

NLRB GC's Injunction Memo A 'Warning Shot' To Management

By **Tim Ryan**

Law360 (August 20, 2021, 6:07 PM EDT) -- The National Labor Relations Board's top prosecutor outlined her views this week on when the board should seek injunctions to address serious unfair labor practice allegations, and experts expect she will use the procedure more frequently than her predecessor did.

The memo general counsel Jennifer Abruzzo issued Thursday said she will "aggressively seek" injunctions under Section 10(j) of the National Labor Relations Act, which allows the NLRB's regional offices to go to federal court to seek injunctions to address particularly egregious alleged violations of federal labor law. The injunction is meant to temporarily remedy alleged violations while the board's often lengthy adjudication process plays out.

The procedures Abruzzo laid out in her memo for the regional offices she oversees to evaluate potential 10(j) cases are largely the same as those her predecessors mentioned in similar documents, said Daniel Rojas, a union-side partner at Rothner Segall & Greenstone. But Rojas said the tone of Abruzzo's memo, such as her use of the word "aggressively," is starkly different and indicates she will likely be more active in using one of the board's most powerful tools.

"This is sort of a warning shot to, I really think, management-side attorneys who are often the ones on the other side of these injunctions, to get ready, advise your clients there's a new sheriff in town," Rojas told Law360.

A 10(j) case begins when one of the board's regional offices flags a particular dispute as a candidate for an injunction. The classic 10(j) case is a so-called "nip in the bud" situation in which an employer fires workers or takes other action to crack down on a union organizing campaign, although a 2014 board case-handling memo listed 15 categories of disputes that could warrant 10(j).

The General Counsel's Office then reviews the region's memo describing the case and decides whether to seek authorization from the NLRB members, who must approve the injunction request before the regional office can go to court.

The process of seeking an injunction under 10(j) is difficult and time-intensive, but Julie Gutman Dickinson, a partner at the union-side firm Bush Gottlieb, said the new NLRB leadership's emphasis on hiring more staff will ease that burden some.

Harry Johnson III, a management-side partner at Morgan Lewis & Bockius LLP and former NLRB member, compared the process of the board authorizing a 10(j) request to "speed dating," as members consider

the general counsel's request quickly. A member will sometimes write an internal dissent, which Johnson said can help warn the board prosecutor of potential holes in their case.

Johnson said he would expect Abruzzo to be more active using 10(j), but that she will likely use "a very well-thought-through approach," because her career at the board means she has a deep understanding of when and how to use the tool effectively.

Dickinson, who previously worked as a board attorney, said Section 10(j) is a crucial tool to mitigate the damage that unfair labor practices can have on union organizing drives. It can take years to litigate a case at the NLRB, Dickinson said, and even if the board ultimately orders an employer to give back pay to a worker it unlawfully fired during an organizing campaign, the employer may have been able to dampen union support.

"I do think with this new administration that we will see true effectuation of the National Labor Relations Act and therefore a focus on making sure we have the teeth in the act that Section 10(j) allows," Dickinson said.

She said it is important for unions to request that the board seek a 10(j) petition when filing a charge, particularly under more friendly leadership.

If Abruzzo is more aggressive in seeking injunctions, she would be continuing the trend of increased 10(j) activity under Democratic general counsel. In fiscal year 2010, the last year Republican general counsel Ronald Meisburg was in office, the top prosecutor's office received 28 authorizations from the board and filed 23 petitions in court, according to board data. The next year, Democrat Lafe Solomon received 59 authorizations and filed for 45 injunctions.

In fiscal year 2018, most of which fell under former Trump-appointed general counsel Peter Robb, the General Counsel's Office filed six petitions in federal court and had 22 authorized by the board, according to board records. The office submitted seven of those cases to the board for authorization from the beginning of the fiscal year until Robb took over on Nov. 17, 2017, according to board records, a period that included Abruzzo's brief stint as acting general counsel.

One way Abruzzo may be able to influence the board's use of Section 10(j) is by instructing the regional offices she oversees to raise more types of alleged labor law violations to the General Counsel's Office for possible injunctions. Ryan Funk, an attorney at Faegre Drinker Biddle & Reath LLP, said Democratic general counsel generally have a more expansive view of what cases may warrant 10(j) than Republicans do.

Funk, a former board attorney, added that Abruzzo could also use more informal methods of boosting 10(j) litigation by merely reminding the regional offices to be more active in evaluating whether cases are potential injunction candidates.

"There are lots of different levers this new administration at the agency can use to try to increase the frequency with which it's seeking 10(j) and the types of cases for which it's seeking that kind of relief," Funk said.

Abruzzo's memo points to five specific types of cases the regional offices should evaluate for potential 10(j) treatment, including when an employer fires workers during a union campaign, withdraws recognition from a labor organization or refuses to bargain with a union as a successor employer after

acquiring a unionized workplace. The memo also suggested cases involving misconduct during negotiations on a first collective bargaining agreement and those in which the board may issue a so-called Gissel bargaining order, which requires an employer to negotiate with a union due to misconduct that would make a fair union representation election impossible.

By comparison, the memo Robb issued in 2018 explicitly mentioned three of the types of cases Abruzzo highlighted, but did not include Gissel bargaining orders or withdrawal of recognition.

Funk cautioned that even if Abruzzo is more active in wielding Section 10(j), the courts remain a variable that is out of her control. That could change somewhat if Democrats are able to enact the Protecting the Right to Organize Act, Funk said, as the legislation would require the agency to use 10(j) more often and would loosen the standard for federal courts to grant the injunction request. The proposed legislation has passed the Democrat-controlled House but faces an uphill climb in a closely divided Senate.

Johnson of Morgan Lewis said there is an inherent tension for the general counsel when seeking Section 10(j) injunctions, because cases that are good candidates are typically emergencies that must be remedied right away, but the litigation requires detailed evidence that takes time to compile.

The General Counsel's Office can wait to file a 10(j) petition until after the initial administrative hearing in the board litigation, but Johnson said that can carry risks because courts may see a delay in filing an injunction as a sign that the case does not require emergency relief.

The practical effects of a more aggressive use of Section 10(j) would reach beyond the employers that must face the actual cases in court, experts said.

Michael Lotito, a shareholder at the management-side firm Littler Mendelson PC, said the threat of a 10(j) proceeding can be a powerful tool for the board to reach settlements with companies. Defending against a 10(j) petition is a costly undertaking, Lotito said, giving the board powerful leverage, especially if the employer is a small business with limited resources.

"The threat of 10(j) oftentimes results in a settlement that you might otherwise not have been able to broker," Lotito said.

Johnson said employers should take it very seriously if the regional office investigating their case brings up the possibility of a 10(j) injunction.

"When the region ... asks for your position on 10(j) relief, that's a sign you should really get back with a very fulsome response because they're significantly concerned with it," Johnson said.

For unions, a general counsel willing to wield 10(j) in a variety of cases is a powerful support, said Rojas of Rothner Segall & Greenstone. He said unions can be bolder with their organizing choices if they know an employer may face a difficult and costly court fight if they commit misconduct in response.

"It changes things a lot, it means that unions are willing to take bigger risks, often on tougher cases," Rojas said.

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