

Risk-Assessment-in-Grievance---ULP-Settlement-Negotiations

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SPEAKERS

Chris Casillas, Loyd Willaford



Chris Casillas 00:10

Labor negotiations are often synonymous with negotiations over collective bargaining agreements. But labor negotiators negotiate a lot more than just CBAs and are frequently called on to negotiate other matters, such as grievances or unfair labor practice cases. In those types of situations, which can range from employee discipline to changes in benefits, it is often necessary to understand the financial stakes of a case—both to understand where productive settlement negotiations may be had, but also to understand what might happen if an agreement isn't reached and the matter ends up in front of an arbitrator or an ALJ. To understand these parameters, it is important for negotiators in these situations to conduct what is referred to as a "risk analysis." But a true risk analysis doesn't involve just asking your client what they want to see in the case or getting a legal assessment of the claims. It also requires that you go through a calculated process to determine what is referred to as an "expected value" for the case so that you can better answer the fundamental question of any negotiation: when to take the deal or when to walk away. Please join Chris and Loyd as they take a deep dive into the world of risk assessment and labor relations. We hope that this can help parties as you prepare to negotiate a resolution in your next grievance or ULP case so that you can come to the table as informed and prepared as possible to either reach a resolution or feel more confident in the decision to move the case forward in another forum.



Chris Casillas 01:54

Hello and welcome to the PERColator Podcast. My name is Chris Casillas, one of the hosts of the podcast, and I'm joined here again by my colleague, Loyd Wilford. Loyd, how you doing?



Loyd Willaford 02:08

I'm good.



Chris Casillas 02:10

Great. It seems like we've been pairing up a lot recently, which I'm happy about, and I enjoy our conversations and want to kind of continue some of, I guess, the recent forays into some different topics by shifting gears a little bit from what we've recently covered together to do a little bit more of a—maybe a technical and detailed dive into the topic of risk analysis and preparing for negotiations, particularly in the context of negotiations that involve settlements of, at least in our world, different types of litigation like grievances or ULPs. And I'm glad we settled on this topic, Loyd, because I think a lot of times on the podcast, we kind of operate under the assumption of negotiating in the context of collective bargaining agreements—and that's certainly kind of a big chunk of what all of our listeners participate in on a regular basis—but as we all know, labor negotiations and labor laws are much more comprehensive than just contract negotiations. And as I mentioned a moment ago, they also involve negotiating resolutions to grievances and unfair labor practice charges as well. So I think we can all relate to or have some familiarity with different types of grievances that involve discipline or termination. They could be interpretation grievances as well over the meaning of the contract, but also have some financial or legal repercussions—like, you know, layoff language or changes in benefits, or, you know, paid leave issues—a lot of times per your collective bargaining agreement or just because of the nature of the case; it makes sense to try and see if the parties can settle those cases short of going to arbitration. And then, similarly, with the unfair labor practice charges, a range of those cases frequently get negotiated and settlements reached; those can involve some financial parameters as well or consequences—like Weingarten violations that might lead to discipline or termination, or unilateral change cases that have economic components to them—maybe changes in compensation, or health benefits, or other paid leaves. And so, we're frequently confronted with these types of negotiations in these cases where some economic calculations and risk assessment is really important. But I'll have to say, after years of kind of being in this world—both as an advocate and negotiator, and now, for the last seven and a half years or so, as a neutral and a mediator—I've found a lot of situations where I think parties maybe are not as prepared as they perhaps could be in really assessing the value of a particular case, and how much risk their particular side has in the case—and using that analysis to then inform their posture and actions in the negotiation itself. And I think that's really, I guess to say it directly, a mistake to not go into that level of detail and analysis because, among other things, if you don't do that, as I always tell my students and in the negotiation courses I teach, you're likely to commit one of two cardinal sins in the negotiation process. And those cardinal sins include taking a deal that you should have walked away from or not taking a deal that you should have agreed to. And I think sometimes we're not even aware that we commit those errors. I certainly am guilty of that myself. And a lot of times, I think we assess kind of the breakdown in negotiations by blaming the other side or the situation. But sometimes, you know, it's our own kind of lack of preparation and kind of going through this analysis that leads us astray. And, I think, with a little bit of extra work and planning, we can really kind of prepare better in these situations. And to do that, the topic here today is kind of thinking about how you might conduct a risk assessment and case evaluation analysis in order to come up with a good plan, and be ready, as best you can, to try and reach a deal and avoid one of those sins that I just mentioned. Before I jump into that, Loyd, does any of that—I mean, you've kind of joined me in our career paths for the last many years on our different parts of the table—does that any of that sound kind of familiar to you as well?



