

Common Mistakes Made When Appearing Before ERB

Mistakes Before the Hearing

- Failing to carefully read and review the Board’s rules regarding hearings as well as relevant Board case law that is important to your case. Understand the procedural requirements for the different types of cases, including what needs to be filed, how it can be filed, and who can file it.
- Remember-a complaint or answer is not deemed filed until we receive the filing fee!
- Failing to effectively plead case:
 - 1) Avoid the “spaghetti approach” (throwing every possible claim against the wall and hoping that one of them sticks). Rather, plead only the strongest claims with good supporting evidence.
 - 2) Plead your case with enough specificity that the opposing party and Board understand the allegations and your legal theory.
 - 3) Make sure you plead facts sufficient to support your requested remedies, particularly civil penalties and notice postings. If you are requesting an electronic posting of a notice, you should present evidence that the employer and employees regularly use electronic communication in the workplace.
 - 4) Remember to clearly plead affirmative defenses in your answer if you are the respondent.
 - 5) If factual matters are unrelated, file as separate complaints. Do not “load” a complaint with multiple charges and unrelated fact situations.
- Not considering using the Board’s expedited procedures for hearings or considering seeking a declaratory ruling on a legal dispute.
- Not responding to ALJ’s communications, particularly with regard to hearing dates. Failure to respond in a timely fashion may lead to dismissal of your claims.
- Not communicating with opposing counsel regarding stipulated facts, joint exhibits, and witness order. Not communicating with opposing counsel regarding requests for extensions or postponements of hearings.
- Failing to have or agree to statements of the issue that are clear, consistent with your case, and proper in scope. Pay careful attention to these, because they drive your case. Improper formulation may result in the Board not deciding what you consider to be important issues.
- Failure to include all likely witnesses on your witness list, and failure to exchange all relevant documents prior to the hearing as required by the ALJ’s pre-hearing notice.
- Seeking to amend the complaint shortly before (or at) the hearing. If amendments are needed, ask to amend the complaint early in the process.

- Not amending your complaint when, during the course of preparing your case, you discover that a claim is not viable or supported by sufficient evidence.
- Filing excessive pre-hearing motions. The rules of civil procedure do not apply to administrative law proceedings.

Mistakes at the Hearing

- Failure to present your case in the best manner possible. Remember-your evidence should tell a complete story and be presented in the manner and order that is both logical and intuitive.
- Not explicitly withdrawing claims or defenses if you do not plan on arguing them.
- Excessive or abusive cross examination (or, as is often the case, both).
- Improper and excessive use of objections.
- Failure to present evidence on all claims and theories raised by the complaint.
- Missing the forest for the trees by focusing on small issues that really have little to no bearing on the outcome of the case.
- Not maintaining a professional demeanor.

Mistakes After the Hearing

- Briefing:
 - 1) Not conducting the optimal level of research into Board and court precedents that are controlling.
 - 2) Failing to adequately brief all arguments you think are important.
 - 3) When summarizing facts, not pointing out where in the record the evidence supporting your proposed fact can be found.
 - 4) Not including argument or discussion on civil penalty requests and other proposed remedies.
 - 5) Raising new arguments for the first time in briefs.
 - 6) Filing briefs by email without an agreement with the other party and the ALJ.
 - 7) If you are filing by fax, there is a \$25 filing fee.

Mistakes at the Board Level

- Filing Objections (and Memoranda):
 - 1) Don't object to trivial findings of fact that have no bearing on the outcome of the case. Whether your shirt was blue or black is probably not relevant, and certainly not worth hours of anyone's time trying to figure out what color it is.
 - 2) Failing to object to findings of fact or conclusions of law that you disagree with, even if you prevail.
 - 3) Objecting to findings of fact without an explanation of why the finding was in error or without citing to specific evidence in the record that supports your objection.
 - 4) Not working with opposing party to stipulate to changes to the findings of facts that both parties agree should be modified.
 - 5) Failing to adequately and fully explain objections to conclusions of law.
 - 6) Restating the uncontested facts of the case. Remember-we have the recommended order, your briefs, complaints, answers, exhibits and recordings of the testimony. You need not recite the facts unless you are contesting a specific finding of fact made by the ALJ or there are facts you believe should have been included in the recommended order that were omitted.

- Oral Arguments Before the Board:
 - 1) Not being prepared to deviate from your argument script or outline. We will generally ask you questions on the issues that we find most relevant. Given that we are making the ultimate decision, your time is best spent answering those questions. Do not refuse to answer the questions or avoid them.
 - 2) Making personal character attacks on opposing parties, the ALJ, the Board or other individuals rather than focusing on the merits of your position. This happens infrequently, but should be avoided. It detracts from your argument and has no place in the labor relations community.
 - 3) Being unprepared to discuss the legal framework that is applicable to your case, including the nuances of the different possible outcomes and the applicable case law that the Board might consider.

- Mistakes After Final Orders
 - 1) When filing petition for representation costs, failing to include required affidavits or other information required by our rules.
 - 2) When filing objections to the amount requested by opposing party, not submitting an affidavit detailing the amount of time spent on the case by the objecting party and the hourly rate and total costs incurred by the objecting party. OAR 115-035-0055(3).
 - 3) Not filing a request for reconsideration if you believe the Board has not responded to an important argument or issue in the final order. See OAR 115-035-0050(4).

Bargaining Matters

- Be clear about your bargaining demands. Be aware that you can demand to bargain about a decision, the impacts of the decision, or both. If you solely demand to bargain about the impacts of a decision, you will likely not prevail on a claim that the employer refused to bargain over the decision.
- Be timely in your bargaining demands.
- Be accurate in your bargaining demands. ORS 243.698 (expedited bargaining process) is very specific. It only applies during the term of a contract, not after a contract has expired.

