

Navigating the Evolving Labor Landscape

Key NLRB Rulings and Their Impact on Employers

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Agenda

- Relevance to non-union employers
- 2024 Labor trends
- Changes at the Board in 2025
- Major 2024 NLRB decisions and other decisions likely to be overturned
- Ongoing litigation concerning constitutionality of the Board

What If My Organization Doesn't Have A Union?

*Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and **to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection**, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.*

29 U.S.C.A. § 157 (NLRA Section 7)

- Section 7 applies to employees in the private sector, regardless of union status
- Section 8 prohibits employers from interfering with protected and concerted activities

2024: Sustained Support For Unions, Increased Labor Action

# RC elections	% union success
1,316 (2023) 1,613 (2024)	76% (2023) 80% (2024)

# RM petitions	% union success
62 (2023) 489 (2024)	4.8% (2023) 28.6% (2024)

Cornell-ILR Labor Action Tracker reports 335 worker strikes started in 2024, 452 strikes were reported in 2023.

2024 Significant Strikes: Dockworkers (settled at 62% wage increase), Boeing (settled at 38% wage increase)

Gallup reports that 70% of Americans Approve of Labor Unions

Specific Focus on Starbucks in 2024

- 2024: 49 unfair labor practice cases. Starbucks found to have violated the NLRA in 48 of these cases.
- From 2021 to 2024 the NLRB has:
 - Administered 566 union elections
 - Processed 1,096 unfair labor practice charges
 - Issued 106 regional election decisions
 - Issued 17 Board decisions
 - Sought 12 preliminary injunctions in federal district court.
 - Appealed 2 of those injunction requests into circuit court.
 - Litigated 1 preliminary injunction request to the Supreme Court

There has been/will be significant turnover at the Board with new administration

- Lauren McFerran (Former Chair) and Joshua Ditelberg (Management Nominee) not confirmed by the Senate
- Three remaining Board members:
 - Gwynne A. Wilcox (Labor)
 - Marvin E. Kaplan (Management)
 - David M. Prouty (Labor)
- Impending termination/resignation of General Counsel Jennifer Abruzzo
- Trump NLRB Transition Team comprised of Former General Counsel Peter Robb and Former Deputy General Counsel Alice Stock

What role will the Department of Government Efficiency play at the Board?

The NLRB found that Musk engaged in an unfair labor practice by posting the following tweet:



A 5th Circuit panel upheld the NLRB's decision. Then, in 2024 the 5th Circuit split 9-8 in favor of Musk.

Challenges to the Board's authority in Federal Courts of Appeals

- SpaceX and Amazon currently have cases pending at 5th Circuit.
- These cases are based on *Jarkesy v. SEC*, recently decided by the Supreme Court, which held that a defendant is entitled to a jury trial where the SEC seeks civil penalties for securities fraud.
- Space X argues
 - (1) the NLRB's structure is unconstitutional because it not only limits the removal of Administrative Law Judges ("ALJ") and Board Members, but it also permits Board Members to exercise executive, legislative, and judicial power in the same administrative proceeding; and
 - (2) the Board's new expanded remedies violate the employer's constitutional right to trial-by-jury.

**New decisions and
decisions likely to be
overturned**

2024: Siren Retail Corp d/b/a Starbucks

- Employers may violate the NLRA by making statements to workers regarding the impact that unionization would have on the relationship between employees and management.
- Statements at issue:
 - “A representation of a union is the rules of employment will then be grounded in a contract. And if it’s not in that contract, it’s not a conversation in my opinion that’s going to happen with leadership. We’ll be bound by the contract. So the union will be bound. And Starbucks will be bound. So I want to be clear on that. That a third party comes in and speaks for you. And everything will be grounded, from my experience and my opinion through the lens of that contract”
- Decision overrules 40 years of precedent which held that employers do not make unlawful threats by explaining to workers that “when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before.”

2024: Amazon.com Services LLC

- Captive audience meetings are a tool in defending a union campaign. Require employees to attend meetings where the employer states their position on the unionization effort and/or election
- Board held that captive audience meetings are presumptively unlawful. This overturns 75 years of precedent.
- Some states (Connecticut and Maine) already prohibited these types of meetings
- Workaround is to not require employees to attend the meetings

2024: Metro Health Inc.

- The NLRB effectively eliminated the use of unilateral consent orders as a means of resolving unfair labor practice charges
- This approach permitted employers to propose resolutions that could be approved by the Board even without the consent of the opposing party, provided it “offered a full remedy for all the violations alleged in the complaint”
- NLRB focus on default language and request for non-admission language

2023: Cemex Construction Materials Pacific, LLC

- Employer must respond to Union demand for recognition with either recognition of the union, or, if the union has not filed for election, a RM petition (Employer Petition for Election).
- If the Employer commits an unfair labor practice (ULP) that requires setting aside the election, the NLRB will dismiss the employer's petition and issue a bargaining order.
 - ULPs at issue in *Cemex*: threatening drivers with discipline for placing pro-union stickers on their hardhats, instructing employees not to talk to union organizers on company time, threatening closure or movement of a plant, using fliers, documents and messages which contained misrepresentations regarding consequences of strikes and impacts of strikes.

Takeaway: If faced with a demand for recognition, quickly file a RM petition

2023: *Stericycle Inc.*

- Overturned *Boeing* (2017). Boeing test evaluated facially neutral policies, rules or handbook provisions that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights. The Board would consider: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.
- Now, under *Stericycle*, the General Counsel must prove that a challenged rule has a reasonable tendency to chill employees from exercising their rights. If the General Counsel does so, then the rule is presumptively unlawful.
 - The employer may rebut the presumption by 1) proving that the rule advances a legitimate and substantial business interest and 2) that the employer is unable to advance that interest with a more narrowly tailored rule.
- **Takeaway: evaluate handbook provisions and other work rules.**

2023: McLaren McComb

- Offering employees a severance agreement that requires them to broadly give up their rights under Section 7 of the Act violates Section 8(a)(1)
- The Board found the agreement's confidentiality provision to be too broad. The provision prohibited disclosure to "any third person", and the Board took that to mean the agreement would prohibit the employees from disclosing to anyone that the agreement contained unlawful provisions, and would further prohibit them from discussing the terms of their agreement with other coworkers.
- Decision applies retroactively to agreements entered into before the case was decided (February 21, 2023)
- **Takeaway: Incorporate protective language into severance and separation agreements**

GC Memoranda will likely be withdrawn

- GC 25-01 Remedying the Harmful Effects of Non-Competes and “Stay-or-Pay” Provisions that Violate the NLRA
- GC 24-04 Securing Full Remedies for All Victims of Unlawful Conduct
- GC 23-02 Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights

QUESTIONS?

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