

ALERT

LABOR & EMPLOYMENT LAW

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NLRB Decisions Move Us Closer To EFCA-“Lite”

As expected, and as we reported in [our last Labor and Employment Alert](#) on the subject, the Employee Free Choice Act (EFCA) is not dead—even though Congress refuses to pass it—because the National Labor Relations Board (NLRB) appears intent on administratively adopting the key provisions of EFCA. For example, increasing the remedies against employers for unfair labor practices was a major component of EFCA. On Oct. 25, the NLRB imposed just such a measure. Specifically, the NLRB held that daily compound interest will be added to back pay and other monetary awards. *See Kentucky River Medical Center*, 356 NLRB No. 8.

This decision dramatically changes Board precedent. The NLRB has ordered interest on back pay for 50 years. But until now interest has not been compounded—let alone compounded on a daily basis. And unlike typical employment law cases where pre-judgment interest is awarded on a case-by-case basis, the NLRB’s new policy applies “categorically wherever a back pay award is appropriate.”

The same day NLRB also issued a decision changing the longstanding procedure for posting orders in unfair labor practice cases. *See J. Picini Flooring*, 356 NLRB No. 9. Until now, employers were required to post remedial notices for a period of 60 days in “conspicuous places including all places where notices to employees are customarily posted.” In practice, this typically meant posting on the employee bulletin board or in the lunch room. In *J. Picini Flooring*, the Board concluded this paper method of posting has “gone by the way of the telephone message pad and interoffice envelope,” and email and website postings have become “the primary means of communicating a uniform message to employees.” Now, notices that must be posted include the following additional language:

In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees [members] by such means.

Both the new interest calculation and electronic posting requirement apply retroactively to every case currently before the NLRB.

These decisions demonstrate the Board has started to administratively adopt a watered down version of EFCA. Employers should expect more of this in the coming weeks and should be proactive to meet the growing challenge to remaining union free.

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