

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 21-06

September 8, 2021

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

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Seeking Full Remedies

Section 10(c) of the National Labor Relations Act states that the Board shall order those found to have committed an unfair labor practice “to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act.”¹ It is well established that the Board possesses broad discretionary authority under Section 10(c) to fashion just remedies to fit the circumstances of each case it confronts.² Consistent with that authority, Regions should request 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.

Our remedies have been revised and updated in the past to ensure that victims of unfair labor practices are provided full relief.³ Indeed, two weeks ago, the Board stated a willingness to explore a new make-whole remedy to those traditionally ordered: 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.⁴ Examples cited by the Board include compensation for health care expenses that an employee may incur as a result of an unlawful termination of health insurance, or compensation for credit card late fees incurred or for loss of a home or a car that an employee suffers as a result of an unlawful discharge.⁵ In my

¹ 29 U.S.C. § 160(c).

² See, e.g., *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969);

³ See, e.g., *Cascades Containerboard Packing*, 371 NLRB No. 25, slip op. at 5 (2021) (modifying and clarifying new remedy issued in 370 NLRB No. 76 (2021), for application in all pending and future cases).

⁴ *The Vorhees Care and Rehabilitation Center*, 371 NLRB No. 22, slip op. at 4 fn. 14 (2021).

⁵ *Id.*

view, remedies such as these will better ensure that discriminatees are afforded full relief under the Act.

Like the Board, I, too, welcome the opportunity to revisit remedies, and during my tenure as General Counsel, I expect to periodically issue remedy updates. This particular memorandum will focus on the types of remedies that Regions should be requesting from the Board in all appropriate cases. I will be issuing another memorandum shortly that sets forth the types of remedies that Regions should incorporate in settlement agreements.

In cases involving unlawful firings of discriminatees, it is critical that Regions avail themselves of all remedial tools to ensure discriminatees are restored as nearly as possible to the status quo they would have enjoyed but for the unlawful conduct. In furtherance of that aim, Regions should seek compensation for consequential damages,⁶ front pay,⁷ and liquidated backpay in a combined complaint and compliance specification where appropriate. Where unlawful firings of undocumented workers are implicated, Regions should seek, in addition to the remedies previously highlighted in GC Memorandum 15-03 (issued on February 27, 2015),⁸ compensation for work performed under unlawfully imposed terms (such as work performed under an unlawfully reduced pay rate),⁹ employer sponsorship of work authorizations,¹⁰ and any

⁶ See *The Vorhees Care and Rehabilitation Center*, 371 NLRB No. 22, slip. op. at 4 fn. 14.

⁷ See *HTH Corp.*, 361 NLRB 709, 718-19 (2014) (concluding that front pay in lieu of reinstatement may be appropriate in some circumstances), *enfd.* in relevant part 823 F.3d 668 (D.C. Cir. 2016).

⁸ These remedies include notice readings, publication of the notice in newspapers and/or other forums, training for employees on their rights under the Act, training for supervisors and managers on compliance with the Act, *Gissel* bargaining orders, union access to employee contact information, reimbursement for organizing or bargaining expenses, consequential damages, reinstatement of qualified referred candidates, and “[a]ny other remedies that may be appropriate in a particular case.”

GC Memorandum 15-03 further advises that in cases where immigration status issues may impact the Agency’s ability to remedy or litigate a potential unfair labor practice violation, Regions should determine whether potential discriminatee(s) could be eligible for U or T Visas, or for deferred actions. See also OM 11-62.

⁹ See *In re Tuv Taam Corp.*, 340 NLRB 756, 759 n. 4 (2003) (agreeing that such a remedy would not be precluded by the Supreme Court’s decision in *Hoffman Plastics Compounds, Inc. v. NLRB*, 525 U.S. 137, 148-49 (2002), which held that undocumented workers were not entitled to an award of backpay for work not performed).

