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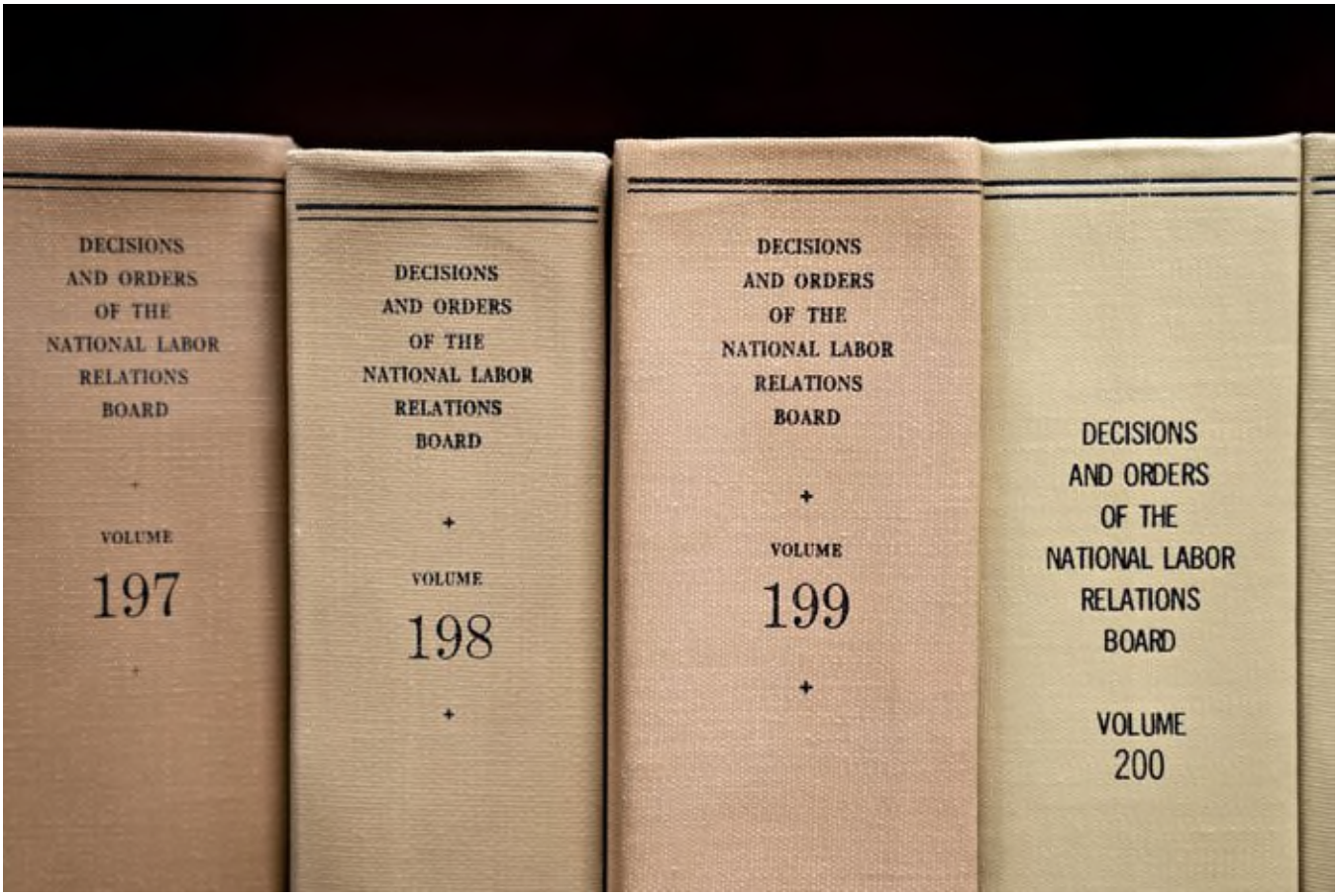
Cases That Could Shift NLRB Precedent In 2023

By **Jessica Mach**

Law360 (March 2, 2023, 9:17 PM EST) -- Since taking the helm as the National Labor Relations Board's top prosecutor, general counsel Jennifer Abruzzo has urged the board to shift a number of labor law precedents, including those related to **captive audience meetings**, what employers **can tell workers** about their relationship after they unionize and religious schools' **exemption** from federal labor law.



