OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 25-06 **May 16, 2025**

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

FROM: William B. Cowen, Acting General Counsel

SUBJECT: Seeking Remedial Relief in Settlement Agreements and Formal Compliance Cases

In GC 25-05, I rescinded a number of General Counsel Memoranda urging Regions to include specific remedies or types of remedies in Settlement Agreements and complaints.[1] In so doing, I noted that full effectuation of the Act requires efficiency – that "if we attempt to accomplish everything, we risk accomplishing nothing." As discussed below, while Regions retain the discretion to tailor remedial relief to the circumstances of each case,[2] the nonmonetary remedies discussed in the rescinded memoranda should not automatically be sought but typically limited to cases involving widespread, egregious, or severe misconduct.[3]

Likewise, with respect to make-whole relief, consistent with longstanding authority, Regions should continue to seek compensation for losses incurred by employees as a result of an unfair labor practice. However, we should be mindful of not allowing our remedial enthusiasm to distract us from achieving a prompt and fair resolution of disputed matters. In this regard, Regional Directors once again have significant discretion to resolve matters in the way they believe best accomplishes the purposes and policies of the Act.

SETTLEMENT AGREEMENTS

Settlements are the principal means by which unfair labor practices are remedied, and employees impacted by unfair labor practices are afforded relief under the Act. See **Table 1** below. Accordingly, "diligent settlement efforts should be exerted in all…cases" to both effectuate the Act and "permit the Agency to concentrate its limited resources on other cases by avoiding costly litigation expenses."[4]

Table 1: The Agency's Settlement Rate in Context

Fiscal Year	2024	2023	2022	2021	2020	2019
ULP Intake	21,300	19,869	17,998	15,081	15,869	18,552
% ULP Merit	39.5%	41.1%	41.2%	37.93%	35.2%	36.0%
Settlement Rate	96.3%	96.0%	96.0%	100%	96.3%	99.3%

[1] See GC 21-06, GC 21-07, GC 22-06, GC 24-04.

[2] "The Board has broad discretion to adapt its remedies to the needs of particular situations so that 'the victims of discrimination' may be treated fairly.'" *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961), quoting *Phelps Dodge Corp.*, 313 U.S. 177, 194).

[3] See *Noah's Ark Processors LLC d/b/a/ WR Reserve*, 372 NLRB No. 80, slip op. at 4-5 (2023); *HTH Corp.*, 361 NLRB 709 (2014).

[4] NLRB Casehandling Manual (Part Two) Unfair Labor Practices Sec. 10124.1.

In drafting Settlements, the scope of the remedial relief sought should typically be consistent with the remedy that would be ordered by the Board in a case involving similar facts and violations. Where a Region wants to pursue a novel remedy, clearance should be sought from the Division of Operations-Management and, where appropriate, the Division of Advice.[5]

Settlements should also be drafted and approved in conformance with the following guidance.

- ***Default Language*** **–** Default language is not required in every Settlement Agreement. Nevertheless, default language has proven to be effective in ensuring that charged parties and respondents comply with the terms of an agreed upon Settlement and, in the event of uncured breach, that the Region "is not put in the position of having to expend resources litigating a settled issue."[6] Consequently, Regions are encouraged to include default language in initial proposed Settlement Agreements, where appropriate. However, the inclusion of such language is at the discretion of the Regional Director, and Regions typically should not fail to achieve a settlement based only on a party's objection to such a provision. Of course, situations implicating a recidivist violator,[7] an installment arrangement, liquidated damages, or other similar circumstances may warrant including default language to ensure compliance.[8]

- ***Non-Admissions Clauses*** **–** Non-admissions clauses may be included in Settlement Agreements, especially in the early stages of an investigation and immediately following a regional determination where a Region has yet to engage in substantial trial preparation. Absent extraordinary circumstances, non-admissions language should not be included in Settlement Agreements involving a recidivist violator. Even when it is appropriate to include a non-admissions clause in a Settlement Agreement, "[the Board] will not permit the inclusion of a non-admissions clause in a Board notice under any circumstances."[9]

- ***Unilateral Settlements*** **–** Regional Directors have the discretion to approve unilateral Settlement Agreements which effectuate the Act without prior authorization.

