



## The Price For Refusing To Bargain May Soon Be Going Up For Employers

July 7, 2022 | [Labor And Employment](#), [National Labor Relations Board](#), [Union Organizing](#)



**David J.  
Pryzbylski**  
Partner

There's a nuanced question coming out of National Labor Relations Board (NLRB) proceedings right now that carries some big implications for any employer whose workforce is likely to organize. The question is: If an employer refuses to bargain with union representatives after a unionization election has been certified, what kind of remedies can the NLRB issue?

Current law under the 50-year-old NLRB decision *Ex-Cell-O Corp.* says that the board can only order an employer to start bargaining. But that could soon change. The current NLRB general counsel, Jennifer Abbruzzo, has pushed for greater protections for employees – and last month lawyers from her office [filed a motion](#) asking the NLRB to overturn *Ex-Cell-O*. They argue that instead of just ordering the employer to start bargaining (what's known as prospective relief), the NLRB should recognize that it has the power to order compensatory relief.

In other words, compensatory relief means an employer refusing to bargain after a unionization election would have to pay employees for the “lost opportunity to bargain.” Figuring out the amount of compensation could be challenging and involve comparing the contracts of employees in similar situations.

Some employers refuse to bargain so they can get a federal court to review the union election process, which is overseen by the NLRB and its

### RELATED PRACTICE AREAS

Labor and Employment  
Labor Relations  
National Labor Relations Board (NLRB)  
Union Avoidance

### RELATED TOPICS

Labor Relations  
Labor Unions

representatives. The employer might believe that the election wasn't properly conducted or that the NLRB made an incorrect decision about which employees belong in a bargaining unit. Under the National Labor Relations Act, the only way a company can get a court to review the underlying NLRB representation proceedings is by refusing to bargain and drawing an unfair labor practice charge, as those charges are reviewable by the courts.

All of this is complicated. But it boils down to something pretty simple: the prospect of increased financial liability for employers. If the NLRB reverses *Ex-Cell-O* and holds that employers have to pay out for delayed bargaining, then an employer who wants to get in front of a judge may have to engage in a nuanced risk/reward calculation. This also follows the NLRB general counsel's office of [seeking to expand its remedial powers](#). Accordingly, this remains an important labor law issue for companies to watch.