The NLRB's top prosecutor has urged the board to shift a number of labor law precedents. (Andrew Harrer/Bloomberg via Getty Images)

Here, Law360 looks at other precedents that are currently under review by the board and could shift in the coming months.

Monetary Penalties When Employers Refuse to Bargain

Last June, Abruzzo **urged the board** to reconsider a precedent that, for more than 50 years, had equipped the board only with bargaining orders when dealing with employers that unlawfully refused to negotiate with a union, without any monetary remedy.

That precedent was established in a 1970 board decision involving Ex-Cell-O Corp., in which a majority held that under U.S. Supreme Court case law, the board did not have the authority to impose financial penalties on employers who refuse to bargain, particularly "make-whole" remedies that include estimated wages and benefits the workers could have earned if the employer had followed through with bargaining.

The general counsel made her argument in a case involving veterinary services provider Pathway Vet Alliance. Because federal labor law does not allow employers to appeal the certification of a union, employers will simply refuse to bargain with the union, wait for the union to file an unfair labor practice charge and then litigate the issue, which was the exact route Pathway Vet Alliance took.

Abruzzo argued that this current system "actively incentivizes" employers to stall bargaining in favor of pursuing litigation, preventing workers from negotiating for better pay and working conditions in the process. But monetary penalties could help curb the practice, the general counsel said.

Elizabeth Ford, a professor at Seattle University School of Law, echoed the general counsel's sentiment, saying Ex-Cell-O has "enabled employers to fail to bargain in good faith without really much of a consequence."

"The board has tried some creative things recently, particularly as it relates to Starbucks," she added, referring to a **recent board order** that required Starbucks founder and interim CEO Howard Schultz to read a notice outlining workers' federal labor rights to Starbucks employees. "That's kind of the most they can do," Ford said. "So I think that it would make a difference, to deterrence, to ramp up those consequences."

Definition of "Protected Concerted Activity"

While some of the precedents that could shift with upcoming board decisions have been the law for decades, the standard for determining what counts as "protected concerted activity" — last established in a 2019 case involving Alstate Maintenance — tends to shift back and forth with each presidential administration.

Right now, that standard is up for review again in two cases before the board: **one involving** a Pennsylvania plastics manufacturer and **another** involving a school-choice advocacy organization.

In the 2019 Alstate decision, the board held that an employee who raises concerns with their employer is engaging in concerted activity protected under the National Labor Relations Act only if there is evidence that the employee had also discussed those concerns with their colleagues. This narrowed the board's previous definition of concerted activity, which encompassed group complaints that didn't necessarily stem from formal group discussions, plans or actions by employees.

In a May brief filed in the case involving Miller Plastic Products, prosecutors urged an NLRB administrative law judge to overturn the Alstate decision, arguing it "undermined the [National Labor Relations Act's] purpose of protecting employees who seek to improve their working conditions" and "improperly narrowed the circumstances under which an employee's conduct is considered to be for the purpose of mutual aid or protection."

Prosecutors added that the definition of protected concerted activity should be broadly interpreted in order to effectively enforce federal labor law.

Mark Spring, who represents employers as a managing partner at CDF Labor Law, said a decision overturning Alstate would not necessarily impede the success with which unions are able to organize workers, but would provide "more protections for individual employees to raise grievances without the same fear of retaliation or reprisal."

It is also one of the precedents Spring says President Joe Biden's board is most likely to shift, but is also likely to be reversed once a Republican administration regains control of the NLRB.

