Hot-Topics-in-Labor-Law--A-Conversation-with-Jennifer-Abruzz...

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SPEAKERS

Chris Casillas, Mike Sellars, Jennifer Abruzzo

C **Chris Casillas** 00:09

In this episode of the PERColator, we welcome Jennifer Abruzzo, General Counsel with the National Labor Relations Board. And Mike Sellars, Executive Director of the Washington State PERC. With so much happening in the world of labor relations these days, Jennifer and Mike spent nearly an hour with us covering a range of hot topics, and offering their perspective on these important issues of the day. While we encourage you to stay with us for an engaging and lively full hour of discussion, for those of our listeners who may be interested in certain topics, we wanted to provide an overview of the topics covered and the specific times those topics are discussed, if you prefer to focus on a few specific areas of the interview. For those of you less familiar with the history and structure of the NLRB, or the Washington PERC, roughly the first 15 minutes or so include both Jennifer and Mike providing a succinct overview of their respective agencies, and how they are structured. At about minute 14:30, Jennifer outlines some of the priorities she brought with her upon her appointment to general counsel in July of 2021. At approximately minute 18:45, both Jennifer and Mike discuss recent developments in the area of remedies for ULP violations, which is immediately followed by a lively discussion of how case precedent changes between the two agencies, which begins at minute 31:45. Then in the face of a noticeable increase in organizing activity in both the private and public sectors. At minute 41:30, Jennifer and Mike discuss the injunctive relief powers of both agencies, finished by a look into the future for both the NLRB and Washington PERC starting at minute 54:30. We hope you enjoy the entire conversation or any of the pieces just mentioned.

C **Chris Casillas** 02:09

Hello, and welcome to the PERColator podcast. My name is Chris Casillas, with the Washington State Public Employment Relations Commission. And it's a pleasure to be back with all of you. Today I have two wonderful and exciting guests who are joining us here on the PERColator. Jennifer Abruzzo, the general counsel with the National Labor Relations Board is here with us today. Welcome, Jennifer.

J Jennifer Abruzzo 02:34

Thanks for having me, Chris.

C Chris Casillas 02:36

Our pleasure. And we are also joined by the executive director of the Washington State Public Employment Relations Commission, Mike Sellars, Mike, good to see you.

M Mike Sellars 02:46

You too, Chris. Good to see you, Jennifer.

J Jennifer Abruzzo 02:48

You too, Mike.

C Chris Casillas 02:49

Well, thanks to you both for your time today. Lots to cover, I'm sure we could spend the next six hours geeking out on labor law and all the amazing happenings going on in the world of labor relations these days. But we will try and focus in on a few kind of more relevant and hot topics, so to speak, and get both of your perspectives from your various agencies. But before we kind of jump into those details, just want to take a moment to provide some space for you both to introduce yourself, you've already said hi, but maybe if he could just tell us a little bit about your respective roles. And describe your respective agencies for a few minutes, in particular, just to familiarize some of our listeners who primarily in the public sector here in Washington State, but maybe somewhat less familiar with the National Labor Relations Board. So first, I'll turn it over to you General Counsel Abruzzo. And if you would mind, kind of doing that introduction, and then I'll turn it over to Executive Director Sellars.

J Jennifer Abruzzo 03:58

Sure. And feel free to call me Jennifer. So yeah, I'll just kind of go back to first principles when the agency was established in 1935. I won't go through the decade since but, but it sets the table in that during that period of time, which was during the Great Depression. There was a lot of industrial instability and labor unrest because of a lack of channels of communication that employees did not have in dealing with their employers regarding issues that were arising in their workplaces health and safety issues, opportunity, inequities and opportunities etc. And so wage issues and so Congress felt it was important that we leveled the playing field somewhat so that employees could actually engage with their employers over issues that were in court to them at the workplace and try to promote better labor management relations. The NLRA basically provides for employees to self organize, to join, support or assist a union to bargain

collectively with their employer through representatives of their own free choosing to engage in other Protected Concerted Activity to improve their wages and working conditions without a union even being involved, or to refrain from engaging in all of those. So I start that way, because the idea was that by providing workers with a voice, we are a pro worker statute. We're an independent agency, but we enforce a pro worker statute and by providing workers with a voice, the idea was that would improve their their wages and working conditions, make them better consumers in the economy and help us get out of the Great Depression. So we do cover, our jurisdiction does cover private sector workplaces as opposed to public sector. I personally have been with the National Labor Relations Board since January of 1995. With a short absence during the Trump administration, and I am currently the General Counsel, as you said, as the General Counsel, I'm ultimately responsible for the investigative and prosecutorial functions of the agency. And I also oversee the conducting of union representation elections in field offices, with regard to the field offices, I have ultimate responsibility for all 48 field office operations, along with all of the headquarters, mission critical, and mission support offices. So, I guess we'll go into probably the structure of of the agency itself in terms of general counsel side versus board side. So I'll stop there unless you want me to continue.

