

# A Back Door to the PRO Act: NLRB General Counsel's Aggressive Agenda Raises New Risks for Employers

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September 7, 2021

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While one of organized labor's most important legislative priorities, the Protecting the Right to Organize Act (PRO Act), languishes with a seemingly limited chance at becoming law, employers still must brace for substantial pro-union changes to labor law. Recent developments at the National Labor Relations Board (NLRB) have clarified some significant avenues the NLRB may pursue.

Numerous potential case law changes, including some contained in the PRO Act, soon may become ripe for decision. Employers should be aware of the coming agenda and assess their labor relations strategy considering a pro-labor NLRB. The Biden Board has been seated (reflecting a 3-2 Democrat majority), and the NLRB's new General Counsel (GC) has issued a directive to shape future cases the NLRB will consider.

On August 12, 2021, GC Jennifer Abruzzo issued a memorandum requiring all NLRB regions to submit cases concerning certain NLRB precedents to her office's Division of Advice ([GC Memo 21-04](#)). The previous GC, Peter Robb, issued a similar memorandum (GC Memo 18-02) at the beginning of his term, which resulted in numerous changes in case law by the Trump Board. It is expected Abruzzo would have similar success with a union-leaning NLRB now.

Abruzzo's memorandum ultimately seeks to achieve some of the objectives included in the PRO Act (which, at this time, appears unlikely to pass the Senate), as well as many others. Employers should be ready for aggressive changes to the law – and possibly bringing substantial new penalties. Following are some of the critical precedents the GC likely will seek to change.

### Initiatives that Could Radically Change NLRB Case Law

#### *Expanding Damages for Unfair Labor Practices*

Monetary remedies for violations of the National Labor Relations Act (NLRA) have been limited to “make whole” relief – restoring an employee's actual wages lost because of an employer's (or a union's) unfair labor practices. However, as urged by the Biden Administration and new AFL-CIO President Elizabeth Shuler, Abruzzo appears prepared to seek increased damages as remedies for unfair labor practices and redefining what constitutes “make whole” relief. Abruzzo is seeking review of the NLRB's decision in *Ex-Cello Corp.*, 185 NLRB 107 (1970). In *Ex-Cello*, an employer unlawfully refused to negotiate a collective bargaining agreement with the certified union. The then-GC urged the NLRB to award backpay based on speculation as to what the employer *would have* agreed to had it negotiated a contract. The NLRB refused to base backpay awards on conjecture. If the NLRB now decides to reexamine monetary damages arising from refusals or delays in bargaining, it could effectively *impose* its view of what an employer *should* agree to. This

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argument, which has not been raised in over 50 years, would not only vastly expand damage awards, but also complicate the mechanics of collective bargaining.

In a related but different vein, in *Voorhees Care and Rehabilitation Center*, 371 NLRB No. 22 (Aug. 22, 2021), NLRB Chairwoman Lauren McFerran stated her view that the NLRB should reconsider “make whole” relief to include new remedies that, for the first time, would include consequential damages (such as costs arising from interest fees on unpaid credit card bills, withdrawal penalties for 401(k) loans, or foreclosure on a home). Now, with McFerran heading a Democrat-majority NLRB and GC Abruzzo preparing cases, it appears this may soon be considered.

### ***Backdoor Card Check?***

Unions typically gain recognition by winning a secret-ballot election conducted by the NLRB. For many years, labor organizations have sought mandatory employer recognition based on the presentation of signed authorization cards from a majority of the employer’s workers in a given work unit (commonly known as “card check”). Card check legislation has consistently stalled in Congress. The PRO Act draws short of calling for outright card check, but it would have made card check a remedy in most cases in which an employer is found to have engaged in objectionable pre-election conduct. However, Abruzzo appears willing to take up the mantle of card check by revisiting the NLRB’s 70-year-old decision in *Joy Silk Mills*, 85 NLRB 1263 (1949).

In *Joy Silk*, the union presented an employer with signed authorization cards from a majority of the employer’s workers and requested recognition. The employer refused and insisted on an election. The NLRB held that an employer could only decline voluntary recognition where it had a “good faith doubt” that the union truly represented a majority. Further, the NLRB found that the employer subsequently committed several (minor) unfair labor practices. The NLRB concluded these violations established that the employer did not have a “good faith doubt” as to the union’s majority status and directed the employer to recognize the union. While this remained the law for a short time, for many decades the NLRB had abandoned the “good faith doubt” card check analysis, directing secret-ballot elections except in rare cases involving egregious conduct by employers.

### **Reversing Trump Board (and Older) Precedents**

In addition to initiatives that would radically change well-settled law, Abruzzo also seeks reversal of numerous Trump Board decisions and a return to many positions the Obama Board first implemented (many of which previously upended longstanding NLRB precedents).

