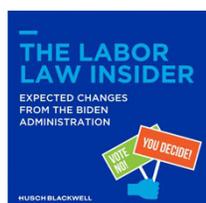


The Labor Law Insider: Expected Changes From the Biden Administration



Episode 16 – NLRB Adopts Pro-Labor Remedies for Alleged Unfair Labor Practices, Part III

August 4, 2022

Speaker

Statement

Tom Godar

Hello, welcome to Husch Blackwell’s *Labor Law Insider* podcast. I am your host, Tom Godar, and together with my Husch Blackwell colleagues and thought leaders from around the country, we will discuss and explore the ever-changing issues in the world of labor law.

President Biden promised to be the most pro-union president ever, and he’s fulfilling that promise. The next four years promise to be a wild ride, so buckle up and join us on the *Labor Law Insider* podcast.

Welcome back everybody to the *Labor Law Insider* podcast. This is Tom Godar, and we have a special thing today. We’re on part three of our remedies podcast, and quite honestly, we thought there was only going to be two parts. But this special part three of the *Labor Law* podcast focusing on remedies was important since on June 23rd, after we recorded our earlier podcast, General Counsel [Jennifer] Abruzzo released another memo focused on remedies. And the real-life lessons regarding such remedies began to emerge in the context of the nationwide Starbucks campaign. Indeed, in my practice town of Madison, Wisconsin, four Starbucks stores are being organized or were being organized, and as of June 30, the first successful campaign for Starbucks was concluded with a vote 15-to-1 favoring the union.

So to discuss these developments, I welcome back Terry Potter, our consummate *Labor Law Insider*. As you might remember, Terry was formerly a Board Agent with the National Labor Relations Board, so when we talk about our insider, he’s the real deal. He’s also been counsel with Husch Blackwell for, Terry, I’m afraid to say how many years. Counseling our clients and our friends on how to interact with the laws, the regulations



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Terry Potter	<p>and the regulators regarding labor law and union issues. Terry, even when we began the podcast on the issue of NLRB remedies and the tougher remedies or insistence on tougher remedies, there has been some development since that time. You're aware, I know, of the June 23rd memo, the GC memo, 22-06 dealing with efforts to secure full remedies and settlements. Tell me a little bit more about that order and what it might mean for employers.</p>
Tom Godar	<p>Well, I think primarily what it means is that it's the General Counsel's office putting an exclamation point on their efforts to enhance remedies and their cases. I mean, you know, really informing the public, meaning employers, and frankly, people like us, people who represent employers in these workplace issues that, you know, we're very, very serious about these remedies. We're not backing off. This isn't a pure PR issue. We intend to toe the line and have these enhanced remedies in every case. No exception. Which is different than what it has been in the past.</p>
Terry Potter	<p>Yeah, there's historically been a fair amount of autonomy by the regional directors of the various NLRB regions around the country. Isn't that correct?</p>
Tom Godar	<p>Oh, absolutely. I mean, they've always had a lot of autonomy, you know. Using discretion is often the buzzword that's provided to the regional directors and the regional attorneys in prosecuting these cases. Which, you know, they should have, because, you know, they're the ones who've investigated the case and have drafted the pleadings. They know what's of interest and concern in the cases, so they should have that discretion. And to have this sort of, you know, discretion taken away from them, frankly is I think not only rather bold by the general counsel but really not good management on their end.</p>
Terry Potter	<p>And this memo celebrates some of the things we talked about quite honestly, like reimbursing employees for late fees related to car loan payments, and payment of interest on loans that the discriminatee - that's the general counsel's language - discriminatee took out to cover living expenses. Posting of the explanation of employee rights in a facility, no big deal, but letters of apology to the reinstated employees? Training of supervisors? I mean these are kind of a step beyond what I'm accustomed to.</p>
Terry Potter	<p>Oh absolutely, absolutely. I mean there were some hints of these sorts of remedies in the past, but nothing as extensive as what we're seeing now, there's no question about it. And they're included in every complaint now as part of the remedy section.</p>