C Chris Casillas 04:03

Yeah, no, I'll let you take a little little breather there. Executive Director Sellars, do you want to do the same kind of introduce the agency and yourself a little bit?

M Mike Sellars 07:09

Sure. And likewise, you can call me Mike. The Washington State Public Employment Relations Commission was founded in 1975. The legislature basically consolidated the amalgam of public sector statutes into one agency, our structure's modeled essentially after Wisconsin's which was the first state to pass legislation to create public sector labor relations. In that time, we now administer 10 different statutes instead of one, covering all sorts of public sector employees, quasi public sector employees. With one exception, we do administer a statute for symphony musicians who don't qualify for jurisdiction under the NLRB. Although we have that statute, we have no units formed under that statute. Similar to the board we conduct, administer the laws that give employees the right public employees, the right to determine whether or not they want to be represented for purposes of collective bargaining. And then we enforce that process. So we administer elections that comes through me, we engage in, you know, any adjudicative matters related to the representation process as well as adjudicative matters enforcing the statutes, unfair labor practice hearings. We also unlike the board, conducted mediations, and Washington is unique in how it does that compared to the other states that have public sector labor relations in that some states will separate the mediation arm into a different agency, similar to what the federal government has done, or they'll separate it out and have two different wings of doing it. We have the same same group of people, Chris is one of them, who conducts both the adjudications and the mediations not on the same case, of course, my role as executive director is similar to Jennifer's in some respects, I'm the day to day agency head, and run the agency. We have 30 staff, we're one of the larger public sector labor relations offices in the US. We have a commission, the commission has a role in the appellate, they function as the appellate body and any decisions issued either by me or by staff as well as their the rulemaking authority for the agency.

C Chris Casillas 07:29

Yeah, maybe we just build off that a little bit, Jennifer, to contrast that what Mike just described with how the General Counsel's Office and the Board are set up within your agency, and maybe you could describe that briefly for us?

J Jennifer Abruzzo 09:50

Sure. So the NLRB is bifurcated between the board and the general counsel and the board has the adjudicatory and rulemaking functions typically they've engaged in the the majority of their time is spent on an adjudicatory matters. But, but they are spending some time on rulemaking, particularly recently. And as I said, I, I have the investigative, prosecutorial and operational functions of the house. So it's a much, the board side is much, much smaller than the GC side. I certainly have, as general counsel, the prosecutorial discretion to bring matters to the board members. And I've been very transparent through the issuance of memos, which you may have seen about issues and case precedent that I would like them to reconsider, particularly, but not exclusively, during the Trump board era. But ultimately, the board members are the adjudicators and they have to make the call with regard to what the precedent is going to be. So my memos offer guidance to the public in terms of what I'm thinking and what I want to bring forth to the board members to consider. But it's certainly not the law until the board agrees with me, which you know, of course, my positions are very reasonable. So I would expect that the board would agree with me. And they have agreed with me, in certain circumstances, fairly recently, but there's still many cases out there that I've taken positions on that I'm waiting to hear back from them on. And I will just say, in terms of procedure, we've got no independent investigatory authority at all, so unlike other federal agencies, and so we have to wait for an unfair labor practice charge to be filed with us before we can even start an investigation. And then the investigations are conducted in the field by field staff, they get affidavit testimony from charging parties, specifically discriminatees and corroborative witnesses, and then they'll get information from charge parties, which are typically private sector employers, although labor unions also can be charged parties and have been charged parties. And we will also seek affidavit testimony, position statements, documentation from from those charged parties to defend against the allegations in the charge. And then about 60% of all cases that are filed in any given year, which is around 18,000 cases are dismissed or withdrawn, either because of jurisdictional issues or because of lack of merit or or some other issue, or there's some non-board, settlement of sorts, so so, so many cases, over half, go away, and of the remaining 40% or so around 95% are settled in the region's without the need to litigate at all. And then those that go to the board that are litigated that 5%. Once the board issues an order, those orders are not self enforcing. So we have to go, unless if the charge party complies, with the board order, that's wonderful, and that's what we want. If not, we'll have to go into the courts to get the board order enforced. And the board, by the way, uses Supreme Court precedent and board precedent when issuing its decisions and considering what you know, considering the law and applying it to the facts. They don't use circuit court law, because, as you likely know, you know, the law may differ depending upon what circuit it is. And and just in terms of election petitions, the region's again, and we've got about 1,250 folks at the agency in total, and the vast majority of those are in the field offices, they conduct the elections, address any pre or post election challenges or objections. And we've actually seen an uptick of an increase of 53% this past year in the filing of election petitions and a related 19% increase in the filing of unfair labor practice charges.

