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The Labor Cases To Watch In 2022's Second Half

By **Braden Campbell**

Law360 (June 27, 2022, 9:18 PM EDT) -- As the calendar flips to the second half of 2022, the National Labor Relations Board is poised to revisit issues including its bargaining order standards and the validity of so-called captive audience meetings, and a New York judge is mulling a landmark injunction bid against Starbucks. Here, Law360 looks at these and other cases to watch for the rest of the year.

Top Cop Eyes Eased Bargaining Orders, Captive Meeting Ban

NLRB general counsel Jennifer Abruzzo is executing an ambitious plan to shift federal labor policy in workers' favor, filing numerous briefs seeking changes to the law. Her office's April brief in a case involving cement company Cemex is the centerpiece of that agenda so far.

In one of several labor cases to watch in the second half of 2022, NLRB general counsel Jennifer Abruzzo is seeking to revive the dormant Joy Silk bargaining standard. (Al Drago/Bloomberg via Getty Images)

The brief urged the board to **make several potentially seismic changes** to federal labor law, including reviving the dormant Joy Silk standard for ordering reluctant employers to bargain with unions and nixing employers' power to make workers sit through anti-union meetings during organizing drives.

The Joy Silk doctrine, named for the 1949 ruling in which the NLRB set it out, holds that employers whose workers express a wish to unionize may insist on an election only if they have a "good-faith doubt" about the union's majority support. If the employer acts in bad faith — including by engaging in unfair labor practices to suppress organizing — it may be ordered to bargain.

This standard is "logically superior" to the board's current bargaining order framework, known as Gissel, because it "directly disincentivizes an employer from engaging in unfair labor practices during organizing campaigns to avoid a bargaining obligation," the brief argued.

The other key piece of the sprawling brief calls on the board to reverse a 1948 decision known as Babcock & Wilcox Co. and hold that employers violate the National Labor Relations Act by holding captive audience meetings. This common employer tactic for defeating organizing drives involves an inherent threat that workers will be punished for flexing their union rights by refusing to listen, the general counsel argued.

Joseph Richardson, an attorney at union-side Willig Williams & Davidson, said the restoration of Joy Silk would be "a really profound shift … on what the purpose of the act is."

"Really what Joy Silk presumes is that when a union approaches a company and demonstrates proof of majority support, that the company has to honor that unless it has good-faith reasons not to," he said.

If Joy Silk is revived, employers that wish to remain union-free will have to make this "much more of an ongoing effort" because refusing a union petition would open them up to bargaining orders, said Daniel Altchek, an attorney at management-side Saul Ewing Arnstein & Lehr LLP.

Employers are also paying close attention to the meeting challenge, he said.

"That's already had at least some employers rethinking whether to engage in captive audience activities … based on the possibility that could end up potentially tainting election outcomes," Altchek said.

The case is Cemex Construction Materials Pacific LLC and International Brotherhood of Teamsters, case numbers 28-CA-230115; 28-CA-235666; 28-CA-249413; 31-CA-237882; 31-CA-237894; 31-CA-238094; 31-CA-238239; 31-CA-238240; and 28-RC-232059, before the National Labor Relations Board.

Raising the Stakes for Starbucks

A federal judge in Buffalo, New York, is mulling an NLRB request for an injunction that could turbocharge the high-profile effort to unionize Starbucks.

The board's suit, filed June 21, **seeks a nationwide order** that Starbucks cease and desist from violating workers' rights in response to the union drive, including by surveilling or punishing union supporters, shuttering stores and refusing to bargain with Workers United.

The complaint is the latest in a series NLRB prosecutors have filed in U.S. district and agency courts accusing Starbucks of violating workers' rights in an attempt to stem an explosive organizing campaign that has reached more than 300 stores nationally.

In Buffalo, where the campaign began last summer, prosecutors have accused Starbucks of numerous violations, including directly or constructively discharging seven workers, convening illegal captive audience meetings, and promising better pay and benefits.

Prosecutors are seeking an emergency injunction forcing Starbucks to cease such violations in Buffalo and around the country under NLRA Section 10(j), which empowers the general counsel to seek interim court orders while the agency's lengthy legal process plays out. This means a ruling is likely to come within months.

Richardson said the so-called 10(j) injunction bid has the potential to be "transformative in two ways." First, a nationwide order would set a standard of conduct that Starbucks will be held to. Second, Starbucks could be held in contempt of court if it commits future violations of the order, exposing the company to far harsher penalties than it would face before the comparatively toothless labor board.

"It would remove the benefits of administrative delay that Starbucks has to its advantage in this process," Richardson said, alluding to Starbucks' practice of stretching the election process to its maximum. "And it would give real teeth to the enforcement mechanism."

The case is Leslie v. Starbucks Corp., case number 1:22-cv-00477, in the U.S. District Court for the Western District of New York.

NLRB Mulls Changes to Precedent

As Abruzzo works to bring her priorities to the agency's titular board for consideration, the panel is readying a handful of significant changes to precedent, including its tests for evaluating the legality of handbook policies and discerning between employees and union-ineligible contractors.

Since last fall, the NLRB has signaled plans to set new standards on these and other issues by requesting amicus briefs from stakeholders in five cases. Briefing has ended in each case, and rulings could come at any time.

In one case involving waste disposal company Stericycle, the board **asked for feedback** on how it decides whether employer rules on workplace recordings, employee conduct, social media use and other topics illegally infringe workers' organizing rights. Since late 2017, the NLRB has used a test that weights employers' reasons for maintaining rules against their impact on workers' rights. In its January call for briefs, the board's Democratic majority hinted at plans to emphasize whether rules could deter workers from exercising their organizing rights.