Union Access to Employers' Financial Records

In 1956, the U.S. Supreme Court held that an employer violated the NLRA when it refused to substantiate claims that it could not afford a wage increase sought by a union, and that the increase would put it out of business.

For decades, the board interpreted the high court's ruling to mean that an employer had to hand over its financial records to a union each time the employer claimed higher wages would put it at a "competitive disadvantage." In a 1991 decision in a case called Nielsen Lithographing, however, the board introduced a higher standard for determining whether an employer had to disclose its financial records to a union, holding that employers are not required to do so if they merely claim a "competitive disadvantage."

Instead, they must express an "inability to pay."

A 2019 decision in a case called Arlington Metals expanded the types of circumstances under which the board would find that an employer was asserting a "competitive disadvantage" rather than an "inability to pay."

In an ongoing case involving Warrior Met Coal Inc., Abruzzo **has asked** the board to overturn Nielsen Lithographing and Arlington Metals, arguing that employers often "paint a dire picture of their financial outlook in an effort to convince unions that concessions are necessary." To discourage this practice, the general counsel proposed a standard holding that an employer asserts an "inability to pay" — and is therefore required to disclose their financials — "where it has raised either its profitability or competitive advantage in response to the union's demands."

Daniel D. Schudroff, a principal at Jackson Lewis PC, argued that such a standard could "hamstring employers from making statements at the bargaining table for fear that whatever they say will be able to then trigger an information request, which will then broadly require disclosure of financial records that employer doesn't want out in any domain."

In that way, Schudroff added, the general counsel's proposed change could "actually inhibit the collective bargaining process."

But Spring said that any fallout will depend on the exact changes — if any — the board actually decides to move forward with.

"Is the new standard that the union has an unfettered right to the employer's financial records whenever the employer refuses a demand based on wages and benefits? Well, obviously that will have a much broader effect than if there's still some material limitations, but they're not quite as narrow as the current Arlington Metals [standard]," Spring said.

"I don't think the board is going to be successful to basically just allow unions … to simply just go in and look at the books," he added.

Bargaining Orders Without Elections

Under Joy Silk, a doctrine the board followed for 20 years before abandoning it following a 1969 U.S. Supreme Court case called NLRB v. Gissel Packing, the board could order an employer to bargain with a union when there was evidence — like signed union authorization cards — that a majority of the employer's workers wanted to unionize.

The current Gissel standard allows employers to insist on an election before recognizing a union, and the board can only issue a bargaining order against an employer without an election if the board finds that unfair labor practices committed during the preelection period have made a fair election highly unlikely.

Soon after the high court's Gissel decision, the board held in a case called Linden Lumber that employers do not violate the NLRB by insisting on an election.

Since NLRB prosecutors **first urged** the board to restore Joy Silk last April, they've **further elaborated** on how they think the board should apply the doctrine, proposing that employers face bargaining orders even when they have only committed "narrow violations" of the NLRA or none at all. The prosecutors also proposed that the burden should be placed on employers to prove they have good faith doubts about workers' majority support for a union.

The restoration of Joy Silk would "remake the topography of labor law in the country," said Matt Fontana, a partner at Faegre Drinker Biddle & Reath LLP. "Our whole system of labor relations is premised on this adversarial nature."

"A challenge with using cards as the basis for recognition is the risk that employees are pressured into signing cards, and it's a risk that employees don't realize that by signing a card, they could actually be bringing a union in," Fontana said. He added, "It just seems very strange to me that anybody would want to take the position that elections are a bad idea, and that we don't want employees to be fully informed of their rights … even if you disagreed with one side."

But Ford argued that reviving Joy Silk would be a step in the right direction.

"When you have a general counsel willing to be more aggressive in enforcing unfair labor practices, having a bargaining order option more available could make a big difference for employers who engage in extreme unfair labor practices," she said.

--Additional reporting by Braden Campbell, Tim Ryan and Beverly Banks. Editing by Haylee Pearl.