C Chris Casillas 12:33

Yeah, some astonishing numbers there. Yeah. Thanks for that. That's incredibly helpful for our listeners. And I do want to turn to some of those eminently reasonable memorandums that you've issued during your tenure here in a moment, but before I do that, just kind of a broader question. I know if I'm, if my memory serves me correctly, I think you've been in this current position, maybe a little over a year and a half an hour or so. awfully, just kind of curious coming into this position, and you've been with the agency for many, many years except for that short hiatus there. What were some of your kind of bigger, broader perspective priorities coming into this position? And then we'll kind of dig into some of the specifics.

J Jennifer Abruzzo 15:19

Yeah. I mean, the one of the biggest priorities for me at the time, and it remains a tremendous priority is making sure that we have sufficient staff and resources, particularly in the field where the vast majority of the agency work is performed. And, you know, so the priority was to try to get an increase in our appropriations, which we actually were successful at doing, not the increase that we hoped for, but certainly any increase is better than none. And we'll put that money to good use and hopefully be able to do some limited hiring. While during my absence from the, from the agency, there was not a lot of backfilling of vacant positions and across the agency, but particularly in the field, and, frankly, particularly in leadership positions within the field. So there were eight, I think, Regional Director vacancies that existed when I arrived, or right around there. And so I made a big push to make sure that we we got those positions filled as soon as we could, because it's extremely important for the public and practitioners on both sides of the aisle to be able to engage with a local leader who is dealing with their, you know, cases. So it's really important to me that, we did that. And we were and we did successfully do that. So that was a top priority and remains a top priority for me. Another top priority for me was to ensure that we the agency was broadly construing the statute, it's really important to me, that we are covering as many workers as possible. And that as many workers as possible are considered employees, as opposed to independent contractors, for example, who are specifically excluded from our our statute. And so I felt when I arrived that some of the Trump board precedent in particular, had narrowly defined who was an employee and narrowly defined what was considered Protected Concerted Activity. And I just felt that that was doing a disservice to workers around the country, and frankly, was not comporting with our congressional mandate, to promote the practice and procedure of collective bargaining and the free association of workers in this country to improve their workplace conditions. So those were the main two. I would say priorities for me, obviously, there were many others, as was reflected in GC 2104, which was the memo that I put out, probably within a month after I arrived, giving a roadmap as to the precedent and issues that I felt that the board needed to take another look at.

C Chris Casillas 18:33

Great, thank you and, and just for our listeners, all of these memos that Jennifer's referred to are on the NLRB website, you're welcome to peruse those. I've read them all. They're all great reads very fascinating. And I'd encourage everyone to check them out. So with with that in mind, let's let's turn to a couple specific topics and specific memos in particular, and there's a couple I'm thinking of, we can kind of dial our memories back to September of 21, that you

issued Jennifer on the board's remedial authority under Section 10(c) of the act. And if I might quote from one of those here briefly, you stated in one of them, that you had encouraged the regents to take into account and employ new and alternative remedies to plead in their complaints to ensure that board orders provide full relief to those harmed. So what were your concerns on this topic that prompted the memo and why specifically did you feel that these kind of quote new and alternative remedies were really necessary to effectuate the purposes of the act?

J Jennifer Abruzzo 19:48

Right. So you know, I worked in the field for many, many years before moving up to headquarters. And you know, as I mentioned earlier, the regents in the field, settle 95% or so, I think it was 96 this past fiscal year of all merit cases. And so it was really important to me, particularly in the perch that I'm in now, to ensure that the agency was pursuing the full breadth of possible remedies under 10(c) in order to deter violations from occurring in the first place. And to ensure that workers whose rights were violated were made fully whole, not only providing backpay, which was, you know, the, quote, standard remedy, but fully whole, for all direct or foreseeable losses that they suffered as a result of violative conduct, typically made by their employers, I didn't feel that violators of our statutes should be able to get off with a slap on the wrist, basically, you know, paying nuisance value while their victims and their victims families suffered long term unremedied effect. I just want to segue one second to settlement agreements, which is within my purview, right, I am not the adjudicator. And so I can't issue board orders. But I do oversee all of the regional offices. And, you know, I do get a say in how we're settling and what we're settling for. And it was really important for me to just remind regional directors who you feel very similarly to the way I do in that we should be ensuring that we are not nickel and diming workers whose rights have been found to be violated that we're seeking all consequential damages, in addition to full back pay, and that we're not agreeing to non admissions clauses or to delete default language. You know, because in terms of the last piece, you know, we don't have the resources to start all over again, to remedy a breach of a settlement agreement. So we want to be able to get to the board and the court as quickly as possible. And I was advised by practitioners on the management side in particular, that my guidance about not accepting non admissions clauses was going to create a deluge of litigation because there wouldn't, you know, their clients would no longer settle. And also the there was this kind of long standing practice of allowing violators to pay 80% of the back pay owed. And so that's what their clients were used to seeing. And they were not going to be able to get their clients to come on board with, you know, these more robust remedies. Well, and I appreciated their feedback. And as I've said earlier, that that did not come to pass their predictions of more litigation did not come to pass, we are still settling cases, in the same numbers that we were before and getting more robust remedies, and not having non admissions clauses and having default language. So I feel feel like we're doing our job much better than then, at least in terms of ensuring that were remedying violations of workers rights.

