

Declaratory Ruling Petitions before the Employment Relations Board: Pro and Cons, and Do's and Don'ts

1. What is a declaratory ruling petition? What statute and rules govern declaratory ruling petitions?

Administrative agencies, including the Employment Relations Board, are authorized to issue “a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by [the agency].” ORS 183.410. “A declaratory ruling is binding between the agency and the petitioner on the state of facts alleged,” but a declaratory ruling is subject to judicial review. *Id.*

The Attorney General has prescribed model rules for agency declaratory rulings, which ERB follows, in accord with ORS 183.410. *See* OAR 137-002-0010 *et seq.*

The content requirements for a declaratory ruling petition are set forth in OAR 137-002-0010.

Notably, an agency must base any declaratory ruling *solely* on the facts alleged in the petition (or stipulated “alternative” facts); there is no evidentiary hearing and the agency is precluded from considering other testimony or evidence. *See* OAR 137-002-0040(2). As discussed in more detail below, the restrictions of that rule determine, in large part, what kinds of cases are better suited for declaratory ruling petitions, and underlie much of the practice guidance offered herein.

2. Generally, what does the declaratory ruling process look like?

In the Public Employee Collective Bargaining Act (PECBA) context, a declaratory ruling petition may be filed by either party to a labor dispute, or both parties jointly.

The petition must be filed with ERB, and meet the content requirements set forth in OAR 137-002-0010, which include (1) the rule or statute that may apply to the person, property, or state of facts, (2) a detailed statement of the relevant facts, including sufficient facts to show the petitioner’s interest, (3) all propositions of law or contentions asserted by the petitioner, (4) the questions presented, (5) the specific relief requested, and (6) the name and address of the petitioner and any other person known to be interested in the requested ruling.

Within 60 days after the petition is filed, ERB will make an initial determination on whether it will issue a ruling. OAR 137-002-0020(2). This determination is about the suitability of the case for the declaratory ruling procedure, not about the merits of the case. When making this determination, ERB has the discretion to consult any “interested persons,” who must be identified in the petition, pursuant to OAR 137-002-0010(6). For example, if only one party to a labor dispute petitions for a declaratory ruling, ERB may find it appropriate to give the other party the opportunity to provide its position on the petition, and to indicate whether it intends to intervene or otherwise appear in the matter (*e.g.*, as an interested party). When ERB asks a non-filing party to provide its position, the party may submit its position informally, by email or by letter.

ERB must give written notice of its decision on whether it will issue a ruling. OAR 137-002-0020(2)-(3). If ERB declines to issue a ruling, it may provide written notice to the petitioner by letter, but in some cases, ERB has issued orders. *See, e.g., In the Matter of the Petition for Declaratory Ruling filed by the County of Jefferson, State of Oregon*, Case No. DR-003-17, 27 PECBR 167 (2017) (declining to issue a ruling).

If ERB decides that it will issue a ruling, it must notify the petitioner in writing and serve all interested persons named in the petition with a copy of the petition, a copy of its rules of practice, and notice of the hearing at which the petition will be considered. OAR 137-002-0020(2). (Even if ERB initially decides that it will issue a ruling, ERB may later decide, at any time during the proceeding, that it will not issue a declaratory ruling. OAR 137-002-0020(3).)

Anyone may petition ERB to intervene and participate as a formal party to a declaratory ruling proceeding. OAR 137-002-0025 (setting forth requirements for intervention petition). ERB has discretion to grant or deny a petition for intervention. OAR 137-002-0025(4). Notably, an intervenor must “accept the petitioner’s statement of facts for purposes of the declaratory ruling,” OAR 137-002-0025(2)(c), unless *all* of the parties stipulate to a “statement of alternative facts,” OAR 137-002-0040(2). An intervenor will be bound by the declaratory ruling on the facts stated in the petition (subject to judicial review). OAR 137-002-0025(4).

ERB may exercise its discretion to permit an interested person who does not intervene (and thereby agree to be bound by the ruling) to submit written briefing or participate in oral argument. *See, e.g., In the Matter of the Petition for Declaratory Ruling filed by Portland Community College*, Case No. DR-6-86, 9 PECBR 9018 (1986) (affected labor organizations appeared at the hearing as interested parties, although neither organization joined or intervened in the college’s petition).

