If Employers Test Union Certification and Lose, Will They Have to Pay?

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Thursday, July 7, 2022

On June 24, 2022, the NLRB sought an order forcing an employer who refused to negotiate with a certified union to pay back wages and benefits to employees that they allegedly could have earned absent the delay in bargaining during the time the employer appealed the NLRB’s certification of the union as the exclusive bargaining representative in federal court. In Pathway Vet Alliance, LLC, the General Counsel for the NLRB made the common allegation that the employer violated 8(a)(5) and (1) of the NLRA by refusing to recognize and bargain with a disputed but certified union representative of its employees. What is noteworthy about this case is that Counsel for the General Counsel’s Motion for Summary Judgment urged the NLRB to “use this case as a vehicle to overrule its decision in Ex-Cell-O Corp.” and order the employer to “make the bargaining-unit employees whole for the lost opportunity to engage in collective bargaining.”
Under current Board precedent, the remedy for refusing to recognize and bargain in good faith with a certified union is an order that the employer cease and desist from its refusal to recognize and bargain and prospectively bargain on request. In *Pathway Vet Alliance*, Counsel for the General Counsel argues that employers “frequently take advantage of the Board’s prospective-only remedy . . . in order to further delay recognition of their employees’ chosen union.” In Counsel for General Counsel’s view, this policy “incentivizes violations of the Act” and does not fully remedy violations of employees’ statutory rights.

Accordingly, the Motion asks the NLRB to overrule its prior decision in *Ex-Cell-O*, where it declined to order a make-whole remedy when an employer refused to bargain with the certified union. There, the NLRB expressed concern that such a remedy would punish employers legitimately seeking to challenge a union’s certification in federal court by imposing completely speculative and potentially punitive remedies. Counsel for the General Counsel now asks the Board to revisit the precedent set by *Ex-Cell-O* and order make-whole damages, arguing that it is not unfair for an employer to risk having to pay damages in the event it loses its appeal because all litigants deliberate a risk when they gamble on a favorable decision on appeal and “in the meantime those whose rights have been violated ‘continue [] to suffer injury.”

If adopted, Counsel for the General Counsel asserts that make-whole remedies for a refusal to bargain “would be designed to reasonably approximate the value of the additional compensation that the employer avoided paying as a direct result of its unfair labor practice.” Critics of this remedy scheme note that such make-whole remedies require speculation regarding what terms would have been included in a contract had bargaining occurred (and presume that a contract would be reached) rather than the employer’s challenge to certification. There is no formula to compute what the actual damages would be, and therefore the back wages and benefits awarded are wholly speculative and likely to lead to more litigation.

Under the proposed remedy scheme, if employers are found to have unlawfully delayed or refused to bargain, they will be ordered to pay back wages and benefits - which is significantly more burdensome for employers than the current prospective remedies. Employers currently appealing a certification and refusing to bargain should carefully analyze the risk of continuing not to bargain and continue to monitor these developments, as Counsel for the General Counsel is asking that the proposed change in remedy be applied retroactively.

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National Law Review, Volume XII, Number 188

Source URL: https://www.natlawreview.com/article/if-employers-test-union-certification-and-lose-will-they-have-to-pay