Pay for Delay? NLRB's Top Prosecutor Wants Monetary Relief in Refusal-To-Bargain Cases

Insights
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In another push to sharpen the National Labor Relations Board's remedial teeth, NLRB General Counsel Jennifer Abruzzo recently asked the Board to impose harsher penalties on employers who refuse to bargain with unions. The General Counsel proposed in a June 24 filing that the Board adopt a monetary "make-whole" remedy in refusal to bargain cases by requiring employers to pay employees the wages and benefits they *could have earned* had a contract been reached with the union. If adopted, this would impose speculative yet potentially substantial financial obligations on those employers who challenge initial union certification or are deemed to bargain with an incumbent union in bad faith. What do employers need to know about this proposed sea change to current Board remedial authority?

The NLRB's Current Stance in Refusal-to-Bargain Cases

Under Sections 8(a)(5) and (d) of the National Labor Relations Act (NLRA), employers have a legal duty to bargain in good faith. Historically, the Board has declined to engage in the conjecture necessary to arrive at specific monetary penalties for those who violate these provisions. Instead, the Board's remedies have traditionally been confined to ordering employers to bargain in good faith and requiring them to post a notice confirming that they will do so.

The Board first explained its reluctance to award monetary relief in its 1970 *Ex-Cell-O Corp.* decision, in which it ruled that any such award in refusal-to-bargain cases would amount to compelling contractual agreement in contravention of Section 8(d) of the NLRA and would involve a measure of compensation too speculative to calculate. The Board's ruling in *Ex-Cell-O Corp.* was not decided in a vacuum. Instead, it turned largely on *H.K. Porter, Co. v. NLRB*, a case decided by the U.S. Supreme Court earlier that year. In that case, the Court ruled that Section 8(d) unequivocally prohibits the Board from compelling parties to agree to specific contract terms. The agency has consistently adhered to this position over the decades since.

The Board's long-standing reluctance to award make-whole relief in refusal-to-bargain cases has not come without criticism. When its decision in *Ex-Cell-O Corp.* was appealed, the D.C. Circuit Court of Appeals took a more expansive view of the Board's discretionary authority, urging it to award "make-whole" relief in cases where the employer's refusal to bargain could be said to be a "flagrant" violation of the NLRA. The Board ultimately declined that overture and has continued to maintain the position that it lacks discretion to order such speculative relief.

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The General Counsel Reverses Course

General Counsel Abruzzo first signaled her intent to pursue changes in the Board's remedial doctrine through an internal memorandum released in August 2021. Acting on the objectives laid out in that memorandum, Board prosecutors filed a summary judgment motion on June 24 in which they advocate for reversal of *Ex-Cell-O Corp.*

The case involves a veterinary hospital (Pathway Vet Alliance) that lost a union representation election to the International Association of Machinists. The employer subsequently refused to bargain in an effort to challenge certification, contending that the election should have included employees at 18 of its other facilities.

Board prosecutors argue that the Board's current remedial scheme not only facilitates the erosion of union support, but also "actively incentivizes" employers to spend months or even years challenging the duty to bargain on appeal while risking only litigation costs and a bargaining order. General Counsel Abruzzo maintains that the Board "has the authority and obligation to make employees whole" and proposes that future remedial orders include a monetary payment to employees "for the lost opportunity to make gains through the collective bargaining process."

She proposes that the Board calculate the value of the proposed make-whole remedy in compliance proceedings after an employer has been found to have unlawfully refused to bargain. This would see the Board rely upon hand-selected "comparator" contracts negotiated by other parties as a baseline for remedial calculations that by their very nature inject an element of conjecture — and seemingly conflict — with the spirit of the High Court's decision in *H.K. Porter*.

What Happens Next?

It remains to be seen whether the Board will adopt the General Counsel's position and agree to overturn decades-old precedent by ordering the payment of wages and benefits that "would" otherwise have been earned at the bargaining table. After all, such relief would necessarily be premised upon the assumption that a contract would have been reached in the first place, containing economic terms more favorable than those currently in effect. Any such assumption would amount to a speculative exercise in any economy – but particularly in one as volatile as this.

Although the General Counsel argues that ordering make-whole relief would not run afoul of Section 8(d)'s prohibition on the imposition of specific contract terms because it is only a remedial issue, the Board itself rejected that very argument in *Ex-Cell-O Corp.*, reasoning that any such distinction is "more illusory than real." As it made clear in that case, the speculative nature of a make-whole remedy is another obstacle to granting such relief in refusal to bargain cases. Utilizing "comparator" contracts to calculate lost wages, as the General Counsel suggests, injects a startling degree of speculation to the extent that cost structures and competitive challenges can vary substantially – even among employers in the same industry. In some instances, comparable contracts may not even exist.

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Given the pro-labor bent of the Board's current majority, however, it is certainly conceivable that it will be receptive to the General Counsel's arguments. Regardless of how the NLRB rules in the *Pathway Vet Alliance* case, the decision could ultimately be appealed (to the D.C. Circuit or any jurisdiction in which the employer transacts business). This would effectively delay any final outcome for years. Should the Board adopt the General Counsel's position in the meantime, however, employers would remain subject to the specter of make-whole remedies in refusal-to-bargain cases pending the outcome of those and any related proceedings.

Practical Implications for Employers

General Counsel Abruzzo's push to obtain make-whole relief in refusal-to-bargain cases is in line with other pro-union measures she has called for in recent months. These include:

- a proposed revival of the *Joy Silk* doctrine, under which an employer must recognize a union based on a majority of signed authorization cards unless it can prove a good faith doubt as to the union's majority support;
- prohibition of captive audience meetings addressing the issue of third party representation; and
- the expansion of damage awards in discharge and other cases.

As unions are filing more petitions for elections than they have in the past 10 years, acceptance of the General Counsel's proposal for an enhanced refusal-to-bargain remedy would have major implications for all employers – including those that have yet to receive a bargaining demand.

Since the NLRA only provides for the appeal of "final" NLRB decisions involving unfair labor practices, the only way for an employer to obtain judicial review of election-related issues is to refuse to bargain and use the Board's decision in the unfair labor practice case as a vehicle for appealing the Board's underlying representational decision. While the proposed make-whole remedy would not foreclose this procedural process, such employers would face significant financial liability if such a remedy were adopted.

The General Counsel's proposed make-whole remedy could also impact renewal negotiations for existing contracts governing established bargaining relationships. Although the General Counsel's proposed remedy was raised within the context of refusing to bargain in order to test certification of a union election victory, its rationale would likely apply to any situation in which the Board finds that an employer has failed to bargain in good faith. Unions could then choose to file unfair labor practice charges based on alleged refusals to bargain, such as the failure to adequately respond to union information requests and, if found liable, an employer would be subject to monetary penalties.

Conclusion

Fisher Phillips will continue to monitor this and other NLRB-related issues, but if you have any questions in the meantime, we encourage you to consult with your Fisher Phillips attorney, the

authors of this Insight, or any member of our Labor Relations Group. Also, make sure you are subscribed to Fisher Phillips' Insight System to receive the most up-to-date information directly in your inbox.

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