insurance;⁶
- Moving expenses (e.g., where an unlawfully fired employee is forced to move to obtain comparable employment and/or thereafter returns after accepting an unconditional offer of reinstatement);⁷
- Medical expenses incurred by an employee who suffers physical injury in retaliation for engaging in activity protected under the Act;⁸ and

⁵ An example of a non-economic remedy for this consequential harm may be to require the employer to request, in writing, reinstatement of the license or certification to the appropriate governing body or agency.

⁶ See, e.g., *M.D. Miller Trucking & Topsoil, Inc.*, 365 NLRB No. 57, slip. op. at 1 (2017), enfd. mem. 728 Fed. Appx. 2 (D.C. Cir. 2018) (ordering reimbursement to an unlawfully fired employee for health insurance premiums the employee incurred during the backpay period, over and above what he would have paid had he been working for the employer); *The Voorhees Care and Rehabilitation Center*, 371 NLRB No. 22, slip op. at 3-5 (2021) (ordering reimbursement directly to employees for their medical expenses already paid to medical providers and further ordering payment directly to medical providers for those employees' still-unpaid medical bills).

⁷ See *Ampersand Publishing, LLC*, 370 NLRB No. 119, slip. op. at 1 (2021) (ordering reimbursement for moving expenses incurred by an unlawfully fired employee).

⁸ See *Nortech Waste*, 336 NLRB 554, 554 n. 2 (2001) (finding that an employee was entitled to medical expenses attributable to the employer's unlawful conduct of assigning more onerous work that the employer knew would aggravate her carpal tunnel syndrome, but leaving to compliance the question of whether the employee incurred medical expenses and, if she did, whether they should be reimbursed).

- Legal expenses that an employee incurs in connection with the employer's unlawful conduct.⁹

Accordingly, in preparing for settlement negotiations, Regions must broadly consider and assess harms caused by an unfair labor practice to ensure that their settlement agreements provide the fullest relief possible.¹⁰

Backpay, Front Pay, and Other Remedies

The purpose behind Board Orders requiring employers to reinstate and to compensate unlawfully fired employees for loss of backpay and benefits is to restore them to the economic status they would have had but for the unlawful conduct. I cannot underscore enough the importance of the remedy of reinstatement. When an unlawfully fired employee returns to work pursuant to a Board Order or a settlement agreement, the effectiveness of our Agency's ability to enforce the Act has been demonstrated in a very public manner, especially to the other employees at the workplace. That will, in turn, deter that employee's employer from further committing unfair labor practices and inform the other employees that they have legal rights that will be honored and, if not, they will be protected by the Agency.

While it has always been the Agency's policy to seek nothing less than reinstatement and full backpay in all cases involving unlawful firings, there are instances, of course, where unlawfully fired employees may understandably not wish to return to work pursuant to an unconditional offer of reinstatement. Where employees are willing to waive reinstatement, the Agency is denied a critical remedy necessary to achieve full effectuation of the purposes and policies of the Act. Thus, in addition to seeking no less than 100 percent of the backpay and benefits owed, and all compensation owed for any consequential damages, Regions should also include front pay as part of their settlement calculations where reinstatement will not be attained.

Along with the economic relief described above, Regions should, where applicable, negotiate a provision where those who voluntarily waive reinstatement may utilize an employer's in-house outplacement service or services of a third-party outplacement firm for a certain duration at the employer's expense. Other appropriate remedies that Regions should seek for employees who waive reinstatement include neutral references and agreements by employers not to contest unemployment compensation.

⁹ See *DHSC, LLC, d/b/a Affinity Medical Center*, 362 NLRB 654, 654, 669-70 (2015) (awarding reimbursement of reasonable legal fees incurred by an employee in having to defend a state nursing board action after the employer discriminatorily reported the employee to the board in retaliation for her union activities).

¹⁰ This would also include rescission of facially lawful rules that affect the broader workplace population, which have been unlawfully applied and led to the discharge or other discipline of an employee(s).

Default Language

An important provision that Regions should include in all settlement agreements provides for the expedited issuance of Board Orders in the event of their non-compliance. By operation of GC Memorandum 11-04 (January 12, 2011), GC Memorandum 11-10 (March 30, 2011), and Operations-Management Memorandum 14-48 (April 10, 2014), Regions had been required to incorporate the following default language in all of their informal settlement agreements and compliance agreements:¹¹

The Charged Party/Respondent agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party/Respondent, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party/Respondent, the Regional Director will [issue/reissue] the [complaint/compliance specification] previously issued on [date] in the instant case(s). Thereafter, the General Counsel may file a motion for summary judgment with the Board on the allegations of the [complaint/compliance specification]. The Charged Party/Respondent understands and agrees that the allegations of the aforementioned [complaint/compliance specification] will be deemed admitted and its Answer to such [complaint/compliance specification] will be considered withdrawn. The only issue that may be raised before the Board is whether the Charged Party /Respondent defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the [complaint/compliance specification] to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party/Respondent, on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is customary to remedy such violations. The parties further agree that the U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte.