Loyd Willesford 07:21

L Loyd Willaford 07:31

Yes is the short answer, Chris. I had basically the exact same experience, both, as you know—and like you, I was an advocate and then I came to PERC. And when you said seven and a half years, that reminded me that, you know, I am celebrating my six year anniversary here at PERC this month.

C Chris Casillas 07:55

Congrats!

L Loyd Willaford 07:55

So—And like you, often in mediations, you know, some parties prepare better than others, is, I think, the short version. And I agree with you that lack of preparation is a real mistake. And, you know, what I was thinking about is, one of the reasons it's a mistake is kind of related to one of the topics that we've talked about recently—and that's emotions at the bargaining table. If you don't prepare ahead of time, you can be surprised—and when you are surprised, that can provoke an emotional response that can get in the way of, you know, thinking about how can we actually get an agreement. Like—you just basically are hijacked. Like, I'm shocked, you know, by how much money somebody's asking for if you didn't do a little bit ahead of time—like, what is the potential here? And then when somebody shows up with a number that you're not expecting, either because you didn't prepare—or sometimes even if you did prepare—and you still get this huge or low number, depending on which side of the settlement you're on—that can produce this emotional reaction that, if you haven't thought through, can really hijack the settlement process. Like, people just kind of get dug in, as opposed to if—and again, this can sound a little cold and calculating, and some of the stuff we're going to talk about is actually calculating—like it's just basically, you know, arithmetic, which sounds like it's devoid of emotion, and as a purely technical matter, it is. But having done a little bit of that, or doing it during the bargaining session, can sort of change that emotional dynamic. I hesitate to say, "oh, it removes the— we're gonna take all this out of the realm of emotions," kind of like what we talked about in our last episode. I don't think you can really do that, but you can sort of mitigate it and maybe move it in a different direction. And I think that's one of the way these tools work is it changes the conversation from "you're right, they're wrong" to "how can we get an agreement that makes us—" you know, "that we can both live with." So, one of the tools that we can use, in terms of settlement, is a mathematical tool called "expected value." And it's basically sort of a mathematical concept. So, what is the, you know—if a certain set of chain of events happen, what do we expect the value? And often this is framed in terms of monetary. And this is a term that's near and dear to my heart, because, as I may have mentioned in previous podcasts, I'm a pretty avid poker player. This expected value concept, is really kind of central to a lot of decision making and certainly in the poker context. Basically, you know, how much money is a particular hand worth? Here, we're going to talk about what is the monetary value of a particular claim. And what it does is it takes what's essentially probabilistic and converts it into one—a number—sort of a—essentially an average of outcomes. And you can do that, like I said, in the context of a particular settlement—we're going to give a concrete example here in a second—or like I said, in the broader mathematical concept, like I said, in terms of poker. At some point, I probably will do a podcast on poker and negotiations, and this is one of the topics we'll talk about.

C

Chris Casillas 11:23

Sorry Loyd, just really quick, I know you were going to kind of work us through some details of that expected value calculation and, kind of, talk with our listeners about how they can kind of do this themselves. But before you do that, I just wanted to kind of step back one piece and kind of mention another concept there that I think builds into kind of what you're about to talk about on calculating this expected value. And the reason for kind of running through that calculation is so that, in the parlance of negotiation talk, each party can establish what we call a "reservation price" or a "reservation point." And this is a really important kind of process, amount, or position to establish in any negotiation where you're trying to settle, you know, a discipline situation or termination—trying to determine how much money is involved or what your final position can be. And when we use this term, what we're talking about, essentially, is depending on what side you're on, it's the minimum or maximum that your side is willing to accept to reach an agreement and avoid going in an alternative route, which, in our world, generally means going forward with the arbitration or going forward with the unfair labor practice charge. And so you kind of need to know what that walk-away point is in the negotiation so that you can, as you say, make a more thoughtful and calculated decision on when to stay or when to go. Because you've at least made some effort to assess this. And it's a little bit of a science and an art. It's not always a precise amount or position, but having that reservation price or reservation point allows you to do two important things: one being that it can help the parties understand when a bargaining—what we call a bargaining zone—exists. When there's some—at least a sufficient overlap in positions—so that we know that, you know, there may be some haggling within that zone to try and get the best possible deal, but we know there is at least some overlap that we can try and reach a resolution here, rather than exercising that alternate strategy. And then it also kind of answers the proverbial question in any negotiation, which is "should I keep doing this, or should we call it a day?" so to speak. And really, I think it's hard to do that without kind of establishing this bottom line position—this reservation point or price. Otherwise, you're just kind of, you know, blindly throwing darts at dart board—or, you know, kind of getting a feeling of whether you're going to get a deal or not—and not being, perhaps, as scientific and thoughtful about that as you can. So, anyway, I just wanted to kind of preface what you were saying about the expected value piece with the understanding that, you know, ultimately, what we're trying to get to here is establishing a point for each party where they know when to walk away and when to stay engaged in the process. And hopefully that helps everyone kind of come at these negotiations in a little bit more of a thoughtful way. And as you mentioned, kind of avoid getting caught up in the emotions of a particular moment and committing what I kind of earlier framed as one of those two cardinal sins. So, with that in mind, I know you were going to walk our listeners through some of those steps and some of those calculations to kind of really put some meat on that bone—and kind of thinking about how might someone go about, you know, undertaking that calculation. So take it from there, Loyd.

