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Checking In On NLRB GC Abruzzo's Busy First Year

By **Braden Campbell**

Law360 (July 22, 2022, 3:42 PM EDT) -- Friday marked a year on the job for National Labor Relations Board general counsel Jennifer Abruzzo, who has made waves pursuing a pro-worker agenda that includes reviving dormant doctrines and raising the stakes for employers in labor litigation.

Weeks after her arrival as the board's top prosecutor, the agency veteran and former union-side lawyer set out a detailed plan to shift federal labor policy in workers' favor. A year later, much of that plan is in motion, alongside initiatives to secure more remedies for workers wronged by unfair labor practices and nip union-busting in the bud amid a wave of organizing.

At the end of a busy first year as the NLRB's general counsel, Jennifer Abruzzo told Law360 that she's pleased with the progress of her initiatives. (Al Drago/Bloomberg via Getty Images)

"She hit the proverbial ground running, and she's still sprinting," said Mark Nelson, a senior partner in management-side Polsinelli PC's Denver office.

President Joe Biden **nominated Abruzzo** to be general counsel in February 2021, shortly after he fired Trump-appointed general counsel Peter Robb, a career management-side lawyer whose productive tenure was marked by an expansive view of employers' rights under the National Labor Relations Act.

Abruzzo, then a special counsel with the Communications Workers of America, had left her job as the top deputy in the NLRB general counsel's office at the end of 2017 after more than two decades with the agency. Facing opposition from Republicans over her union-side work and the circumstances of Robb's departure, Abruzzo was confirmed by the U.S.

Senate in July 2021 only after Vice President Kamala Harris broke a party-line tie, and sworn in on July 22, 2021.

At the end of a busy first year, Abruzzo said in a statement to Law360 that she's pleased with the progress of her initiatives.

"As I move into my next year as general counsel, I look forward to continuing our progress in encouraging the practice and procedure of collective bargaining and the full freedom of association among workers to improve their circumstances," she said.

As general counsel, Abruzzo guides litigation in the agency's nationwide network of field offices, setting the tenor of prosecutions, deciding what legal theories to present to the five-member NLRB and overseeing priority lawsuits.

Abruzzo issued a memorandum in early August **setting out a roadmap** for her pro-worker agenda. The so-called mandatory submissions to advice memo, which general counsels typically issue early on, directs field staff to send cases raising certain issues to headquarters, so the general counsel can use them to urge the NLRB to shift the law in precedential decisions.

In addition to targeting several employer-friendly policies set during the Trump administration, Abruzzo announced plans to revisit certain longstanding precedents in ways that could shake up labor relations.

Most notably, Abruzzo has sought to revive the Joy Silk Mills doctrine, a dormant standard by which the NLRB may order employers to bargain with unions who have assembled testaments of support from a majority of a workforce. Under this doctrine, which the agency abandoned more than 50 years ago, the board may order an employer to bargain if the union demands recognition and the employer refuses and demands an election, but lacks "good-faith doubts" about the union's claim. If the employer answers the demand for recognition with unfair labor practices, that may be used as evidence of bad faith.

"[Joy Silk] just makes so much sense, making recognition more accessible and deterring unfair labor practices," said Julie Gutman Dickinson, a partner at union-side firm Bush Gottlieb.

Abruzzo's office has urged the NLRB to revive the doctrine in a few cases so far, including administrative suits **accusing Starbucks** and **building materials company Cemex** of interfering with union drives.

Abruzzo has also drawn praise from the labor side and jeers from management for her **challenge to nearly 75-year-old precedent** recognizing an employer right to persuade workers against unionizing in mandatory meetings.

In a ruling known as Babcock & Wilcox, the NLRB held that an NLRA provision protecting employers from liability for sharing their views of unions allows these so-called captive audience meetings. Abruzzo has urged the board to revisit Babcock, arguing that this practice violates a worker right to refuse to sit through anti-union meetings.

Polsinelli's Nelson said employers are keeping a close eye on this and the Joy Silk initiative, which threaten to "curtail employer free-speech rights" and "eliminate secret-ballot elections," respectively.

Invoking another deep cut, Abruzzo's office recently **urged the NLRB to revisit Ex-Cell-O**, a 1970 decision rejecting a framework for heightening the remedies due workers when their employers duck their duty to bargain with unions.

Currently, if employers violate the NLRA by refusing to bargain or bargaining in bad faith, the board orders them to cease dodging this duty and meet with unions. Under the framework the board considered in Ex-Cell-O, employers that delay or avoid inking contracts by bargaining in bad faith must also cough up an estimate of the pay and benefits they would have agreed to had they played ball.

"I see time and time again … employers delaying bargaining," Dickinson said. "[If] you can really threaten that financial liability to the employer and have them believe they're going to have to pay employees for what they lost, that will be such a deterrent."

In addition to pursuing these changes to board doctrine, Abruzzo has issued a series of directives calling on field attorneys to step up prosecution of unfair labor practices by seeking heightened remedies and more frequently pursuing emergency court orders.

In two September memos, Abruzzo told field agents to pursue "full remedies" in suits and settlements. The NLRA empowers the board to order remedies "that will effectuate the policies" of the act, which confers broad discretion to rectify the harms caused by unfair labor practices, Abruzzo said. For example, an employer that interferes with a union election may be ordered to allow union agents to address workers or use their bulletin boards, and employers that fire

workers for organizing may be ordered to pay consequential damages addressing the full harm their actions caused, Abruzzo has argued.

These sorts of remedies, which are making their way into complaints and settlements, "give some teeth to the National Labor Relations Act that it needs to have in order to really be the law of the land, and not just a law on paper that employers freely ignore," said Ryan Quinn, an attorney at union-side Segal Roitman LLP in Boston.

Abruzzo's pursuit of these heightened remedies is just one piece of the puzzle: For them to have force outside of settlements, the NLRB must endorse them. Even then, employers will likely challenge board orders imposing novel remedies in the federal circuit courts, which may look skeptically on them, said Mark Carter, chair of the labor practice at management-side Dinsmore & Shohl LLP.

The U.S. Supreme Court has held that the NLRA's remedy provisions empower the board to make workers "whole" for the consequences of unfair labor practices, but not to punish employers for violating the law. Carter said he and other labor lawyers will argue certain of these novel remedies cross this line, such as the bad-faith bargaining damages considered in Ex-Cell-O and prosecutors' attempts to make employer agents read mea culpas to workers whose rights they violate.

The U.S. Supreme Court's recent ruling in West Virginia vs. EPA **limiting actions by executive agencies** that aren't explicitly authorized by their empowering statutes may strengthen this case, he added.

"Management labor lawyers are not shrinking violets, and … they will bring this question to the courts," Carter said.

--Editing by Amy Rowe and Nick Petruncio.