I believe that the aforementioned default language remains an effective and appropriate means to ensure that charged parties will comply their obligations set forth in a settlement agreement to which they freely agreed. Further, such language protects Regions from having to litigate what they reasonably believed were issues already settled in the event of a breach. Accordingly, with very limited exceptions, Regions should return to the practice of incorporating default language in all of their settlement agreements,

¹¹ The prior General Counsel rescinded GC Memorandum 11-04, Default Language (January 12, 2011), and thus the requirement to include the aforementioned language in settlement agreements and compliance agreements ceased. See GC Memorandum 18-02, Mandatory Submission to Advice (December 1, 2017). Through this memo, I am reinstating GC Memorandum 11-04.

which will ensure the timely delivery of agreed-upon relief to those harmed by unlawful conduct.¹²

Letters of Apology

Where a settlement agreement incorporates a provision requiring that an employer make an unconditional offer of reinstatement to an unlawfully fired employee, Regions should also seek to require that the employer draft a written letter of apology to the employee, particularly where the employee is likely to accept the offer. Such a letter may assist in de-escalating lingering tensions between the employee and the employer during the reinstatement process.

Sponsorship of Work Authorizations and Other Remedies in Cases Involving Immigrant Workers

Immigrant workers are especially vulnerable to unfair and unlawful treatment in the workplace. It is crucial that Regions seek in their settlement agreements all possible remedies to ensure that these employees are provided the fullest relief. For example, where an employer's unfair labor practice causes the loss of an employee's work authorization, Regions should seek, at the very least, a settlement agreement requiring the employer, at its own expense, to sponsor the work authorization of the affected employee, such as payment of any fees in having to sponsor the affected employee's non-immigrant visa (such as H-1B, H-2B, J-1, F-1, TN), and reimbursement for any legal fees, application fees, and travel costs that the affected employee may incur in seeking to regain a lost work authorization. Additionally, where an employer has misused the E-Verify system in an unlawfully discriminatory manner, Regions should require all of the employer's supervisors and managers to attend training on the E-Verify system conducted by the Department of Justice's Immigrant and Employee Rights Section.

Expanded Use of Security Provisions

Regions should expand their use of confessions of judgment,¹³ promissory notes, and other forms of security—especially where a settlement agreement provides for backpay and other payments to be made in installments—to ensure that the Agency will be able to expeditiously commence collections proceedings following non-compliance with any agreed-upon payment terms.¹⁴

¹² Such exceptions include the following: where there has been no Regional determination in the case or where the Regional Director has determined that the case presents isolated instances of conduct by a non-recidivist requiring only a cease and desist remedy.

¹³ Operations-Management Memorandum 09-58, Confessions of Judgment (April 10, 2009).

¹⁴ Regions should be mindful that settlements containing installment payment provisions are discouraged, absent special circumstances.

Admissions

Regions are reminded that non-admission clauses in informal settlement agreements should remain the exception and that, absent special circumstances, Regions should continue insisting on the exclusion of non-admission clauses in all settlement agreements and strongly consider the inclusion of admission clauses for repeat violators.

Notices to Employees

Regions are encouraged to consider multiple and innovative provisions in their settlement agreements pertaining to the dissemination of the notice. Technology has evolved to such a degree that distribution of the notice electronically to employees is, in many cases, likely to be a more effective means of informing affected employees of their rights under the Act. Regions should, therefore, seek to incorporate in their settlement agreements various means of electronic distribution of the notice to accompany physical posting. For example, the notice should be sent via text message to mobile work phone numbers and to personal email addresses or via text message to their mobile personal phone numbers if a charged party maintains that information on file. Regions should also seek posting on an employer's public social media website, where appropriate,¹⁵ and on any internal mobile apps that an employer uses to communicate with its employees.

For settlement purposes, Regions should seriously consider posting periods that exceed 60 days depending on the circumstances and forbid the posting of any side notices. Moreover, Regions should draft language in the notice that may more effectively communicate to employees their rights under the Act and the charged party's obligations under the settlement agreement.¹⁶ And, finally, Regions should incorporate provisions in their settlement agreements that will allow them to monitor compliance with any posting requirements, such as a visitorial provision¹⁷ and provisions requiring a charged party to submit photographs of all posting locations to the Region on a weekly basis during the duration of the posting period.

¹⁵ It would certainly make sense to insist on posting on a public social media website where, for example, the website was used in the commission of an unfair labor practice.

¹⁶ Of course, notices should also be printed in all languages spoken by the affected employees.

¹⁷ GC Memorandum 85-5, Inclusion of Visitorial Clauses in the Board's Remedial Orders (September 23, 1985).

Conclusion

As the Agency is Congressionally mandated to protect the statutory rights of employees throughout our country, it is critical that our settlement agreements provide the fullest and most effective relief possible to the victims of unfair labor practices and send a message to workers nationwide. The Board agents in the field offices have a great responsibility in effectuating the Act. Through their field presence and active participation in seeking the most full and effective relief in settlement agreements, we can ensure workers' statutory rights are vigorously protected. I thank you for your continued commitment and dedication to our mission.

/s/

J.A.A.