### ***Scrutinizing Employee Handbooks, Again***

The GC has targeted the Trump Board’s decision in *The Boeing Co.*, 365 NLRB No. 154 (2017), which established a three-part test for determining whether an employer’s work rules unlawfully infringed on employees’ rights to engage in concerted activity protected by the NLRA. It appears likely the GC will advocate a return to Obama Board precedent under which the standard for proving a work rule violated the NLRA was very low. Employers should be ready for another round of handbook reviews.

### ***Raise the Bar for Independent Contractor Status***

The GC has asked for cases suitable to asserting more stringent standards for establishing independent contractor status. Further, the GC appears to be reviving an Obama-era argument (actually rejected by the NLRB) that an employer's mistake in classifying employees as independent contractors is in itself a violation of the NLRA.

### ***Strike Replacement Restrictions***

Permanent replacement of economic strikers has been lawful since the U.S. Supreme Court held it so in 1938. It appears the GC is preparing to argue that permanent replacement of strikers should be unlawful if the employer was motivated by a desire to undermine the union — a threshold that in a strike situation not only seems low, but has been rejected by the NLRB in the past. Further, the GC is likely to contend that employers should not be permitted to provide strike replacements (permanent or temporary) with higher compensation than strikers were receiving (which has long been held lawful).

### ***Undermining Employer Confidentiality Interests***

NLRB regions must submit cases involving confidentiality and non-disparagement clauses in settlement agreements for scrutiny regarding possible inhibition of employee Section 7 rights. The GC also seeks cases to argue for lowering the threshold requiring employers to provide a union with confidential financial data in collective bargaining. Additionally, the GC has her sights on restoring the Obama Board's restrictions on employers' ability to maintain the confidentiality of workplace investigations.

### ***Protecting Employee Misconduct During the Course of Protected Concerted Activity***

Abruzzo is apparently calling for the reversal of *General Motors*, 369 NLRB No. 127 (2020). That case overruled NLRB precedent that often extended protection to employees who engaged in abusive or offensive conduct while in the course of otherwise protected concerted activity. *General Motors* was widely seen as a long-overdue recognition of employers' interest in promoting civility in the workplace.

### **Other Potential Changes**

The GC's memorandum identifies many other topics that may bring increased risks to employers. Among them are:

- *Bargaining over discipline prior to a first contract.* Restore the prior NLRB's rule requiring employers to bargain over discipline during first contract negotiations.
- *Weingarten representatives.* A return to *Weingarten* rights (requiring employees be permitted a representative during disciplinary investigations) for non-union employees; also requiring an employer to provide information on the investigation to a union.
- *Salts.* Lower the threshold for "salts" (individuals applying for work, but actually sent by a union for organizing purposes) to be considered "employees" under the law and expanding the monetary remedies available to them.
- *Withdrawal of recognition.* Eliminate employers' ability to withdraw union recognition after the third year of a collective bargaining agreement (but while the contract is in effect). Revisit the NLRB's current 45-day requirement for a union to file a petition following an employer's anticipatory withdrawal of recognition.
- *Cessation of dues checkoff upon contract expiration.* Restore the NLRB's prior policy of requiring employers to continue wage deductions under dues checkoff provisions

even after the contract expires.

- *“Status quo” increases.* Require continued wage and benefit increases beyond the expiration of a contract and prior to agreement upon a renewal.
- *Company media.* Restore the decision in *Purple Communications*, 361 NLRB 1050 (2014), and its limitations on employers restricting employee use of company communication vehicles.
- *Stronger remedies for settlements.* Require “full remedies” as opposed to the NLRB’s current policy of imposing settlements on charging parties based on the “reasonableness” of proposed remedial action. Potentially restrict or eliminate waivers of employee reinstatement in settlements
- *Duty to bargain.* A return to the NLRB’s “clear and unmistakable” contract waiver rule, which required most changes in terms and conditions to be bargained even where there is a broad management-rights contract provision.

These are not the only changes the GC may seek. Expansion of the definition of “protected concerted activity,” union access to private property, union solicitation rules, NLRB jurisdiction over religious institutions, surface bargaining, successor employers, deferral to arbitration, expanded union information requests, intermittent strikes, secondary picketing, employers’ burden to prove non-mitigation by charging parties, mandatory arbitration, expansion of the bargaining order remedy, raising the threshold for successful employer defenses in “mixed motive” cases, and threats under Section 8(a)(1) are among the other potential changes.

These are all in addition to the usual list of cases required to be submitted to the Division of Advice. Jackson Lewis attorneys are monitoring all the initiatives the GC identified in her memorandum. If you have any questions about these topics, potential risks before the Biden Board, or your workplace rules and policies, please contact a Jackson Lewis attorney.

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