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Tom Godar	And include it if you're trying to resolve these through settlement.
Terry Potter	Absolutely, absolutely.
Tom Godar	Well, what about—go ahead, Terry, I'm sorry.
Terry Potter	<p>Yeah, just I mean, I had a recent situation in which, again, I mean the region was toeing the line based upon these memos that GC was issuing, and fortunately, the administrative law judge who was assigned the case thought differently and was not bound, from her perspective, to the GC's memos. And she took a settlement with provisions, frankly, that didn't include all these recent desires by the GC to have this part of the remedy in these cases.</p>
	<p>So at least from a strategic standpoint, as I think we might've touched upon earlier, one opportunity is to and not ignore, I suppose, but to go to the ALJ assigned and say 'hey, we're having difficulty with regard to coming up to a settlement, even though the substantive terms are virtually agreed to. Here is our request for your authority to enter a settlement that's just a little bit more employer friendly.'</p>
	<p>Yeah, I think they're going look at it with a lot more discretion in their mind, because if the Board isn't careful, I mean they're going overload the administrative law judges' dockets. And you know, everything is going to squeal to a halt. And so I think that the administrative law judges are going to take advantage of settlements where they can to avoid that from happening.</p>
Tom Godar	<p>You know, Terry, in talking about overloading anybody who's paying attention knows that Starbucks has become the centerpiece of literally hundreds of its locations being organized simultaneously. Which is of course stretching the resources of the Board significantly. But a development that's occurred and again consistent with the desires, admonitions if you will of General Counsel [Jennifer] Abruzzo, is the issuing of bargaining orders or at least the argument that they should be issued. Tell us a little bit more about that and why that is significant.</p>
Terry Potter	<p>Yes, and what is not clear to me so far is the whether or not she's going to take it one step further. Historically, bargaining orders have been allowed where there's been some showing of majority status, either from a card check or an election or something of that nature. But in the background there are some older cases in which the Board has issued what they refer to as a non-majority bargaining order. Where even though, the majority status is not been established by a card check or an election, that the egregious nature of the unfair labor practices involved are such that they're going to issue a bargaining order without a showing of majority status.</p>



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	Now again, I don't know if that's part of the gameplan here. It's not at least openly discussed in any of the memos. But I imagine that might be the next step.
Tom Godar	Well then I see as well and I love your comment; my sense is that a bargaining order would be offered in circumstances where at least in the past 20 or 30 years, it was just calling for a new election. Even if there had been a bargaining, or a majority status shown by a card check if the Board looked at the cards. Then the employer entered into a campaign with the union, six weeks later a vote is taken, the union loses two to one, but the union also pursues unfair labor practices. Then instead of saying, yep there were a couple of unfair labor practices we believe, so have an election again, they're going to say no, we're just going to impose a bargaining order. You must recognize this unit. Do you see that as becoming more likely under the correct order?
Terry Potter	Yes, I think that's probably the primary direction they're headed here. That scenario you just pointed out, so, I mean it's definitely what they're pleading in their complaints. I was reviewing some of the complaints that have issued recently where a bargaining order is included and that's what you described is exactly what's taking place.
Tom Godar	Well, and there used to be an old song which is win the election, worry about the ULP's later. At least from the employer's side of course. And I suppose a union says it inside too. But in this case, there'd be a lot more head scratching about whether some item that it might historically have passed muster, isn't going to pass muster under the current Board and what's the outcome? Might we end up winning an election but having a bargaining obligation anyhow?
Terry Potter	Not only that--
Tom Godar	It's confusing to me.
Terry Potter	Well not only that but often times these bargaining orders come in conjunction with cases in which employees have been discharged. Multiple employees and often times the Boards issuing not only injunctions but the discharges. You know, requiring reinstatement pending the outcome of the case and things of that nature. So there's a lot more in play here than there used to be. I mean not only the backpay issues and whatnot, but you're talking about legal fees that are mounting up when you're engaging in this sort of litigation.
Tom Godar	Well Terry, thanks a lot for helping walk through some of the developments that occurred frankly in late June that we wanted to include



Speaker**Statement**

in our discussion with our friends and clients regarding NLRB remedies and the impact and implications of stiffening those remedies, whether it's in the context of ULPs or ULPs within the context of an election. Thanks a lot for joining us, and we'll talk to you soon. Take care.

