

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 24-04

April 8, 2024

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

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Securing Full Remedies for All Victims of Unlawful Conduct

As you know, I have issued a number of GC Memoranda regarding our dedicated efforts to obtain full remedial relief for victims of unlawful conduct.¹

Much of the progress Regions have achieved in obtaining more complete remedies has been in the context of employees discharged for engaging in union or other protected concerted activity. For example, Regions have done an excellent job in securing make-whole relief that includes compensation for: lost contributions to multi-employer pension funds; increases in the amounts of health insurance premiums, copays, deductibles, or co-insurance;² loss of contributions already made to a retirement fund due to failure to complete a vesting period; lost anticipated earnings from already-accumulated retirement fund amounts; penalties imposed for early retirement fund withdrawal caused by cessation of participation; unreimbursed tuition payments, where that reimbursement was part of the employee's compensation package; unreimbursed web development, marketing, and business insurance costs made by an employee on commission in order to increase sales of the employer's product; job search costs, such as reimbursement of mileage and gas costs, car/ride service payments, job search app costs, and resume printing fees;³ day care costs; specialty tool costs; late fees and/or related accrued interest on payments of rent, utilities, mortgage, tax, auto loans and credit cards; bank overdraft fees; utility disconnection/reconnection fees; reductions in earnings and/or penalties resulting from a dischargée dipping into savings or retirement funds to replace income lost; costs associated with loans and credit card advances; relocation/moving

¹ See, for example, 21-06, Seeking Full Remedies, 21-07, Full Remedies in Settlement Agreements, 22-01, Ensuring Rights and Remedies for Immigrant Workers under the NLRA, and 22-06, Update on Efforts to Secure Full Remedies in Settlement Agreements.

² Such costs are appropriately treated as interim expenses and part of gross backpay if they would have been paid for by the employer (or insurance) had the individual remained employed. See e.g., *M.D. Miller Trucking & Topsoil, Inc.*, 365 NLRB No. 57, slip op. at 1 (2017), enfd. mem. 728 Fed. Appx. 2 (D.C. Cir. 2018) (ordering reimbursement to an unlawfully fired employee for health insurance premiums the employee incurred during the backpay period, over and above what he would have paid had he been working for the employer); *The Voorhees Care and Rehabilitation Center*, 371 NLRB No. 22, slip op. at 3–5 (2021) (ordering reimbursement directly to employees for their medical expenses already paid to medical providers and further ordering payment directly to medical providers for those employees' still-unpaid medical bills).

³ *King Soopers, Inc.*, 364 NLRB 1153, 1155–1161 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), made reasonable search for work and interim employment expenses recoverable without regard to the amount of interim earnings.

expenses; legal representation costs in eviction proceedings; expenses resulting from a change in immigration status; and salting income.⁴

In addition to the above remedies, we also need to ensure that we seek full make-whole remedies for all employees harmed as a result of an unlawful work rule or contract term,⁵ regardless of whether those employees are identified during the course of the unfair labor practice investigation. The remedy of mere rescission of an overbroad, unlawfully promulgated, or unlawfully applied rule or contract term does not expunge discipline imposed under those unlawful provisions or retract related legal enforcement actions,⁶ and thus fails to make impacted employees whole. As a result, the chill caused by an employer's maintenance of an unlawful provision is left unremedied because the lingering effects of its enforcement remain in place. Inasmuch as that result fails to adequately remedy the harm caused by the unlawful provision, it falls short of the Board's capacity to fully redress violations pursuant to Section 10(c). It also creates an unwarranted disparity with the Board's traditional remedy for cases involving unilateral changes to work rules in violation of Section 8(a)(5). In unilateral change cases, the Board regularly orders the employer *both* to rescind the unilaterally imposed work rule *and* to expunge any discipline instituted under the rule and make disciplined employees whole, regardless of whether such discipline was alleged as an independent violation of the Act.⁷ In doing so, the Board implicitly acknowledges that disciplinary rescission is

⁴ Sections 10544.1 et seq. of the Compliance Casehandling Manual identify various non-wage components of backpay, including any increase in health care premiums paid by employees, charges for medical services that would have been provided under the prior employer's health insurance, lost contributions to pension or retirement plans, as well as service credit, lost interest on deferred-income or profit sharing contributions that would have been made but for the discharge, and tips. Board caselaw also identifies other forms of recoverable compensation, including vacation benefits, *Kartarik, Inc.*, 111 NLRB 630, 534–635 (1955), enfd. 227 F.2d 190 (8th Cir. 1955); bonuses, *United Shoe Machinery Corp.*, 96 NLRB 1309 (1951); discounts on purchases, *Central Illinois Public Service Co.*, 139 NLRB 1407 (1962), enfd. 324 F.2d 916 (7th Cir. 1963); and car allowance, *Garment Workers*, 300 NLRB 507, 509 (1990).