Election and Representation Matters

- Before filing any petitions for representation or unit clarification, prospective petitioners should carefully review the relevant statutes and the Board's rules relating to representation matters. See ORS 243.682 through 243.692; OAR 115-025-0000 through OAR 115-025-0090. Copies of the statutes and rules can be found on the Board website: <http://www.oregon.gov/ERB/Pages/StatutesRules.aspx>.
- The petition form and instructions are available on the ERB website at <http://www.oregon.gov/ERB/Pages/ERB-Forms-and-Instructions.aspx>. It is not uncommon for the petitioning party to mark the wrong box on the form, particularly in unit clarification cases, so pay close attention to the rules and the form to ensure that the petition is properly filed.
- If you have process related questions concerning petitions, ERB staff may be able to assist you. However, Board staff are not authorized to provide legal advice. For election questions, contact Elections Coordinator Sarah Hackett at (503) 378-6471.
- In 2013, ORS 243.672(2)(a) was amended to allow unit clarification petitions (seeking to add unrepresented employees to an existing unit) to be filed using card check provisions. Such a petition must be filed by "a group of unrepresented employees." Our rules clarify that a petition may be filed jointly with the recognized or certified representative of the existing bargaining unit. OAR 115-025-0005(1)(b).
- Under ORS 243.684 and OAR 115-025-0005(7)(a), authorization cards submitted under card check procedures must be signed within 180 days of the filing. The deadline used to be 90 days.

Mediation Reminders

- Mediation scheduling is conducted by email to ensure equal participation and agreement by each party to the final mediation arrangements, although the mediator can set a mediation if the parties are unable to reach agreement on a schedule. Once ERB initiates the scheduling process, parties are encouraged to communicate to the entire email group about their preferences for the mediation date, time and location. Individual emails and phone calls can delay progress in scheduling the mediation.
- The agency strives to make mediators available in a timely manner, particularly for time-sensitive disputes. Generally, mediation sessions are scheduled approximately three weeks after a request is made, so that the mediators have time to properly prepare for a mediation session.
- Requests for ERB mediation and training services must be submitted on a request form that can be downloaded from ERB's website at the following link: <http://www.oregon.gov/ERB/Pages/ConciliationSvcs.aspx#Facilitation>. The mediation process may be initiated through ALJ referral or other means, but a form must also be completed for ERB's documentation purposes.

Important Timelines

- Statute of limitations for filing an unfair labor practice complaint: 180 days from the date of the occurrence of the alleged unfair labor practice. ORS 243.672(3). However, the Board applies a "discovery rule," meaning that a complaint must be filed within 180 days of when a party knew or reasonably should have known of the occurrence of the unfair labor practice. The complaint is not considered filed until the \$300 filing fee is received.
- Deadline to file an answer to a complaint: 14 days from the date of service of the complaint. OAR 115-035-0035(1). The answer is not considered filed until the \$300 answer fee is received.
- Deadline to file objections to a recommended order: 14 days from the date of service of the recommended order. OAR 115-035-0050(2).
- Deadline to file memoranda in aid of oral argument: 5 days before the date set for oral argument. OAR 115-035-0050(3)(b).
- Deadline to file a petition for reconsideration or rehearing of a Board order: no later than 14 days after the date of service of the order. OAR 115-035-0050(4).
- Deadline to file a petition for representation costs: 21 days from the date of the issuance of the Board's order. OAR 115-035-0055(2).
- Deadline to file objections to a petition for representation costs: 21 days from the date of service of the petition for costs. OAR 115-035-0055(3)(a).

Mistakes That Can Lead to an Appearance Before the Board

- Mistakes Leading to Duty of Fair Representation Complaints
 - 1) Inadequate communication with members of the bargaining unit (*e.g.*, failure to respond to e-mails or phone calls; failure to update employees on the status of their issues/grievances; failure to explain the reasons for decisions, particularly decisions not to advance grievances; failure to communicate regularly during bargaining or when an employer is proposing changes that impact certain employees; failure to inform employees of their rights under internal union procedures/by-laws or under the CBA to file their own grievances).
 - 2) Procrastination and failure to advance grievances per the contractual requirements.
- Mistakes Leading to Employer Filed ULP Complaints
 - 1) Refusing to bargain (or delaying bargaining) until an employer agrees to a ground rule or a concession on a permissive subject of bargaining.
 - 2) Actions relating to failed ratification votes on TAs (advocating against ratification or remaining neutral instead of taking reasonable steps to encourage ratification).
 - 3) Violation of bargaining ground rules. Remember-failure to comply with any agreed upon, written ground rules can be an unfair labor practice for either side!
 - 4) Failure to adequately engage in the collective bargaining process when making or responding to contract proposals.
- How to avoid ERB cases:
 - 1) Communicate, communicate, communicate, and then communicate again.
 - 2) When making bargaining proposals, explain what your intent is, why the subject is mandatory if it is not 100% clear on its face, and what interests are served by the proposal. Clarify your proposals in response to employer concerns. When responding to proposals, make it clear if you believe something is permissive or prohibited and explain why. Give the employer the opportunity to explain, modify or withdraw any inappropriate proposals.
 - 3) Be open to informal processes. For example, if an employer isn't immediately amenable to bargaining, consider engaging in some less formal process while still ensuring that any applicable timelines or procedural requirements are met to ensure no prejudice to any future rights occurs. Some employers are more willing to engage with unions if it is not called "bargaining." Remember-the end result is the important thing, not the label.
 - 4) Labor relations is aptly named. Do what you can to make the relationship work. Try and develop constructive ways to resolve differences and develop trust.