Conflicting NLRB Stances Create Employer Compliance Plight

By **Alice Stock** (July 25, 2023)

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Can an employer give employees a wage increase or benefits improvement during a union organizing campaign or while negotiating a first collective bargaining agreement after a union has won an election? At present, in most situations, it will be unlawful for an employer to do so.

However, if the National Labor Relations Board decides to agree with NLRB General Counsel Jennifer Abruzzo in her 2022 complaint against Starbucks Corp., it will also be unlawful for an employer not to confer the same increases on organizing and union-represented employees that it is granting unrepresented employees. This new standard would change eight decades of law.

During both of those periods — a union organizing drive and during negotiations of a first contract — employers are expected not to take away or to grant wage increases and benefits improvements, but to maintain the status quo of the bargaining unit's or proposed bargaining unit's wages and benefits and other terms and conditions of employment.

If the union loses the election, the employer may then grant wage and benefit improvements. On the other hand, if the union wins the election, no wage or benefit improvement can be given, unless the union has agreed to such increases.

These increases are generally agreed to through negotiation of a first collective bargaining agreement, which usually takes more than a year from certification, or if the parties have reached a good faith impasse in bargaining.

Most of the time, maintaining the status quo means keeping everything the same — essentially freezing wages and benefits — for that group of employees. Sometimes, however, maintaining the status quo may mean making changes, like giving wage increases, if there is a fixed past practice of doing so.

The recent NLRB decisions in CVS Pharmacy and United Food and Commercial Workers, Local 324,[1] and 10 Roads Express LLC and International Brotherhood of Teamsters, Local 727,[2] as well as the pending Starbucks and Workers United Labor Union International[3] case, discuss the issue of when the grant of a benefits increase is required or prohibited during an organizing drive and a first contract negotiation.

On June 8, in the CVS case, the board affirmed an administrative law judge's decision that CVS had unlawfully announced and granted a wage increase to employees during a union organizing campaign at store 9119 in Orange, California.

The union had filed an election petition for store 9119 on Aug. 18, 2021. Employees were advised of and given wage increases between Aug. 17 and Aug. 27. The election occurred on Sept. 15, and the union lost the election by one vote.

Under long-standing board law, it is unlawful for an employer during a union organizing campaign to withhold or threaten to withhold benefits, or to announce or confer new employee benefits for, as the U.S. Supreme Court phrased it in its 1964 NLRB v. Exchange

Parts Co. ruling, "the purpose of inducing employees to vote against the union."[4]

The employer bears the burden of proving that it was not motivated by a desire to thwart union activity. The grant of a benefit during an election campaign can be deemed lawful, or may be required, if:

- The decision to grant the benefit was made before the employer became aware of the union organizing activity;
- It was consistent with a recurring past practice; or
- It was required by exigent circumstances or considerations unrelated to union activity.

Nevertheless, even if an employer had a past practice of granting a wage increase or had decided to grant the increase before it became aware of organizing activity, the timing of the announcement of the increase will be carefully scrutinized in order determine whether the announcement was designed to dissuade employees from supporting the union.

In the CVS case, the company argued that the wage increase was lawful because it had been working on a nationwide market adjustment wage increase for employees for months before it knew of the union organizing drive at store 9119 and had given wage increases to 16,000 employees throughout California during that same time period.

In fact, CVS' CEO had sent a letter and issued a press release announcing wage adjustments on Aug. 4, before it knew of the store 9119 union activities, stating that changes to wages would begin on Sept. 5.

Notwithstanding the fact that the wage increase had been in the works long before this organizing drive, the NLRB administrative law judge found CVS' wage increase at store 9119 unlawful based on the amount of the increase the employees received and the timing of the announcement.

First, in July, shortly after two other stores in California had filed union election petitions, there was an email dialogue between two CVS human resources and labor relations managers concerning CVS' union wage rates in California and granting those wage rates to nonunion employees in certain locations in California.

The union wage rates were higher than the market adjustment wage rate list generally applicable to its California stores. Store 9119 employees received those higher union wage rates when the increases were announced in August.

Second, the store 9119 employees were individually advised of their new wage rates to be made effective immediately between Aug. 17 and Aug. 27 — at a time that CVS was aware of the union organizing drive, since the election petition had been filed on Aug. 18. In addition, CVS had not previously issued wage adjustments in this manner.