L

Loyd Willaford 15:37

Yeah, Chris, I appreciate that sort of—because this expected value piece is a way of at least informing that kind of reservation point, as you say, or reservation price. And it is this—we're going to see, there is some science here. There's some arithmetic. And that's can maybe be a little bit difficult to explain orally, but I'll do the best that I can here, and then there's a certain amount of art, and I'm going to talk about the art piece here as we go, too. So, expected value—basically, the way that you calculate it is: you take a particular outcome, and then you assign a probability to it—and there may be multiple different outcomes—and you then add those

together—each potential outcome, you add them together to get one number—what we're going to call an expected value. So, the science piece is the arithmetic. The art piece here is really the probability, which can be a little bit, you know, there's going to be some nuance there. People may have different judgments, but sometimes you can certainly assign some probability. So the example here is, let's assume, for example, that we have an employee who's been fired, and the union is going to argue that there was no just cause for the firing. And we understand that there was \$100,000 in lost wages and benefits, and that that is going to be all of the damages. So again, we got to do a good assessment here of—the pieces that are important here are—the last piece. What do we think is the maximum value? In other words, there's a, you know, a mediator, term that sometimes people use about, you know, best alternative negotiated agreement. What happens if you don't get an agreement? And what's the worst outcome for either side, right? So for the employer here, the worst outcome would be you go to arbitration and you lose, and you have to pay all of the back pay, all of the benefits, and that is \$100,000. So that's economic. Now, there may be other worse outcomes, and we'll talk about those in a second because that's going to inform maybe some adjustments. But economic outcome—\$100,000 is the max exposure. And you want to do a little bit of research to understand that so that you're doing that accurately. On the flip side, what is the exposure for the Union? Well, the max exposure is you go, you know, you don't get an agreement, you go to arbitration and you lose, and the employee gets nothing—so zero. And, you know, as we'll talk about later, there's some other costs—other things that may figure into this. But just from a purely expected value perspective, if we say that we think that there's a 30% chance that either the case won't go to arbitration or the employer wins, meaning there's zero—so we're talking now from the perspective of the employer: what's the expected value of this case from the employer's perspective? 30% chance no arbitration, or you win, and there's a 50% chance of a value of \$20,000 or less. So this would be a situation where maybe there's \$100,000, but maybe there's mitigation, or maybe there's, you know, the arbitrator awards something less than, and we're going to say 50% it's going to be \$20,000 or less. Maybe there's a dispute about, you know, how much back pay or whether back pay will be awarded at all—50% chance \$20,000 or less, and there's a 20% chance that there's going to be a full \$100,000. If you do this math, 30% times zero, plus 50% times 20, plus 100% times 20. So that's the 20% of that you're gonna pay the full boat. You do all that math, what you end up with is zero plus 10, plus 20, or \$30,000. So the expected value of this claim, based from the perspective of the accessible new employer, is \$30,000. So you could use that as, you know, this risk assessment as your kind of reservation point, right? We're not going to pay more than \$30,000 under any circumstances because we don't think, based on our calculations, that we would ever have to—you know, expected value run. You're taking some risk because, remember, this is probabilistic. It's not a, you know, it's not really a number. It's more of a kind of, well, on the average, if we did this, if we ran this simulation, you know, 100 times, we would expect, at the end of the day, that our net exposure would be \$30,000. That's really what expected values is telling you. Of course, you're not doing it over and over and over again. You're going to do it one time, so. But it is a way of getting at kind of a value, and it's a useful tool. We're going to talk about the fact that, because it's a tool, you may need to make some adjustments. And so I'm going to talk a little bit about what those adjustments might be. So, remember, we're talking—so it's \$30,000. We might, for example, think, "well, we're not really risk—we'd really like to have some finality and certainty." And we, you know, we got this upside. Well, we could lose \$100,000, and that may make us look really bad, or we want to avoid that risk, so we might be willing to pay a little bit more than the expected value. Maybe, if we had an offer on the table that was 40 or \$50,000, we might take that just to get rid of the upside risk. Or, you might be, you know, "hey, we really don't care. We don't care about the risk," you know, "we think we've got a good case, and we're willing to roll the dice," and maybe sometimes we have to pay the 100,000 but we're okay with that. And so you might say, "well, we are, you know, we're not willing to pay the full