Typically, ERB will schedule oral argument before the three-member Board (but the rules permit the Board to designate an ALJ as the presiding officer, who would issue a proposed ruling pursuant to OAR 137-002-0050). As noted above, the rules prohibit ERB from accepting evidence or testimony at the hearing; ERB may only consider a statement of alternative facts, “if such a statement has been stipulated to in writing by all parties to the proceeding,” including any intervenors. OAR 137-002-0040(2).

Parties have the right to present oral argument. They also may file written briefs in support of their respective positions, according to a briefing schedule set by ERB. OAR 137-002-0040(3). ERB may also permit post-hearing briefs. *Id.*

ERB must issue its declaratory ruling within 60 days of the close of the record. OAR 137-002-0060(1). The ruling is subject to judicial review, under ORS 183.480.

3. What are some of the reasons to consider petitioning for a declaratory ruling, in the PECBA context?

In the PECBA context, petitioning for a declaratory ruling may help obtain quicker resolution of a legal dispute, and may help an entity avoid committing an unfair labor practice (ULP) and/or incurring the costs and potential liability associated with ULP litigation. ERB must issue a declaratory ruling within 60 days of the close of record, and declaratory ruling petitions are

usually decided by the three-member Board in the first instance. In contrast, PECBA does not set a deadline for issuing an order in a ULP case, and most are assigned to an ALJ for issuance of a recommended order (unless the Board agrees to expedite the case).

Unlike in ULP cases, there are no filing fees for declaratory ruling petitions, no potential liability for make-whole remedies or civil penalties, and no applicable representation cost or attorney-fee shifting provisions. Because the process is relatively streamlined (there is no evidentiary hearing) and non-adversarial, representation costs will likely be less than those associated with ULP litigation.

In the PECBA context, where disputes necessarily involve at least two parties, the benefits of the declaratory ruling process are maximized when all of the parties to the dispute either file the petition jointly or intervene and agree to be bound by the ruling. ERB may hear (and has heard) petitions filed by only one side in a dispute, but as a practical matter, when only one side will be bound by the declaratory ruling, there is a greater risk that the same issues will be litigated in a subsequent ULP case, and that the outcome may differ (*e.g.*, because the factual record developed in the contested evidentiary hearing differs from the statement of facts included in the declaratory ruling petition). Jointly seeking resolution to a legal dispute through the non-adversarial declaratory ruling process might also help preserve or promote good labor relations.

4. What types of cases are more or less well-suited for declaratory ruling petitions, in the PECBA context?

Because declaratory rulings must be based on the statement of facts alleged in the petition (or stipulated alternative statement of facts), with no testimony or other evidentiary record, cases involving primarily legal disputes, rather than factual disputes, are best suited for declaratory ruling petitions. For example, most scope of bargaining disputes involve little factual dispute and are well suited for resolution through the declaratory ruling procedure. By contrast, a case that involves a contract interpretation dispute is more likely to require resolution of factual disputes regarding the intended meaning of contract language, and may require consideration of extrinsic evidence regarding bargaining history and past practice. Thus, in the absence of allegations or stipulations that would obviate the need for an evidentiary hearing, the typical contract interpretation case is better suited for resolution through a contested case proceeding (which the parties may seek to have processed on an expedited basis, pursuant to OAR 115-035-0060). Other cases in which an evidentiary record is helpful—such as cases that present credibility questions—are also less suited to resolution through a declaratory ruling proceeding. *See In the Matter of the Petition for Declaratory Ruling filed by the County of Jefferson, State of Oregon*, Case No. DR-003-17, 27 PECBR 167 (2017).

The Board also has been cautious about issuing a declaratory ruling where the other affected party has not joined in the petition or agreed to be bound by a ruling on the petition, primarily due to the greater risk of subsequent ULP litigation on the same issue. *See, e.g., id.; In the Matter of the Petition for Declaratory Ruling filed by The Oregon School Employees Association*, Case No. DR-4-97 at 6, 17 PECBR 403, 408 (1997).

That said, there may be (and have been) cases involving contract disputes, or filed by only one party, where issuance of a declaratory ruling would be appropriate.