C Chris Casillas 23:23

Great. Thank you. And just to kind of expand on that a little bit and talk about some recent board decisions. I think we're we're recording this in January of 23. Just last month, in December, the Board issued Thrive, Incorporated. And, you know, as part of that kind of, there's extensive discussion about kind of not necessarily expanding but reimagining how we

understand this kind of traditional make whole remedy that you spoke about to include what the board described in the decision as compensation for direct and foreseeable pecuniary harms. Can you I teach this stuff, but when I see direct and foreseeable pecuniary harms that still gets me a little bit confused. So maybe you could unpack that a little bit for us in terms of kind of where where we were there on the make whole remedy side and how you see this as this decision as kind of changing that landscape.

J Jennifer Abruzzo 24:21

Sure. So yeah, I was really happy to see that board decision issue. It basically agreed with me that the time was right to reconsider what should be considered standard remedies. So I'll just back up to say, you know, under the current NLRA, the agency cannot mete out any fines or penalties, right. But it does have broad discretion discretionary power to provide for medical relief, as I mentioned, and you mentioned under tech section 10(c). And and that make whole remedy is one that restores as closely as possible a worker situation prior to being subjected to the unlawful conduct. So for example, if a worker was unlawfully fired, we certainly asked what their wages and what wages and benefits were lost. Okay. But we also need to ask, what other losses or consequential damages did a worker suffer as a result of the unlawful firing, for example, or could be unlawful suspension or some other adverse action? Did they incur credit card late fees or 401k penalties because they had to remove cash to make ends meet? Right? Did they need to move? Or do they need to get training to find another job? Did they need to obtain new health insurance? You know, did they did they incur medical expenses that they would not have because they didn't have medical coverage because they unlawfully lost their job. So all of those and I just to, just to make sure everyone's clear, it's direct, or foreseeable pecuniary harms. So any direct or foreseeable harm that results in some financial loss is the way the board has defined the standard remedy. And, I'll just want to say one other thing, it's not only the effect on the particular discriminatee or discriminatees who have been unlawfully or adversely affected through a violation of our statute. It is also, how did that let's say unlawful firing affect coworkers? What was the chilling effect that that violative conduct had on others in the workplace, to exercise their own statutory rights? And how can we most fully remedy those detrimental effects. And so through board orders, you'll see you're seeing a lot more board orders where they're requiring notice readings, by CEOs or high level principles or officers, or a board agent who is reading the board's order or notice, or the board's notice, not necessarily the order. We are also garnering in settlement agreements quite often. And sometimes through court orders, hopefully, more so. The training of employees and the training of supervisors and managers about rights that workers have under the NLRA and obligations that employers and unions have under the NLRA. Because unlike other federal statutes, there is no requirement for employers to post or otherwise advise their workers of rights under the NLRA. So it's up to us through through outreach, through through podcasts such as this one. So I appreciate you invited me, and through our settlement agreements, that we are able to really get out there and really educate the public about our agency and the rights that we protect.

C Chris Casillas 28:14

Thanks for breaking that down. That's that's really helpful. Mike, just take this this topic and train of thought but shifted over to the Washington State PERC, here in Washington State, many of our statutes governing public sector employees have similar, kind of remedial language, to what Jennifer just described under 10(c) of the act. How is the PERC Commission

here in Washington typically interpreted its remedial authority with kind of the same subject and making employees whole who have suffered some type of of harm as a consequence of some found unlawful activity?