value." And this, by the way, this is also goes for the union side as well. So in some cases, the union and—you're going to be a combination here of the union and the grievance. Okay, well, you know, some money in the hand, we avoid the uncertainty of getting nothing, or, hey, you know, we're okay with getting nothing, but we think our cause is righteous, and we want to have the potential to get the full value. So those are some—so the risk appetite is going to inform how you might make adjustments to a, sort of a reservation point. I will say on the, you know, the reservation price, these adjustables are important. It's not—I think it's really important to be open minded, and sometimes in negotiations, you may hear more information, or your attitudes might change—and to be flexible, particularly at the margins because there is—some of the other things that are going to go into this are going to be the, you know, value of finality. You know, putting this behind us so we're not spending time and energy on dealing with this issue. We can do other things. There's also transaction costs, which you might build into—you could build into the transaction cost, the expected value. Like, 100% of the time, you're going to have to pay for whatever this—whatever the resolution process looks like. And you could build that into your expected value. There's going to be—we're going to have to pay X dollars for an attorney. We're going to have to pay the arbitrator's fee. We may—if we're in a PERC hearing, we're going to pay for the transcript. So, some fixed costs that are unrelated to whether or not you—the actual value of the case. And so those things will also be an impact, and have an impact in terms of adjusting, kind of, where you think the value of the case is at. And again, I mentioned that the uncertainty—there is a sort of, like, finality, but also getting out of the conflict, as I often have told people in mediations, I have yet to see the adversarial hearing that improves labor relations. Sometimes you have to do that, but getting people on the stand and testifying and taking positions is a hard thing, you know, and it has an impact on relations. And somebody is going to win and somebody is going to lose, right? And that has an impact. Like, people don't like losing, and they're going to remember that, "hey, we went to this hearing and we lost to this and we—" that may have some impact on what happens later down the road. So avoiding that and reaching a—has some inherent value. In some case, quite—quite a lot of inherent value. So, all of this is to say, you know this, the idea of using expected value and then making—understanding where you might need to make some adjustments. And to do this all, think about this ahead of the settlement negotiations; like, maybe even write some stuff down, talk about it with this various stakeholders, so that you show up to the mediation or settlement negotiation, whatever you're doing, prepared to be able to meaningfully negotiate. And I come back to some some stuff that Chris and I talked about earlier. It is very frustrating for the mediator—I'm just talking from a mediator's perspective, and also, when I was an advocate, this was also frustrating—where some of this work has not been done ahead of time, and you're either doing it on the fly during the settlement and spending a lot of time on this, which is frustrating because that time you're spending is not actually negotiating. It's one party trying to figure out what they want to do or where they might want to go, which that—and that frustration that has an impact on negotiations. It's also, you know, just the time spent—if you have a day of mediation and you have one or both parties spending half of that time trying to figure out where they wanted to start at. That's the thing: this is a starting point. I want to sort of reiterate that this is not a "I come up with a number and that's my fixed thing, and I'm either going to get that number or I'm going to walk away." I think back to something you said earlier, Chris, about making informed decisions about, you know, having an idea so that you're not—you don't make a— what did you call them? Cardinal sins?



Chris Casillas 26:50

Yeah, cardinal sins.

L

Loyd Willaford 26:52

Yeah, taking a deal that you shouldn't have or not taking a deal that should have been—would have benefited you and your party. So that's a little bit about, sort of, the tool of expected value and the sort of reservation price, and how you might want to think about DV and that. And so, Chris, do you have anything to add to those?