5. What are some practical do's and don'ts when filing declaratory ruling petitions?

DO:

- Confer with the other affected party (or parties) before filing a petition, to see if they will agree to petition jointly. As a general matter, the Board is more likely to agree to rule on a declaratory ruling petition in which both parties seek the ruling.
- Include in the petition all relevant facts, including the facts that the *other* affected party contends are relevant (even if you disagree). You can obtain a declaratory ruling that clarifies your legal duties and minimize the risk of liability, but the ruling provides certainty only if the factual allegations in the petition are reasonably accurate *and complete*. A declaratory ruling is based solely on the alleged facts in the petition. If the other affected party can prove different or additional facts in a subsequent ULP proceeding, there could be a different legal conclusion.
- Consider the option of stipulating to a statement of “alternative facts,” as permitted by OAR 137-002-0040(2), to reduce the risk of subsequent ULP litigation.
- Include sufficient allegations or statements to make clear what factual disputes do *not* exist. For example, if there is a contractual interpretation dispute, but there is no relevant past practice or bargaining history, state that in the petition.
- Attach relevant documents to the petition (the Board may consider documents attached to the petition, but it is prohibited from accepting documents or other evidence later in the proceeding).
- Consider requesting expedited processing of the declaratory ruling petition, if the circumstances warrant faster resolution (for example, if the issue is impeding bargaining).

DON'T:

- Don't frame the issues and present the factual allegations like a complaint in an adversarial proceeding.
- Don't present contract interpretation issues that require consideration of disputed extrinsic evidence.
- Don't present issues that require ERB to resolve factual disputes that depend on credibility determinations.
- Don't include facts or attach voluminous documents to the petition that are not truly relevant. A large number of extraneous facts or documents might indicate that there are complex factual disputes that are not suitable for the declaratory ruling process.

6. Pros and cons of filing a declaratory ruling petition.

PROs:

- Provides faster resolution than a ULP contested case, particularly if expedited consideration is requested and granted.
- Avoids possible impairment of labor-management working relationships caused by adversarial process (including cross-examination).
- May be a more cost-effective method of obtaining resolution of dispute because no evidentiary hearing is permitted.
- May be less disruptive or time-consuming, because no one has to appear as a witness.
- No exposure to possible liability for make-whole remedies, civil penalties, or the other side's representation costs.
- May help a party avoid committing a ULP.
- May help the parties resolve a legal question that is getting in the way of bargaining or agreement (for example, a scope of bargaining dispute).
- Procedure is well-suited to cases in which an evidentiary proceeding is not necessary (such as scope of bargaining disputes).

CONs:

- The Board must base its ruling *solely* on the facts alleged in the petition (or in a stipulated "statement of alternative facts"). The Board cannot consider any other facts or evidence.
- Because there is no evidentiary hearing (no presentation of competing evidence, no witness examination and cross-examination), the declaratory ruling process is not well-suited for resolving issues that involve significant factual disputes or nuanced facts, such as cases that involve credibility issues or matters of contract interpretation that require consideration of extrinsic evidence (such as bargaining history and past practice).
- If the petition is filed *without* the other party, the declaratory ruling will not be binding on the other party (unless they intervene) and, as a result, the ruling may not fully resolve the dispute, and there may be a risk of inconsistent holdings if the other party later files a ULP complaint regarding the same issues.
- Unlike in a ULP case, in the declaratory ruling process, there is no opportunity to exchange an informal response, answer, or other evidence. That *lack* of record development and information exchange might prevent the parties from realizing that a dispute is well-suited to resolution through a negotiated settlement.

	Declaratory Ruling Petition	Unfair Labor Practice (ULP) Complaint
Option for parties to <i>jointly</i> seek a ruling?	Yes	No
Filing fees?	No	Yes
Option to request expedited processing?	Yes	Yes
Evidentiary hearing?	No	Yes
Opportunity to submit legal briefs?	Yes	Yes
Opportunity for oral argument before the Board?	Yes	Yes
Number of days for Board to issue a decision?	60 days from close of record (deadline set by statute)	No set deadline, except in expedited cases
Can the Board order remedies (<i>e.g.</i> , make whole remedies, civil penalties, representation costs)?	No	Yes
Is the Board order binding?	Yes, but binding only on petitioners and intervenors	Yes (binding on complainant and respondent)
Can the Board order be appealed?	Yes	Yes