

## Two by Two, Noah's Ark Decision Expands Remedies Providing No Refuge for Employers

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On Thursday, April 20, 2023, the National Labor Relations Board (“NLRB” or “Board”) released a decision in [\*Noah's Ark Processors, LLC d/b/a WR Reserve\*](#), 372 NLRB No. 80, in which it laid out sweeping remedies the Board will consider imposing in cases involving so-called “repeat offenders” of the National Labor Relations Act (“NLRA” or the “Act”).

In *Noah's Ark*, the Board affirmed findings made by an NLRB Administrative Law Judge (“ALJ”) that the employer bargained in bad faith with the union representing its employees, implemented its final offer without achieving overall impasse, engaged in regressive bargaining and other impermissible bargaining tactics, and threatened and interrogated employees because of their protected activity, all of which came on the heels of the employer defying a previous federal court injunction related to earlier bad faith bargaining and other unfair labor practice allegations. The Board not only upheld the make-whole remedies ordered by the ALJ, but also announced “the potential remedies the Board will consider in cases involving [employers] who have shown a proclivity to violate the Act or who have engaged in egregious or widespread misconduct.” In doing so, the Board ordered remedies beyond those imposed by the ALJ, noting that the Board “[has] broad discretion to exercise [its] remedial authority under Section 10(c) of the Act even when no party has taken issue with the judge’s recommended remedies or requested additional forms of relief.”

Almost all of these “potential” remedies announced by the Board have been deployed in previous cases where the Board determined an employer’s conduct was pervasive and egregious enough to warrant enhanced remedies beyond make-whole relief. The Board’s inclusion of direct or foreseeable pecuniary harms in its list of remedies follows its introduction of this concept in its recent decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), which we discussed [here](#).

The laundry list of “potential” remedies recounted by the Board in its *Noah's Ark* decision, and which can be expected to be imposed on employers with greater frequency, are summarized below:

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## **Explanation of Rights & Notice to Employees**

- **Explanation of Rights:** The Board may require the employer to post, read aloud, and/or mail an Explanation of Rights that informs employees of their rights under the Act. This Explanation of Rights goes well beyond the standard notice of employee's rights under the NLRA set forth in the Board's Notice to Employees ("Notice") and will be tailored to the violations that the Board may find an employer has committed.
- **Signing the Notice:** The Board may designate and require certain members of management directly involved in the conduct found to violate the Act to sign the Notice issued by the Board that details the remedies imposed upon the employer and the employer's obligations.
- **Reading of the Notice:** The Board may require a corporate official, high-ranking manager, or other member of management to read the Notice aloud to a group of employees, as selected by the Board, potentially with a Board Agent and/or union representative present.
  - During this reading, the Board Agent may distribute physical copies of the Notice to employees who are present for the reading.
  - Certain supervisors may be required to attend the reading and confirm their presence by signing a sign-in sheet.
- **Mailing of the Notice:** The Board may require the employer to mail the Notice and Explanation of Rights to the homes of current and *former* employees.
- **Publishing in Local Publications:** The Board may require the employer to publish the Notice and Explanation of Rights in "local publications of broad circulation and local appeal."
- **Extended Posting:** The Board may require the employer to post the Notice at the employer's facility for longer than the normal 60-day posting period.

## **Other Remedies**

- **Visitation by Board Agent:** A Board Agent may visit the employer's facilities to assess compliance, including by inspecting the employer's records, taking statements from the employer's officers, employees, and "others" for the purpose of determining or securing compliance with the Board's order.
- **Reimbursements to the Union:** The Board may require an employer to reimburse expenses incurred by the union while bargaining, including reimbursing the union for the money it paid to bargaining committee employees for lost wages due to bargaining during working hours.
- **Reimbursements to Employees for Direct or Foreseeable Pecuniary Harms:** The Board may require an employer to reimburse employees for direct or foreseeable pecuniary harms incurred as a result of the employer's actions found unlawful by the Board.

In the 2-1 split decision, NLRB member Marvin Kaplan dissented in part, criticizing the majority's decision as "advising the General Counsel [Jennifer Abruzzo] regarding extraordinary remedies she

might seek in future cases and (implicitly but unmistakably) even encouraging her to seek them.”

Employers should be aware that the General Counsel is likely to take the Board majority up on its offer to characterize a much broader scope of alleged violations of the Act as “egregious” and seek to impose these extraordinary remedies in non-egregious situations. Consistent with the Board’s commitment to an increasingly aggressive enforcement agenda, employers should anticipate expanded efforts by the General Counsel to pressure employers into signing settlement agreements that include such extraordinary remedies in non-egregious situations. For cases that proceed to litigation without settling, the Board may also seek to enhance standard and existing remedies, such as by requiring that the Notice be distributed by text message, e-mail, **and** by regular mail, making compliance more cumbersome, onerous, and expensive.

The NLRB noted in its decision that the list of potential remedies it outlined is not exhaustive and that it may order additional remedies beyond those mentioned in *Noah’s Ark*. When exactly it may decide to do so remains an open question, as the Board “emphasize[d] that in other cases, different combinations of remedies or additionally remedies may be appropriate under the particular circumstances.”

The *Noah’s Ark* decision marks yet another attempt by the union-friendly NLRB to enhance the remedies available to unions and employees who allege violations of the Act and to more closely monitor and control employers’ bargaining efforts and strategy through an ever-expanding reading of the NLR Act.

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