Rather, its past practice in giving wage increases was based on annual performance reviews. The ALJ concluded that because the grant of the wage increase days before the election "was not mandated by law, past practice, policy or custom," it was unlawful.

According to the ALJ, CVS should have postponed any announcement or grant of wage

increases to store 9119 until after the election and provided assurances to employees that they would receive wage adjustments after the election, whether or not the union won the election. The ALJ cited the NLRB's 1999 Ansul Inc. ruling,[5] which cited the board's 1968 Uarco Inc. ruling[6] for this suggestion.

Interestingly, those cases concerned allegations that postponing the announcement of an annual wage increase during an organizing drive was unlawful. The board held that the employers had acted properly in telling employees that they were postponing any announcements of wage adjustments until after the election so as to avoid any perception that they were interfering with the election.

While the CVS decision generally reaffirms existing law, what is new is that the holding suggests that any announcement or grant of a wage or benefit improvement during an organizing drive is per se unlawful, unless such an announcement was compelled by law or a past practice from which the employer never deviated.

Thus, even if the decision to grant the increase was made long before the union campaign was known and thus could not have been motivated by the organizing drive and been made for the purpose of dissuading a vote in favor of the union, any announcement of such decision during an organizing drive will be deemed for that purpose and cannot be rebutted.

Although the ALJ in CVS suggested that the wage increase should have been announced after the election occurred, it is not clear that an announcement of an increase at that time would have been lawful either.

Whether an employer can grant a wage increase after an election will depend upon whether the employees have elected the union as their bargaining representative and whether there are pending objections to the election. If the union loses the election and there are no objections to the election, the employer can grant a wage increase because there is no employee collective bargaining representative with which the employer must negotiate.

On the other hand, if the union wins the election, the employer cannot grant a wage or benefit improvement without giving the union notice and opportunity to bargain.[7]

An employer's unilateral change to the bargaining unit's preelection terms and conditions of employment, such as the wage increase suggested by the ALJ in CVS, would be an unfair labor practice in violation of National Labor Relations Act Section 8(a)(5)'s requirement that the employer bargain with the employees' bargaining representative, and Section 8(d)'s duty to bargain in good faith about terms and conditions of employment.

Such an increase would be a unilateral change to the terms and conditions of employment and is unlawful because it undermines the union's role as the employees' exclusive bargaining representative and the bargaining process itself.

An employer must thus maintain the status quo in terms and conditions of employment and may not lawfully improve wages or benefits, unless the decision was

- Made before the employer became aware of the union organizing activity;
- Consistent with a recurring past practice;
- Agreed to by the union or implemented after an overall good faith impasse in bargaining a collective bargaining agreement; or

- Required by exigent circumstances.

As if these decades-old legal principles concerning the status quo weren't hard enough to navigate when applying them to concrete, daily operational situations, the NLRB general counsel is now challenging these fundamental principles in a case against Starbucks.

This case concerns the 2022 announcements of former Starbucks CEO Howard Schultz that Starbucks would improve wages and benefits for its unrepresented employees, but could not give those same improvements to its unionizing or union-represented employees because of its legal obligations to maintain the status quo in locations in which organizing was occurring and in which it was negotiating contracts with its unionized employees.

In August 2022, the NLRB general counsel issued a complaint against Starbucks, alleging that not granting these increases to unionizing and union-represented employees was discriminatory and retaliatory in violation of NLRA Sections 8(a)(1), (3) and (5).

In her December 2022 brief to the ALJ, ignoring long-standing status quo principles, the general counsel argued that Starbucks' failure to give the increases was unlawful because the decision to withhold the benefit was based on union activity, and requested that the NLRB's 1948 Shell Oil Co. Inc. decision be overturned.[8]

For eight decades, Shell Oil has stood for the proposition that because granting improvements to unionized or unionizing employees is presumptively unlawful, abstaining from such grants is presumptively lawful. Accordingly, under Shell Oil, employers are not required to afford represented and unrepresented employees the same levels of wages and benefits.

For eight decades, the cardinal principle that an employer's maintenance of the status quo at a petitioned location in an effort to comply with the law cannot be a legal violation has protected employers from whipsaw allegations of illegality. In the Starbucks case the maintenance of the status quo was the withholding of a wage increase.