C

Chris Casillas 27:16

Yeah, that's, I think, really helpful. And you did a good job of explaining a somewhat complex process, I should say, you know, through this forum. But I think to kind of bring it all together and kind of summarize what you were saying. You know, it's important to start with that, you know, calculation, and then kind of move into some of those adjustments so that you can come into the negotiation process with at least a bit of a plan and some parameters on what makes the most sense because, otherwise, I think you're susceptible to just kind of reacting to the moment or maybe being kind of driven by the outcome that the client or the involved parties wants to see but isn't necessarily kind of informed by this deeper assessment. And so what I think we're hopeful for is people can kind of use this as a way to really be as prepared as possible when you come into these things, and you know when to say yes to a deal and when to walk away—and sometimes walking away is the best, outcome in a particular situation for various reasons. And so I hope this is helpful. But I also want to kind of mention, too, to close things out, that, you know, both of us certainly recognize there's kind of this textbook approach to kind of maybe how we should do things, and then there's reality. And sometimes that textbook approach can say to us that, you know, our risk assessment says we should be willing to pay 20 or 30,000 in this case, for example. But the reality is that it's a type of case, or there's a relationship here that just necessitates you to do something different, and that's okay and certainly understandable. You know the risk analysis, as I said, might warrant you offering up to \$20,000 to resolve a grievance over an employee's termination. But, you know, the nature of the relationship that, you know, the parties have with one another, or just politically, there's a need to have some kind of neutral arbiter or judge kind of issue a decision. Or there's just some other kind of legal constraints that you feel, you know, sometimes that just necessitates a very different approach. And I don't want our listeners to kind of leave this thinking that, you know, you have to kind of be beholden to this calculation that you just walked everybody through, and if you're not, that you're doing kind of something wrong or something of that nature because we certainly understand that there are circumstances in which, notwithstanding what the science part of things says, you know, for various reasons, you just, you can't do that. But I think what I want to leave everybody with on that point is that that's all fine and good, so long as you've gone through the process of going through these calculations that Loyd just walked everybody through, so that if you do ultimately make a decision that—you know, no matter what—we just have to take this case to arbitration, because we just need a neutral person to issue a decision one way or the other—that you're making that decision in the most informed way possible. And so even if you ultimately decide to go to that route, which is obviously up to the parties, you've gone through this process, and you're not just doing it because, you know, that's what somebody said at the outset, and you haven't kind of gone through the motions of doing these calculations and really kind of thinking through these different factors to evaluate the cases as best as possible. So that's where I'd want to leave us. Any other closing thoughts there, Loyd?

L

Loyd Willaford 31:52

Yeah, Chris, just to comment about—I 100% agree. There are going to be times when you do need to deviate. And the only thing I would add to what you said, Chris, is back to this idea of the value of relationship: finding a way to communicate that to the other side in a way that, you know—and this can be a little bit tricky to do—but I will say there's often—I, as a mediator, I often get a lot of parties that are frustrated by the other side's inability to, you know, or seeming inability to want to settle. And what I would say is if you get a situation where you know you're never going to settle, or you have to go, then you want to think about whether or not you even want to go through a mediation process. Because there's nothing more frustrating than going to a mediation process with somebody who does not—is not going to move. They're going to go so, and it's okay. And, you know, that's a hard thing for us as PERC mediators say, "Oh, it's okay not to mediate." Well, it is. Sometimes it is, and sometimes that's the best thing you can do—but to communicate that, rather than spending a lot of time on a, you know, negotiations that are not going to go anywhere. And you want to be careful because you don't always know that, right? So there's a little bit of a balance, back to what Chris is saying, where, you know, this is not 100%, you know. Oh, we spit out a number, and then we, you know, we just mechanically apply that. That's, of course, as we all know in collective bargaining and negotiations, there isn't anything that's purely mechanical. But some of these, what appear to be mechanical devices, can be tools that can be used to hopefully get you through a process that ultimately, you know, in terms of negotiations, it's designed to hopefully get to something that everybody can live with. And sometimes, you know, you need to—the only thing that can solve that is this: having some third party decide that, so.

C

Chris Casillas 33:55

Yeah, I think that's a great point to close us off on: relationships matter. They matter a lot in collective bargaining, and ultimately, that's kind of a big chunk of what everybody's doing here, so great point. Thanks for the conversation today, Loyd. I hope everybody finds that useful. I know it's always a little bit challenging kind of mathing things over the air here, so to speak. But, you know, perhaps if there's some interest, we can also kind of follow up in some other forums with the negotiation project to kind of elaborate on that further. But I hope folks find this useful. And as always, thanks for the conversation, Loyd.

L

Loyd Willaford 34:40

Thanks, Chris.