¹⁰ See *Saipan Hotel Corp.*, 321 NLRB 116, 120-21 (1996), *enfd.* mem. 116 F.3d 485 (9th Cir. 1997).

other remedies that would prevent an employer from being unjustly enriched by its unlawful treatment of undocumented workers.¹¹

Cases involving unlawful conduct committed during a union organizing drive present particular challenges with respect to remedies. It goes without saying that the “laboratory conditions” necessary for a free and fair election are often difficult to restore sufficiently in the face of unlawful firings, threats of retaliation, surveillance, and other coercive tactics designed to root out and squelch union support among employees. However, effective remedies still remain at our disposal. The following, which does not represent an exhaustive list, are remedies that Regions should seek from the Board in all appropriate cases:

- Union access (e.g., requiring an employer to provide a union with employee contact information, equal time to address employees if they are convened by their employer for a “captive audience” meeting about union representation, and reasonable access to an employer’s bulletin boards and all places where notices to employees are customarily posted);¹²
- Reimbursement of organizational costs (e.g., requiring an employer to pay for organizational costs that a union incurs in a re-run election because the employer has engaged in unlawful conduct sufficiently egregious as to cause the results of the prior election to be set aside);¹³
- Reading of the Notice to Employees and the Explanation of Rights to employees by a principal or, in the alternative, by a Board Agent, in the presence of supervisors and managers, with union representatives being permitted to attend all such readings, or, where appropriate, video recording of the reading of the notice and the Explanation of Rights, with the recording being distributed to employees by electronic means or by mail;¹⁴

¹¹ See *Mezonos Maven Bakery*, 357 NLRB 376, 384 (2011) (Pearce, Liebman concurring) (suggesting that the Board’s remedial authority would arguably not prevent the Board from ordering payment by an employer of backpay equivalent to what it would have owed an undocumented discriminatee and that such backpay could be paid into a fund to make whole discriminatees whose backpay the Board had been unable to collect).

¹² See, e.g., *Haddon House Food Products, Inc.*, 242 NLRB 1047, 1059-60, enf. in relevant part 640 F.2d 392, 400 (D.C. Cir. 1981).

¹³ See *Texas Super Foods*, 303 NLRB 209, 209 (1991).

¹⁴ See *HTH Corp.*, 361 NLRB at 720-23.

- Publication of the notice in newspapers and/or other forums (such as online publications and websites maintained by an employer, including social media websites), chosen by the Regional Director and paid for by the employer, so as to reach all current and former affected employees, as well as future potential hires;¹⁵
- Visitorial and discovery clauses to assist the Agency in monitoring compliance with the Board's Orders (e.g., requiring an employer to grant a Board Agent access to its facility and to produce records so that the agent can determine whether the employer has complied with posting, distribution, and mailing requirements,¹⁶ or permitting the Agency to obtain discovery under the Federal Rules of Civil Procedure for compliance purposes);¹⁷
- Extended posting periods for notices where the unfair labor practices have been pervasive and occurred over significant periods of time;¹⁸
- Distribution of notices and the Board's Orders to current and new supervisors and managers;¹⁹
- Training of employees, including supervisors and managers, both current and new, on employees' rights under the Act and/or compliance with the Board's Orders (e.g., requiring an employer to provide such training, one time or ongoing, with an outline of the training submitted to the Agency in advance of what will be presented, or requiring that a Board Agent be permitted to conduct such training);²⁰
- Instatement of a qualified applicant of the union's choice in the event a discharged discriminatee is unable to return to work;²¹ and

¹⁵ See id.

¹⁶ See id.

¹⁷ *Cherokee Marine Terminal*, 287 NLRB 1080, 1104-05 (1988).

¹⁸ See *HTH Corp.*, 361 NLRB at 720-34.

¹⁹ See id.

²⁰ See, e.g., *J.P. Stevens & Co., Inc.*, 244 NLRB 407, 408 (1979).

²¹ See *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408, 417-19 (1995) (Browning, dissenting in part), *enfd.* 134 F.3d 50 (2d. Cir. 1997).