The general counsel wants to take away this key employer protection.

If the general counsel's position were to become law, employers would face a no-win legal dilemma: If the employer grants new benefits improvements to unionizing and unionized employees, it presumptively violates Section 8(a)(1) and (5). If it does not grant these improvements, it faces claims of unlawful discrimination and retaliation under Sections 8(a)(1), (3) and (5).

The general counsel's argument in Starbucks completely contradicts her legal position in the CVS case. In that case, she argued that CVS acted unlawfully in granting a nationwide wage increase to its employees who were organizing, and now in Starbucks, she claims that Starbucks acted unlawfully in not granting a nationwide wage increase to employees being organized.

These twin legal positions put employers in a true "damned if you do, damned if you don't" situation, especially for those with multiple stores or locations in which compensation and benefits require constant or periodic adjustments.

Putting employers in this catch-22 situation is not helpful because there is no guidance on how to comply with the law. Additionally, it does not help employees, because employers

may be reticent about improving even unrepresented employees' benefits.

These legal positions benefit only unions because they enable them to claim that an employer engaged in unlawful conduct for granting or not granting wage or benefits improvements and that any election that the union lost should be overturned because of such conduct.

Of course, if the board goes along with the general counsel's position, as it is likely to do, it will find some way to justify these conflicting legal positions and simply assert that they are reconcilable and that there is a way to comply with both legal requirements.

But the board is unlikely to provide guidance to employers on how to do so, because these positions are simply irreconcilable.

However, in the context of first contract negotiations, the board's July 14 ruling in 10 Roads Express has indicated that there is a way for an employer to navigate these conflicting requirements and not run afoul of the law.

There, the board majority held that the employer had not discriminated against represented employees in violation of Sections 8(a)(1) and (3) by implementing a wage increase for unrepresented employees and not for represented employees. The board made this holding because the employer had first offered that same wage increase to the union, had offered to bargain with the union about the increase, and only implemented the wage increase after the union had rejected it.

The employer intended to put in an emergency wage increase for represented and unrepresented employees with the proviso that once market conditions had changed it reserved the right to reduce or eliminate the wage increase.

Objecting to the wage increase reduction proviso, the union rejected the proposal; when implementing the wage increase for the unrepresented employees, the employer advised its represented employees that they were not getting the wage increase because their union had rejected the increase proposal.

NLRB member Gwynne Wilcox dissenting, while not ruling on the discrimination charge, found that the employer had violated its duty to bargain in good faith under Section 8(a)(5) by undermining the union in the eyes of employees by telling them that the union was responsible for their not receiving a wage increase.

In sum, where there are organizing campaigns or first-contract negotiations occurring in a part of an employer's operations, employers need to carefully analyze, first, whether it is lawful under current law to provide any changes in wages and benefits they intend to make for their unrepresented workforce to employees being organized or negotiating first contracts in the same or similar job categories.

If it is unlawful to do so, then, they need to weigh the business and legal risks of providing needed benefit improvements to only unrepresented employees, and the likelihood of being charged with, and found liable for, an unfair labor practice for allegedly discriminating against represented employees and those being organized.

Where employees are represented by a union, the employer may be able to protect itself from liability if it offers to the union the same proposed change it intends to implement for its unrepresented employees.

Of course, depending upon the context, the safest course may be to not improve wages and benefits for anyone, but this may not be a feasible business option.

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[1] CVS Pharmacy and United Food and Commercial Workers, Local 324, 374 NLRB No. 91 (June 8, 2023).

[2] 10 Roads Express LLC and International Brotherhood of Teamsters Local 727, 372 NLRB No. 105 (July 14, 2023).

[3] Starbucks Corporation and Workers United Labor Union International,19-CA-294579, 19-CA-294708, 19-CA-295181, 19-CA-297594.

[4] NLRB v. Exchange Parts, 375 U.S. 405 (1964).

[5] Ansul Inc., 329 NLRB 935 (1999).

[6] Uarco Inc., 169 NLRB 1153, 1154 (1968).

[7] NLRB v. Katz, 369 U.S. 736, 743 (1962).

[8] Shell Oil Co., Inc., 77 NLRB 1306 (1948).