M Mike Sellars 28:58

Thanks, Chris. Yeah, the case law for our agency, both commission decisions, as well as court cases is that the commission has broad remedial authority. It has not historically gone as far as what Jennifer just discussed, but it starts with, you know, returning to the status quo making whole in that regard. The standard remedy is returned to status quo, post the notice and in certain circumstances, depending upon the governing body, read that notice to the public at a public meeting. I think if you look at our case law, the remedies have been more, I wouldn't say expansive, but kind of more creative along the lines that Jennifer's talked about in kind of more unique situations. So for example, if there's an issue involving insurance, so let's say there's a violation regarding change in insurance that wasn't appropriately bargained. We've seen the commission look to more of the costs that occurred to the actual bargaining unit members, by result of that change, the out of pocket costs and things of that nature, that was discussed by Jennifer. But they seem to be more limited to that with respect to if there's discrimination and the job that was either terminated or not offered, the order will typically be to return the person to the job that they lost with interest, or appointed to that position and any back pay that should occur with with interest. But I think you've seen over the years, the Commission probably stick to the standard, traditional, route as far as what are what are the back, what are the remedies that flow from that? What are essentially the back pay remedies that flow from that and maybe not going that more expansive approach that the board is now looking at as far as the direct or foreseeable pecuniary things as a result. With respect to the more punitive kind of remedies, we don't have any authority to fine as well, but the commission has the authority, and the courts have upheld this too in certain circumstances, impose attorneys fees for frivolous claims, or frivolous defenses. And so we've seen that on occasion, maybe that where you have a situation where it's a repeat offender on a repeat issue, and the Commission will in some, some occasions, impose attorneys fees, but that's pretty rarely done. I don't think the last time they did it was four years ago. So there, they have broad remedial authority. But as far as what that broad remedial authority is, that's not been extensively discussed recently.

C Chris Casillas 31:54

I wonder if I might pick your brains here for a moment and go slightly off script. And don't worry, I'm not gonna go too far afield here. But this just raises a, as I'm listening to you both respond to this question, it raises a really interesting point to me that I'd really be curious to get both of your perspectives on, which is, you know, in the board's case, you have the general counsel kind of advocating or pushing for, you know, a understanding, or maybe a more expansive understanding of what that make whole remedy looks like. And then, you know, shortly thereafter, we get a decision from the board talking about, you know, this this new approach of applying these direct or foreseeable pecuniary harms. In the Washington State public sector, we don't have that same arrangement. And so I'm just curious, like, what are some of the kind of pros and cons there? How do those, how do those changes or those evolutions and kind of understanding of these standards differ Mike, in the in the Washington public sector versus, versus in the private sector with the board? And maybe what are some of the pros and cons there? If the two of you might be willing to weigh in on that?

M Mike Sellars 33:14

Yeah, I'll start with that, just because I think I was saving that probably for the next question. But it's it is timely in that the, what you've seen, particularly during Jennifer's time with the board of, looking at their congressional mandate, looking at her role in essentially establishing what is the labor relations policy, you know, over the folks that they they govern, and their structure with the General Counsel structure allows them to do that, you know, I didn't go too much in our structure, but, you know, we are structured differently. And that plays a role in how things then kind of germinate. You know, we we don't have a general counsel, board or commission kind of wall. We don't have, when complaints come in, we don't investigate them. We review the complaint and say, okay, everything in here, is it true? And we'll assume it's true and provable? Does it state a cause of action under our statute? If it does, it goes forward to hearing and then it's up to the parties to prosecute their complaint to bring their their case forward? So there are benefits to that structure, I think, create some stability. For us over the long term. You don't necessarily see as much kind of what I call the ping pong effect that maybe you've seen with the board over the years, depending upon the administration's and whereas with with us, you've had more stability and that's a benefit, but what it doesn't allow is a easy process to kind of say, "Let's reimagine this how, how should, you know let's, let's push this issue forward." We essentially have to take the issue as they come, then if the parties advocate it, and there there are a couple areas where, you know, we much to what Jennifer's done, kind of like we think these are areas that probably should be they're ripe for discussion. They're ripe to be relooked at. But we don't really have the right vehicle, nor are we necessarily in the driver's seat when that vehicle comes. So that that is a challenge. And, you know, kind of staying along remedies that that's one area where we've talked about. I mean, I suspect that, that given what's happened at the board over the last year and a half when Jennifer's been there, we're going to, we're going to see some clientele with a case going wait we think these remedies, you should look at this, you should look at that. But, you know, it's not always going to be teed up for the maybe the best kind of discussion, it might not be the best case to have that type of discussion. So that's a challenge. And just even in looking at our standard remedy, as I mentioned, you know, our remedy, the standard remedy is you post a notice in the bulletin board. Well, let's think about the workplace now. Are there bulletin boards? I mean, the bulletin board really is the computer screen that I'm having this conversation on. So you know that that's a that's a small thing, but how do we, and as we have so many more remote workers, how do we re-envision the notice posting because that that is that gets to a major point that Jennifer mentioned, which is, you know, how do you, how do you get the word out to others, that this conduct occurred and to deter it from happening again? Because the effectiveness of our respective agencies is not just necessarily in that one case, but it's in ensuring that that behavior doesn't repeat in that workplace and another's.