- Broad cease-and-desist orders requiring violating parties to cease and desist “in any other manner” from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.²²

As for bargaining orders in cases involving union organizing drives, I refer you to GC Memorandum 21-04 (issued August 12, 2021). In it, I directed Regions to submit cases to the Division of Advice in which an employer refuses to recognize and bargain with a union where the union presents evidence of a card majority and the employer is unable to establish a good faith doubt as to majority status. As I consider *Joy Silk*-type bargaining orders,²³ Regions should actively seek *Gissel* bargaining orders where appropriate.²⁴

In cases involving unlawful failures to bargain, I am considering make-whole remedies that would compensate employees for the losses they sustain as a result of their employers’ failures to bargain. It is important, therefore, as I requested in GC Memorandum 21-04, that Regions also submit to the Division of Advice all cases concerning the applicability of *Ex-Cell-O Corp.*, 185 NLRB 107 (1970) (declining to provide a make-whole compensatory remedy for failures to bargain).

As for other types of remedies in the context of unlawful failures to bargain (tests of certification, withdrawals of recognition, first-contract negotiations, and any other situations where disruptions in collective bargaining have occurred), Regions should seek the following in all appropriate cases.²⁵

- Bargaining schedules (e.g., requiring a respondent to bargain not less than twice a week, at least six hours per session, until an agreement or a bona fide impasse is reached);²⁶
- Submission of periodic progress reports to the Agency on the status of bargaining (e.g., requiring a respondent to submit sworn written reports to the Agency every 30 days, over the course of a specified period, showing in detail the nature and course of

²² See, e.g., *David Saxe Productions, LLC*, 370 NLRB No. 103, slip op. at 9-11 (2021).

²³ *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), enf’d as modified 185 F.2d 732 (D.C. Cir. 1950), cert. denied 341 U.S. 914 (1951).

²⁴ *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1960).

²⁵ Again, this list is not exhaustive.

²⁶ See, e.g., *Camelot Terrace*, 357 NLRB 1934, 1941-42 (2011) enf’d. in relevant part 824 F.3d 1085 (D.C. Cir. 2016).

bargaining with the union and attaching any written communications between the parties with respect to such bargaining),²⁷

- 12-month insulation periods, including extensions of the certification year, from the date an employer commences compliance with its bargaining obligations pursuant to a Board's Order, during which a union's status as bargaining representative may not be challenged;²⁸
- Reinstatement of unlawfully withdrawn bargaining proposals;²⁹
- Reimbursement of collective-bargaining expenses (e.g., requiring a respondent to reimburse an opposing bargaining party for negotiation expenses incurred during the entire period in which it fails to bargain in good faith);³⁰
- Engagement of a mediator from the Federal Mediation and Conciliation Service (FMCS) to help facilitate good-faith bargaining between parties;
- Training of current and/or new supervisors and managers in cases involving failures to bargain (Regions should be aware that such training has routinely been incorporated in settlement agreements to resolve contempt allegations over chronic failures to timely furnish information to unions);³¹ and
- Broad case-and-desist orders.

Lastly, the requirement to post a Notice to Employees will allow us to educate victims of unfair labor practices about our Agency, its mission, and their rights under the Act. While the Board's Orders currently reference physical posting, posting on intranet sites, and distribution of the notice by email, Regions should also seek Orders expressly

²⁷ See, e.g., *All Seasons Climate Control, Inc.*, 357 NLRB 718, 718 fn. 2 (2011).

²⁸ See, e.g., *Mar-Jac Poultry Co.*, 136 NLRB 785, 787 (1962); *Metta Electric*, 349 NLRB 1088, 1089 (2007).

²⁹ See *Universal Fuel, Inc.*, 358 NLRB 1504, 1505-06 (2012); *Mead Corp.*, 256 NLRB 686, 687 (1981), enf. 697 F.2d 1013 (11th Cir. 1983).

³⁰ See, e.g., *Camelot Terrace*, 357 NLRB at 1942.

³¹ See, e.g., *NLRB v. United States Postal Service*, Nos. 14-1223 and 14-2575 (6th Cir. 2018).

directing the distribution of the notice by text messaging and by posting on social media websites and on any internal apps used by an employer to communicate with its employees. Regions should also request company-wide postings and mailings where appropriate, such as when an unlawful work rule has been applied across all facilities.

As stated earlier, another memorandum on settlements will issue soon. In the meantime, I encourage Regions to continue exploring new and alternative remedies to ensure that we are providing the most effective relief possible to those who have been harmed by unlawful conduct.

/s/
J.A.A.