⁵ When employees are first hired, they are often required to sign employment agreements or other *ad hoc* contractual agreements (e.g. confidentiality, non-compete, or arbitration agreements). Likewise, severance agreements entered into at the time of separation are sometimes used to bring legal action against a former employee. In each case, legal enforcement based on an unlawful contract term—such as where an employer sues an employee for breach of an overbroad non-disparagement provision or seeks to compel arbitration of an employment-related lawsuit filed by an employee notwithstanding that the arbitration clause is overbroad—can amplify the term's chilling effect. Importantly, contract terms often also govern workplace conduct in the same manner as do workplace rules, and in those circumstances an overbreadth analysis requires application of the Board's standard from *Stericycle, Inc.*, 372 NLRB No. 113 (2023).

⁶ Where an employer institutes legal action against an employee in reliance on an unlawful contract term, such as suing an employee for breach of their employment agreement, that constitutes an "illegal objective," and the Board may therefore require the employer to retract the legal action and make employees whole. See, e.g., *Anheuser-Busch, LLC*, 367 NLRB No. 132, slip op. at 4 (2019) (citing *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 737 n.5 (1983)) (an "illegal objective" exists where, for example, a "court filing seeks to enforce an unlawful policy or contractual provision"), *pet. for rev. granted sub nom. Teamsters Local 947 v. NLRB*, 66 F.4th 1294 (11th Cir. 2023) (finding that the Board construed the illegal-objective exception too narrowly).

⁷ See, e.g., *Uniserv*, 351 NLRB 1361, 1362 (2007) (ordering make-whole relief for unnamed unit employees who may have been disciplined or discharged as a result of unilateral employment policy changes).

necessary to restore the conditions that would have been obtained but for the unlawful rule *itself*, and the General Counsel sees no reason the remedy should be different for unlawful rules that constitute direct violations of Section 8(a)(1) versus those that violate Section 8(a)(5) and are derivatively unlawful under Section 8(a)(1). The assessment of whether an unlawful work rule or contract term has been enforced against any employees should be shifted to the compliance stage, which is consistent with precedent permitting the identification of affected individuals as well as resolution other complex matters to be undertaken in compliance.⁸

Accordingly, Regions should seek settlements that include make-whole relief for employees who were disciplined or subject to legal enforcement as a result of an unlawful work rule or contract term since the start of the Section 10(b) period⁹ where: the discipline or legal enforcement action targets employee conduct that “touches the concerns animating Section 7,”¹⁰ unless the employer can show that the conduct actually interfered with the employer’s operations and it was that interference, and not reliance on the unlawful rule or term, that led to the employer’s action. Given that Regions may not have full information regarding which employees, if any, were disciplined or subject to legal enforcement actions since the start of the Section 10(b) period, Regions should seek and obtain such information from the employer during settlement efforts. Further, in such cases that do not settle, Regions should urge the Board¹¹ to ensure that all employees who would have been entitled to make-whole relief under *Continental Group* had their discipline been alleged as an independent violation in the complaint are able to obtain expungement and backpay in compliance as part of remedying the unlawful provision.¹² Regions should also urge the Board to adopt a similar remedial procedure for enforcement actions instituted by an employer in reliance on an unlawful contract term so eligible employees may have the legal action withdrawn and recover legal fees and costs.¹³

Should you have any questions about this guidance, please reach out to your AGC or Deputy in the Division of Operations-Management. Thank you for your hard work and dedication to effectuating the mission of the Agency.

/s/
J.A.A.

⁸ See, e.g., *NLRB v. Int’l Ass’n of Bridge Workers*, 600 F.2d 770, 778 (9th Cir. 1979).

⁹ For overbroad rules, the Region should seek expungement and make-whole relief for discipline issued since the start of the 10(b) period. However, for facially lawful rules that are applied to restrict Section 7 activity, Regions should seek expungement and make-whole relief only for the discipline where the rule was first unlawfully applied as well as additional discipline instituted under the same rule *after* the unlawful application.

¹⁰ *Continental Group*, 357 NLRB 409, 412 (2011).

¹¹ See General Counsel’s brief to the Board in *United Wholesale Mortgage*, 07-CA-297897, filed March 18, 2024.

¹² Of course, Regions should also seek reinstatement remedies for those who were discharged pursuant to an unlawful rule or contract term, including for those “employees who have yet to be named.” See *Great Western Produce*, 299 NLRB 1004, 1007 (1990).

¹³ Further guidance regarding remedial relief involving non-compete and other restrictive provisions is forthcoming.