J Jennifer Abruzzo 36:52

So I'm just gonna pick up on a couple of things that Mike said. And I completely agree with I mean, he's he's looking at it from a different perch, but we have similar viewpoints on this. But one thing Mike said, was about the ping pong, you know, the goat that going back and forth, and I hear this a lot about how, you know, when there's a what, what is what are clients and practitioners supposed to do? You know, because when there's a Republican administration, it's, you know, the board is is a more a more pro employer. Place. And when a Democrat than when it's there's a Democratic administration, the board is more pro union. And my answer is

no, it's it shouldn't be right. It shouldn't be either, right? Because as I said earlier, we are a federal independent agency that protects the rights of workers. So we are a we enforce a pro worker statute, we just did. That's our congressional mandate. We are pro worker or agency is pro worker. And I think if more politically appointed, Senator confirmed folks at the board, and I'm talking at the agency, you know, general counsel and board members, if they just remembered that, you know, go back to first principles, as I did you know, why the statute was enacted in the first place? And what is our true congressional mandate? There might not, and I'm not so naive to think that there wouldn't be some kind of flip flopping or ping pong going on, depending upon the administration. But I would hope there would be a lot less of that. If, in fact, these politically appointed standing firm people embraced what our congressional mandate is truly all about. So that's what I will say about the the ping pong thing. In terms of you know, Mike, hit it on the head, you know, sometimes, you know, as I said earlier, we don't have independent investigatory authority, you wait for cases to come to you, and you hope that those some of those cases might be vehicles, within which you can get the board to reconsider a particular precedent or issue with which you don't agree. That being said, I actually have, as I said, been very transparent, about getting memos out, because I want the public to see what I'm thinking. And to the extent that workers are suffering, they should, I would hope that they, they, they would know that our agency exists, and that they would bring charges with us, because those could be vehicles to have the board reconsider certain precedent or issues. I will tell you, I you know, with regard to cases that are brought before us, if there's no violation of extant board law, current board law, I'm not going out on a frolic and saying, Well, I don't agree with that. exam for law. So I'm going to issue a complaint anyway, you know, I mean, if you've not violated the law as it currently stands, then you you're not a violator of the NLRA. So, and certainly, I'm not going to stand in the way of a good settlement that, you know, may address all of the violations and provide for a full and robust remedy for the discriminatory ease and for the workplace writ large, because it could be a vehicle to change, you know, some case precedent that I don't like. So, you know, I'm very cognizant of the fact of, you know, our, our congressional mandate is to promote good labor management relations, and to try to assist with stability in the workplaces. And when you have labor disputes, the goal is to try to, and I think this may segue into our next topic, but is to as quickly as we can remedy the violations in the workplace to get the workers and their employers and their union representatives if they have one, back to some sort of better playing field, so that we so that they can actually engage productively together to ensure that the workplace is stable, because that's just going to ensure not only to the benefit of the workers, but also to the benefit of the employer.

C Chris Casillas 41:29

Well, that is a that is a good segue, I think, to our next topic that I wanted to be sure to ask you both about, which is this issue of injunctive authority that the agencies have, I think maybe perhaps this has become more relevant, in part, because we've seen quite a bit of activity out there these days, a lot of headlines of organizing and whatnot. So maybe that's part of the reason this has become more more of a pertinent issue. But also, I think, if I counted correctly, I think, Jennifer, you've issued at least three, three different memos on the topic of injunctive relief under Section 10(j) of the of the act, wondering if you could just maybe kind of generally describe that authority for us, and then kind of transition into a discussion. I think in one of those memos, you stated that these injunctions are, quote, one of the most important tools available to effectively enforce the act. So obviously, something that you see as as holding a good deal of weight, and just trying to better understand kind of what that authority is and why that has become so relevant as of late?