"This is definitely one where employers and the employer bar are paying attention, because it goes to how we draft policies and what's in employee handbooks," said Altchek, who said he expects renewed scrutiny of handbook rules from the board under President Joe Biden.

The Biden board is also **taking another look at its test for determining employee status** in a case involving a union drive by makeup artists, wig artists and hairstylists at the Atlanta Opera. In a 2019 ruling, the Trump-era board spiked a union election petition by airport shuttle drivers in Texas, making workers' "entrepreneurial opportunity" the crux of a 10-factor test prescribed by federal court precedent. The board's January call for briefs asked whether it should restore its 2014 FedEx test emphasizing "actual, but not merely theoretical, entrepreneurial opportunity" and the constraints on it that companies impose.

Richardson of Willig Williams panned the current test for ignoring "the economic realities of the modern fragmented workplace," in which employers use technology to exert arm's-length control over workers.

"I hope that the board will either return to the FedEx standard or adopt some other test … that weighs the economic risk assumed by an individual against their actual opportunity," he said.

University of North Carolina School of Law professor Jeffrey Hirsch said the ruling has the potential to make waves because the board's status test "touches a lot of people in this gray area," most notably workers in the so-called gig economy whom companies typically treat as contractors.

"That one, too, depending on how they write it, could be consequential even in other areas," like **whether collegiate student-athletes are eligible** to unionize, Hirsch said.

The NLRB has also sought briefs on whether and when to order expanded damages compensating victims for the consequences of labor violations, how it resolves disputes in which employers argue bargaining units should include more workers than unions have sought to include, and whether employers may make workers keep arbitration proceedings and results confidential.

The cases are Ralphs Grocery Co., case number 21-CA-073942; American Steel Construction, case number 07-RC-269162; Thryv Inc., case number 20-CA-250250; The Atlanta Opera Inc., case number 10-RC-276292; and Stericycle Inc., case number 04-CA-137660, before the National Labor Relations Board.

Amazon Angles to Reverse Union Election

A grassroots organizing outfit calling itself the Amazon Labor Union pulled off an upset in April when it won an election to represent workers at one of the retail giant's Staten Island facilities, but Amazon is fighting the result in a closely watched case.

A week after the NLRB's office tallied the votes, Amazon filed dozens of objections alleging that the ALU tainted the election and urging the agency to reverse the outcome. Among other things, Amazon accused the NLRB's Brooklyn office of putting its thumb on the scale by seeking a court injunction shortly before the election and alleged that ALU leaders intimidated and surveilled workers while they waited to vote.

The trial **began June 13** before the NLRB's Phoenix office and remains ongoing. In the trial's early days,

Amazon flagged the union's tactic of **disrupting the company's anti-union meetings**.

Hirsch said an Amazon win would be a "major, major deal" that would deflate a labor movement riding high on recent organizing successes there and elsewhere and set an "expansive view" of what sort of union conduct can justify setting aside a victory. But that outcome is unlikely because Amazon's arguments are weak, Hirsch said.

"I would like to think that's going nowhere, because it seems ridiculous to me," Hirsch said.

The case is Amazon.com Services LLC and Amazon Labor Union, case number 29-RC-28820, before the National Labor Relations Board.

Political Advocacy Rights at Work

General counsel Abruzzo has taken the novel stance that workers' rights to organize and act collectively in the workplace may encompass advocacy for political and social causes. Her office is testing the theory in cases accusing Kroger, Whole Foods and Home Depot of violating workers' rights by barring them from wearing apparel supporting the Black Lives Matter movement.

Prosecutors filed the first such suit in August, alleging Home Depot **violated an ex-employee's rights** by giving him a choice between removing the letters "BLM" from his apron or quitting his job at a Minnesota store. Prosecutors filed similar suits **against Kroger** in November and **Whole Foods in December**.

The complaints rest on a theory that workers' NLRA rights to act collectively to improve their jobs protect such displays because racial harassment impacts working conditions. An NLRB judge **rejected the Home Depot complaint** earlier this month — prosecutors have until July 8 to appeal to the board — and the other cases are pending in NLRB administrative court.

Saul Ewing's Altchek said the decision in the Home Depot case highlights a potential flaw in the general counsel's theory: To the extent workers' displays are about society broadly rather than their particular workplace, protection is a hard sell. Meanwhile, it's well-settled that challenges to racial inequities in the workplace are protected, he said.

"I'm not sure this is going to end up creating any new law in the end," Altchek said. "But it is a case of major interest to employers … because lots of employers are dealing with this question, employees speaking out on social issues."

Hirsch said the cases raise an interesting question of where the line lies between work-related advocacy and broader political statements.

"To the extent the board is open in some of these cases to quasi-political messaging being protected, that can be a big deal," he said.

The cases are Home Depot USA, case number 18-CA-273796; Fred Meyer Stores Inc. and Quality Food Centers, case numbers 19-CA-272795 and 19-CA-272796; and Whole Foods Market Services Inc., case numbers 01-CA-263079, 01-CA-263108, 01-CA-264917, 01-CA-265183, 01-CA-266440, 01-CA-273840, 04-CA-262738, 04-CA-263142, 04-CA-264240, 04-CA-264841, 05-CA-264906, 05-CA-266403, 10-CA-264875, 19-CA-263263, 20-CA-264834, 25-CA-264904, 32-CA-263226 and 32-CA-266442, before the National Labor Relations Board.

--Editing by Abbie Sarfo.