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BLOGS

Employment Law Updates; Labor & Unions

NLRB Takes Hardline Approach to Settling Unfair Labor Practice Charges

Last week, the National Labor Relations Board's General Counsel directed the Regional Offices to adopt a hardline approach to settling unfair labor practice charges. When an employee or union files an unfair labor practice charge, the Regional office will conduct an investigation. This investigation generally does not allow the employer to see any statements or other evidence provided by the charging party or its witnesses, and, in fact, the employer may not even know the identity of the witnesses. Based on this investigation, and before any hearing, the Regional Office often will attempt to settle the charge.

In the newly-issued General Counsel directive, the Regional Offices are directed to seek settlement agreements which include all of the remedies that could be recovered after a full hearing in which the NLRB prevailed. This includes things like 100% of backpay and benefits, as well as reinstatement to employment. In addition, the directive also instructs the Regional Offices to seek remedies in settlement that could not be recovered even if the NLRB prevails at a hearing. The directive notes that the Regions are "less constrained" by the law in crafting settlement agreements, so they should go above and beyond the remedies available at a hearing. These additional remedies include things like employer-paid outplacement assistance if the employee chooses not to be reinstated, consequential damages for things like damage to credit rating, and interest or late fees on credit cards.

In litigation settlements, a common term is that the employer does not admit liability. This is inherent in the idea of a compromise—the employer does not admit that it did anything wrong, but nevertheless provides some benefits to the employee as part of a mutual agreement to resolve the matter. However, the General Counsel's directive takes the position that a non-admission clause should be the exception, and, in fact, that in certain circumstances the NLRB will only settle if the employer admits it violated the law.

Seeking 100%, and more, of what the employer would be liable for if it lost after a full hearing does not seem to be a strategy aimed at promoting settlement. If an employer is going to be required to pay more in settlement than it can expect to lose at the hearing, there would seem to be less incentive to settle. A settlement often is a compromise based on the relative strengths of the case and other factors. Yet the General Counsel's directive does not seem to take this into account. Whether this policy will advance the purposes of the law, or lead to more protracted litigation, will be of great interest to employers. A copy of the General Counsel directive can be found at <https://apps.nlr.gov/link/document.aspx/09031d458354fad5>.