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EMPLOYMENT LAWSCENE ALERT: NLRB DECISION INCREASES EMPLOYER RISK IN UNFAIR LABOR PRACTICE LITIGATION

In a move that could significantly increase the risk associated with unfair labor practice litigation for employers, the National Labor Relations Board ("NLRB") issued a decision on October 24, 2014 that stated it has authority to order expanded remedies for violations of the National Labor Relations Act ("NLRA") that are "egregious and pervasive."

In HTH Corporation, 361 NLRB No. 65 (2014), the NLRB recognized violations by a Hawaii hotel chain for repeated violations of the NLRA, including unlawfully terminating an employee for engaging in protected activity, eliminating contributions to unionized employees' retirement plans, maintaining an unlawful anti-solicitation policy, bargaining in bad faith, and failing to comply with NLRB orders.

The NLRB ordered, among various other remedies, the employer to reimburse both the NLRB General Counsel and the union for several years of litigation expenses, including counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses, per diems, and other reasonable expenses. In addition to expenses, the employer must comply with increased posting requirements. Typically, employers who are found in violation of the NLRA must post, for 60 days, a notice informing employees of their rights under the NLRA and a statement that the employer will not violate those rights. In HTH, because of the egregious and pervasive conduct, the NLRB required the employer to post the standard notice and an Explanation of Rights, outlining employees' core rights under the NLRA and giving specific examples of violations, for three years. In addition, the company will be required to give all new hires in that three year period copies of the notice and the Explanation of Rights. The NLRB is also requiring the company to publish the notice and the Explanation of Rights in two local publications twice a week for eight weeks.

And, although the NLRB did not exercise its right to do so in this particular case, it did note that front pay is an available remedy under the NLRA as part of a make-whole remedy. Front pay is money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement. The NLRB did not specify how front pay would be calculated in the event that reinstatement was not awarded and left that question for a later decision.

This decision underscores the NLRB's recent aggressive enforcement agenda and the NLRB's willingness to deal the unions a winning hand in unfair labor litigation. The NLRB is active in enforcing the NLRA and will continue to use its broad discretionary powers to do so. This decision is likely to increase unfair labor practice charges being filed, as now unions have additional incentive to pursue such claims because they can recover their costs, and employers will be pressured to settle such charges to avoid the risk of liability for the union's costs and fees.