J Jennifer Abruzzo 42:44

Right. So before I do, I just wanted to touch on something that Mike reminded me of, because we were talking about remedies and direct or foreseeable consequences and harms that resulted from violative conduct. And I just want your audience to be clear that in addition to obtaining make whole relief to address financial losses, you know, we of course, also seek offers of reinstatement to get folks who've been fired, or, or whatever, you know, whatever unlawful discipline that they that may have been meted out, rectified. And we also to Mike's point, you know, have to look towards, how can we best engage with workers so that when they are having violations, how can we get the word out that what their rights are, and that the violations have been addressed? And so, you know, as I mentioned, we do the training. But to Mike's point, you know, the prior standard remedy used to be, you know, a posting of a notice, you know, a lot of people are working virtually, you know, oftentimes there aren't break rooms with bulletin boards and the like. And so, you know, our our standard, frankly, is, quote, posting in all, through all channels that an employer would typically communicate with their worker. So if they engage if there's an intranet system, and that's how they engage with their workers, that's where they would have to, quote post, or if they email regularly with their workers, and that's how they engage that's what they would or if they text, you know, what, however, whatever technology they use, to regularly communicate with their workers would be how they would have to communicate the board's order requiring a notice of of rights and the violations that have been cured. Now, so you asked me about section 10(j) Injunctive Relief. And so just briefly, that allows us to go into district court and quickly seek interim relief, where we're asking a district court judge to enjoin unlawful actions that are chilling the exercise of Section 7 rights that employers or employees are engaged in, typically will be nip in the bud activity where an employer gets wind of an organizing drive and fires the main union organizers. Or it could be where the employer is making a mockery of the collective bargaining process, you know, the first contract they just got in and now they're not bargaining with the representative or something like that. And we certainly have obtained interim reinstatement for workers who have been found to be unlawfully fired by the region. And what I do is, and I say interim reinstatement, because of course, at this point, the board hasn't issued an order. But we feel that the conduct is sufficiently egregious that we need to stop it in its tracks immediately. And the process is, I would send a recommendation to the board members requesting authority to go into District Court. Thus far, every case since I've been General Counsel, which is, as you noted, it's been about a year and a half now, every case that I've submitted to the board has been authorized by the board majority, to seek injunctive relief in the district courts. I've also, in addition to the violative conduct that we typically would go into District Court on, which is, as I said, nip in the bud activities, to get rid of an organizing drive or, or, or to get rid of some protests that the employees have engaged in to address some inequity in the workplace for example. I've also advised regions to look at cases and consider potential contingent relief when there's been threats of adverse action, like a threat of a firing, or a threat of a plant closure, or a threat of deportation, in response to some sort of collective action, organizing, and the hope is that that order will issue and it will mandate cessation, and that will then prevent the threat from becoming a reality, right? And in fact, with threats of deportation, for example, you know, the board is held, and in any number of cases that immigrant populations in particular, are ones that are exploited frequently, and threats of deportation, evoke tremendous fear, because not only could you lose your job, if you continue to engage in some collective action to improve your work circumstance, but you could lose your home, you could lose your family, you know. So it's extremely important that we are, you know, trying to enjoin, employers in particular from engaging in this bad behavior. I will say, I, like mentioned, I've issued three memos on this topic. I like my predecessors on both sides of the aisle, frankly,

issue memos about section 10(j) relief, because we recognize that that's one of the most powerful tools in our toolbox that Congress has statutorily provided us. So that we can, again, you want to be able to get the word out that we're not afraid to use this tool, because you want to deter violations from happening in the first place. And then you want to obtain quick remedies to stop the conduct that's stifling collective action by employees. And so we will file in district court if we feel that the threat of remedial failure where a board order, which unfortunately takes more than a year to issue typically will come too late to restore the lawful status quo and, in essence, because of the delays in our processes. A violator will be allowed to accomplish its goal of chilling employees exercise of their statutory rights to band together to improve their workplaces. And I certainly don't think we should be allowing violators of our statute to benefit from delays in our own administrative process, the result of which is to circumvent the rights of workers to collectively seek improvements in their terms and conditions of employment. So I do think that our ability and our willingness to seek 10(j) injunctive relief in appropriate cases does incentivize better behavior.

C Chris Casillas 49:41

And Mike, just to throw this topic over to you for a few minutes. I know Washington State has an administrative rule kind of somewhat analogous to 10(j) and our Administrative Code 391-45-430. Can you maybe briefly explain for us kind of how that compares and contrast to 10(j), and what Jennifer just explained in terms of how the agency utilizes that rule here in Washington?

M Mike Sellars 50:13

Sure. Well, the mechanics for the injunctive relief for this are essentially the same. They're the same given the respective difference in our structure, of course. So this is, again, where having a general counsel who is bringing the cases forward, kind of allows a little more control in determining whether or not to bring that forward. Whereas with us, since it's the parties who are prosecuting their case, they're the ones who are filing the motion before the commission to seek to have the commission authorize our assistant attorney general to go to court for an injunction. And again, you know, you get a look at our structures. So if the case is going forward, it will go to an examiner to to hear initially, so the unfair labor practice complaint would be filed. And let's assume it got through that first stage of the initial review, it did state a cause of action, you know, under that standard, so now, it's been assigned to an examiner to hear, that's when the typically the motion, or around that time the motion for injunctive relief would be filed, or maybe when it was the case was first filed. But some of the mechanics are generally the same. It's a rarely used provision in our agency. I think we've had less than five filed in the 11 years I've been with PERC. And the commission has not authorized it. It's it's probably three, but the commission is not authorized in any of those circumstances. We actually, as I mentioned, the Commission's the rulemaking body, but the agency, me, and staff and Chris was actually one of the folks participate on this, did pretty extensive rulemaking this past year, streamlining our rules, going back and looking at what rules need to be relooked at are there other pressure points? Are there other pain points that need to be dealt with? And the staff looked at the injunction rule? And kind of the question we asked them discussed internally, is, is the mechanism we have creating an impediment, meaning, because it's the commission making the decision to ask our assigned Attorney General to go to court to get the injunction, is that really effectuating the mandate? Would it make more sense, since the

