# What We Know

**ARTICLES & INSIGHTS**

## ABOUT THE AUTHOR

Connie Elder Carrigan is a partner in the firm, with a practice concentration in Business Law. Her focus is assisting clients with issues regarding employment law, business advice and litigation, construction law, equipment leasing and creditor bankruptcy. Connie has lectured on topics ranging from employment law, bankruptcy, and equipment leasing to construction law.

# Private Employers Beware as NLRB Ramps Up Enforcement

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During the Obama administration, the National Labor Relations Board (NLRB) aimed at employment policies prohibiting employees' use of private employers' equipment, including work emails and IT resources, and certain policies requiring employee confidentiality in workplace investigations. The basis for this emphasis was the NLRB's position that such policies unduly restrict activities protected under Section 7 of the National Labor Relations Act, which prohibits employer practices and policies that unduly infringe upon employees' statutory right to discuss terms and conditions of their employment.

The Biden administration and Congress have signaled their intention to reinstate this emphasis. It is important to note that this expanded reach applies to what the NLRB perceives as unfair labor practices by private employers, regardless of whether or not they have a unionized workforce.

**NLRB General Counsel's Memoranda Outline Aggressive Enforcement Measures**

On September 15, 2021, NLRB General Counsel Jennifer Abruzzo issued two memoranda directing regional offices to pursue an expanded array of remedies against employers in unfair labor practice cases, including the imposition of consequential damages in discharge cases in which relief had previously been limited to reinstatement and back pay, plus interest. Such consequential damages have not generally been available under prior law as the NLRB traditionally has not had the authority to issue monetary fines. The General Counsel's memoranda indicate that such damages seek to compensate employees for other economic losses suffered as a direct and foreseeable result of their termination, such as interest or late fees incurred on credit cards they used to cover living expenses, penalties incurred by the employee for prematurely withdrawing money from an investment or retirement account to cover living expenses and loss of a home or car due to the employee's inability to keep up with loan payments.

The General Counsel further instructs that in cases where employers make an unconditional offer of reinstatement to an unlawfully discharged employee in the context of settlement of a charge in lieu of trial, they should be required to draft a

written letter of apology to the employee on the basis that such a requirement "may assist in de-escalating lingering tensions between the employee and the employer during the reinstatement process." It remains to be seen whether such a requirement would have the opposite effect of dissuading employers from pursuing the option of settling charges filed by discharged employees.

Abruzzo's memoranda further dictate that settlement agreements in discharge cases include "default language" that empowers the regional office to seek and obtain summary judgment against an employer that fails to comply with the terms of settlement, and that these agreements should not include standard language in which the alleged violator is permitted to deny wrongdoing in exchange for providing requested relief. The NLRB General Counsel additionally instructs that notice to employees of settlement of such cases should be disseminated not only via traditional posting but also by text and on social media, with settlement agreements to include "visitation" clauses permitting Board agents to "drop-in" on the workplace to ensure that notices are posted as required.

**Congress Signals Its Desire to Include Civil Penalties for NLRB Violations**

Demonstrating Congress's intent to increase enforcement of the National Labor Relations Act is language contained in the pending Build Back Better reconciliation bill. If enacted as currently written, this bill provides civil penalties of up to $100,000 for violations of the National Labor Relations Act if an employee is discharged or faces "other serious economic harm" and includes individual liability for corporate officers and directors for these civil penalties if it is demonstrated that they committed the violation, established a policy that led to the violation, or had actual or constructive knowledge of the violation but failed to prevent it from occurring. These penalties would be payable to the federal government, not affected employees. The penalties could be based upon technical violations of the NLRA's language protecting employees' right to discuss terms and conditions of their employment.

Taken together – NLRB's signaling of more aggressive enforcement and their intention to levy civil penalties against officers and directors of employers found in violation – these movements underscore the urgency for employers to prioritize ensuring their employment policies and procedures comply fully.

If you have questions regarding these agency and Congressional developments or other legal issues about the employment relationship, please feel free to contact Connie Carrigan at ccarrigan@smithdebnamlaw.com.


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