- ***Make-Whole Relief*** **–** Regional Directors should continue to pursue settlements that deliver full, effective relief to those whose rights have been violated. This includes striving to ensure that affected employees are made fully whole for the losses they incurred as a result of unlawful actions. Nevertheless, in appropriate cases Regional Directors have the discretion to approve Settlement Agreements that provide for less than 100 percent of the total amount that could be recovered if the Region fully prevailed on

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[5] NLRB Casehandling Manual (Part Two) Unfair Labor Practices Sec. 10124.1.

[6] OM 14-48.

[7] See *Service Merchandise Co.*, 299 NLRB 1132 (1990). In assessing whether an entity may be considered a recidivist, relevant factors to consider include, not only prior violations, but also the seriousness of those violations, the length of time between violations, and the number of facilities involved.

[8] NLRB Casehandling Manual (Part Three) Compliance Sec.10592.12.

[9] *Pottsville Bleaching & Dyeing Corp.*, 301 NLRB 1095, 1095-1096 (1991). NLRB Casehandling Manual (Part Three) Compliance Sec.10594.9.

> all allegations in the case. When doing so, Regional Directors should consider the nature of the violations alleged, the weight of the evidence, the inherent risks of litigation, and the extent to which a prompt resolution of a contentious dispute will promote labor peace. Absent compelling circumstances, Regional Directors should seek authorization from the Division of Operations-Management prior to approving a Settlement Agreement that provides for less than 80 percent of the relief reasonably anticipated to be recoverable after full litigation.

What about *Thryv, Inc.?* 372 NLRB No. 22 (Dec. 13, 2022)

In its decision in *Thryv*, the Board expanded the scope of remedies for unfair labor practices, stating:

> We conclude that in all cases in which our standard remedy would include an order for make whole relief, the Board will expressly order that the respondent compensate affected employees for *all direct or foreseeable pecuniary harms* suffered as a result of the respondent's unfair labor practice.

372 NLRB No. 22 at 6.

The Board went on to describe at length its view of the scope of its statutory authority, the failings of its traditional remedial practices, and the compelling need for remedial change. Acknowledging that interested parties had been invited to file briefs regarding "relief for consequential damages," the Board recognized that "consequential damages" referred to a specific type of legal damages that "fails to accurately describe the make-whole remedial policy we espouse here." 372 NLRB No. 22 at 8. The Board also acknowledged that it "does not award tort remedies." Id. at 9. Nevertheless, the Board stated its new remedial formulation using a term that unmistakably sounds in tort – "*foreseeable*."

Foreseeability is a fundamental principle of tort law. So fundamental that it is part of the first year curriculum of every accredited law school in the nation. Unfortunately, none of that body of law and scholarship is available to us in interpreting the "*Thryv* remedy," because the Board expressly disavowed "that the remedies contemplated herein are akin to those awarded in tort proceedings. . . ." Id. at 10.

So the question is – What is a "*direct or foreseeable pecuniary harm"* that falls short of "consequential damages" or "tort damages"? The majority opinion in *Thryv* does not provide a discernable standard for answering this question. The dissent, however, does provide a standard:

> In our view, employees should also be made whole for losses indirectly caused by an unfair labor practice <u>where the causal link between the loss and the unfair labor practice is sufficiently clear</u>.

372 NLRB No. 22 at 16 (emphasis added). The majority did not address the dissent's formulation, but it seems clear that the majority would include all harms encompassed by the dissent's standard. What is not clear is what additional harms the majority would include that would not be included by the dissent.

In sum, both the majority and dissent in *Thryv* agree that foreseeable "harms" or "losses" should be remedied if they "result from" the unfair labor practices or where the "causal link" between the loss and the unfair labor practice is "sufficiently clear." Thus, at least for purposes of Settlements, Region's should focus on addressing foreseeable harms that are clearly caused by the unfair labor practice. While this admittedly is the standard advocated by the dissent, it is the only standard reasonably capable of application.[10]

/s/

W.B.C.

Memorandum GC 25 -06

[10] In the event a Region believes that it has identified a harm in a particular case that is more than the dissent would allow but less than consequential damages or tort damages, please submit the case to the Division of Advice for consideration.