commission has broad remedial authority, and if they're going to make the determination to go to court and they're essentially making the determination to issue an injunction? Would it make more sense to have the commission issue the injunction? And then if it's not an, you know, if the parties don't comply with the injunction, then go to court to get it enforced. And we, the staff, proposed that rule, we got some responses from our clientele, some kind of questioning whether we have that authority, I think if we have the authority, if the commission has the authority to authorize and the lawyer to go to court to get the injunction, I think they have authority to issue it themselves. Ultimately though the commission declined to take that route. And I think, you know, part of the reason was, would it, there was a concern that was stated in the open meeting. I'm not saying anything that's that's, you know, that's hidden. But the concern was, would it create more injunctions than may be necessary or I think they just weren't, they weren't sure what they were biting off. But it didn't, you know, at the end of the day, I don't think we've adequately addressed whether the process we currently have is meeting the need. Now, I would say, the public sector with various other rules, or laws that have been placed typically, typically, there, you're dealing with people who can only be disciplined for cause when you have other things that are in place that create a little broader net than you would have in the private sector. So we don't see at least in Washington, we don't see the type of situations where we read about injunctions, you know, being sought by by the board, you know, somebody's an organizer being fired. That typically is not something we see in Washington, I mean, that that at least comes to us.

C Chris Casillas 54:37

Well, thank you for those responses. Really appreciate it. Just kind of take us out here. I wanted to provide both of you an opportunity to maybe opine for a minute here about what each of you see as maybe kind of the most significant challenge or initiative that you see your kind of respective agencies tackling, kind of moving forward as we transition into this new year and continue forward. So just kind of curious if there's there's kind of one thing that maybe stands out on that front, Jennifer I'll start with you. And then maybe Mike.

J Jennifer Abruzzo 55:20

Sure, so I mentioned this earlier when you asked about priorities, but I do still feel that our biggest challenge is providing our field or field offices with sufficient staff and resources. So that we, the agency is not an obstacle to workers being able to exercise their rights and obtaining the relief they need if those rights are violated, because as we all know, Justice delayed is justice denied. So that, to me, remains the biggest challenge. I will just say just one final thing, though, with the, with the challenges associated with the pandemic, and hopefully, you know, we're finally seeing some daylight there. But it seems to me that our continual efforts in encouraging productive labor management relations with regard to health and safety with regard to scheduling, compensation of essential workers, etc, whether whether unions represents the workers or not, but I feel that productive labor management relations is a crucial step towards promoting workplace and broader industrial stability, because, you know, if we can ensure that workers voices are heard, and that issues are considered and hopefully addressed, then workplace conflict diminishes. And not only businesses, but communities at large will will flourish.

M Mike Sellars 56:56

I think for for Washington, you know, if you'd asked 5 years ago, when Janus came out, I think, like most public agencies, you know, what, what would the future be? But similar to what Jennifer mentioned, you know, the vast increase in representation cases filed in the last year, with the NLRB, post, Janus, we've seen and certainly from 2020, the pandemic to now we've seen our three highest years of representation petitions filed, our representation work continues to be very, very high. So it's robust in that regard. But I think I would say the overall continuing challenge in the public sector is external factors. You know, in external groups, you know, you're dealing with the public sector, so various clientele groups that, you know, employee groups or advocacy groups, or the public at large, have interests that are involved, and they aren't a party to the bargaining process, and they aren't contemplated to be a party to the bargaining process. I'm not saying that they should be. But they're, I think the challenge is, how do we educate our clientele? And how do we educate the public about the process? And how do we ensure enough transparency so that bargaining is not an impediment to the public, it's not seen as an impediment to the public. But it is part of the overall process. And I think that, you know, we've seen that play out in Washington, where there have been, you know, pushes to make mandatory bargaining be open to the public, by a requirement that seems to have recently been settled by the State Supreme Court. And you see it now with respect to various cities and communities with respect to their law enforcement and an oversight and accountability and how that over plays with the bargaining process. And I think that's going to continue to be a challenge in the public sector, because, you know, our role, the agency's role we are, you know, one, one part of that stool of collective bargaining with labor and management, but we are the only one whose sole job is to protect the process. And, you know, in doing that we make sure it's a viable process. I think that will continue to be one of our challenges.

C Chris Casillas 59:19

Thank you. incredibly wise words from you both. It's been a real pleasure. Totally been kind of fanboying over here, the last hour as we have had a chance to talk. I wish I could spend the next few hours going through all the other questions in my mind, but I've taken enough of your time. Thank you so much. This is such a wonderful service for our listeners and just talking about this, this important subject of collective bargaining and worker rights and labor management relations. So appreciate your time. Thank you very much, and hope to be able to connect with you both again sometime in the future.

J Jennifer Abruzzo 1:00:01

Thank you, and thanks for having us.

M Mike Sellars 1:00:02

Thanks, Chris.