



---

# a boxing day miracle: federal court grants national labor relations board's requested injunction against california assembly bill 288

---

Louis Cannon  
*MSK Client Alert*

January 5, 2026

In September 2025, California Governor Gavin Newsom signed into law Assembly Bill ("AB") 288, a law that purports to expand the authority of the California Public Employment Relations Board ("PERB") to also exercise jurisdiction over private sector employers in situations where the National Labor Relations Board ("NLRB") either cannot act or is not acting expeditiously. Specifically, AB 288 would allow the PERB to process unfair labor practice charges and conduct union elections as to employers who are covered by the National Labor Relations Act ("NLRA"), a law administered by the NLRB. Shortly thereafter, the NLRB's Acting General Counsel filed a lawsuit in the U.S. District Court for the Eastern District of California, seeking invalidation of, and an injunction against enforcement of, the law. On December 26, 2026, the injunction was granted, which means that the law cannot be enforced while the lawsuit is processed. This development affects all employers in California who fall under the NLRA's jurisdiction; this includes nearly all private sector employers in the State.

## What AB 288 Would Have Meant for California Employers

The PERB, broadly speaking, is charged with governing labor relations (collective bargaining, unfair labor practices, and representation matters) involving public employers, such as governmental bodies. In January 2025, President Donald Trump terminated NLRB Member Gwynne Wilcox, which left the NLRB without a quorum and rendered it unable to issue binding decisions and triggered a court battle that is making its way to the United States Supreme Court. It is worth noting that although the NLRB lacked a quorum after Wilcox's firing, the day-to-day operations of the agency continued: regional offices

## **attorneys**

Louis J. Cannon Jr.

## **practice areas**

labor & employment

labor litigation & counseling



## a boxing day miracle: federal court grants national labor relations board's requested injunction against california assembly bill 288

---

continued processing unfair labor practices and representation elections, and trials continued to be held before agency administrative law judges. But the lack of an NLRB quorum left the agency unable to make "final" (at least from the agency's standpoint) decisions on issues appealed to it.

In response to this, the California legislature passed, and Governor Newsom signed, AB 288. The law would allow the PERB to exercise the following authority:

- Investigate and decide unfair labor practice charges.
- Process union representation petitions and certify exclusive bargaining representatives.
- Order remedies, including requiring employers to bargain and even submit to "binding mediation" after negotiating for a collective bargaining agreement, without concluding such negotiations.
- Impose civil penalties for patterns or practices of unfair labor practices.

The PERB, of course, already had such authority over State employers. However, AB 288 expanded that authority to cover private sector employers—almost all of which fall under the jurisdiction of the NLRB—in the event the NLRB is unable to act or otherwise acts in a significantly delayed manner. In particular, AB 288 would cover private sector employers when one (or more) of the following conditions is present:

- The NLRA is repealed or "otherwise narrowed so that it no longer covers a certain type...of worker[]."
- The NLRB "cannot execute its statutory duties" due to lack of a quorum or due to "legal challenges" that render the NLRB unable to "prosecute cases involving that worker."
- An NLRA-covered employer has refused to bargain with an incumbent union, the union/employees have filed a charge with the NLRB as a result, more than 6 months have passed since the charge was filed without an order from the NLRB, and the NLRB has not "dismissed" the charge during that time.

### The NLRB's Lawsuit and Court's Decision

On October 15, 2025, the NLRB, through Acting General Counsel William Cowen, sued California in the Eastern District of California to have AB 288 declared invalid; in connection with that, the NLRB sought an injunction to immediately stop California from enforcing the law against private sector employers falling under the NLRB's jurisdiction. Why? The law was preempted, said the NLRB.

On December 26, 2025, the court issued that injunction. The court ruled that the NLRB likely will prevail on its argument that AB 288 is preempted under the Supreme Court's ruling in *San Diego Bldg. Trades Council, Millmen's Union, Loc. 2020 v. Garmon*, 359 U.S. 236 (1959) (also known as "Garmon preemption"). The essence of a *Garmon* preemption claim is that a state is without power to adjudicate a case; therefore, a court faced with a *Garmon* preemption claim must first consider whether the conduct at hand is "arguably" covered by the NLRA. The court answered that question: yes, most likely. Although the court did not decide the issue on the merits – courts don't



## a boxing day miracle: federal court grants national labor relations board's requested injunction against california assembly bill 288

---

do so at the injunction stage – it included a thorough analysis of the applicable legal principles and found that the federal Government's interests in regulation of private-sector labor relation is so strong that it cannot be ceded to a state government, even in the rather limited circumstances where the NLRB is unable to act (or unable to act expeditiously).

California did prevail on a couple of points. The court agreed that the state lawfully can intervene and assert jurisdiction in situations where the NLRB has declined jurisdiction, a concept already embodied in federal law. On a similar note, the court noted, California can exercise jurisdiction over employees who have been declared not to fall within the NLRA's ambit. Finally, the court agreed that California can act in situations where a court has enjoined the NLRB from prosecuting a case. In all of these circumstances, the court reasoned, the NLRA cannot act, so there is no conflict between federal and state law if California fills the gaps. To be clear, these exceptions permitting California to assert jurisdiction over private sector employers are narrow indeed, already existed, and will not apply in the vast majority of scenarios. For the most part, private sector employers in California will not be subject to AB 288.

This trend actually started on the East Coast. New York passed a largely similar law, the New York Trigger Bill, which Governor Kathy Hochul signed into law on September 5, 2025. Amazon challenged the Trigger Bill on preemption grounds after the Amazon Labor Union No. 1 filed a charge with the the New York State Public Relations Board pursuant to the New York Trigger Bill. The Eastern District of New York issued a decision that tracks with this one.

### What Does This Mean for California Private Sector Employers?

The court's decision does not come as a surprise. Many commentators and labor relations professionals had the same reaction to the AB 288 and the NLRB Trigger Bill: "They did what? That's preempted." Candidly, both of these laws may have been passed with the knowledge that *Garmon* preemption likely doomed both statutes, but the states were trying to rectify the uncertainty surrounding the NLRB for nearly all of 2025. It must be noted that this decision is not final (because the court was only passing on the *likelihood* of the NLRB's success on the merits of the argument). When it rules on the merits, the court could (but likely won't) rule in favor of California. And the Eastern District of California's decision will be subject to review by the Ninth Circuit Court of Appeals, then the Supreme Court).

Alas, the decision might not have any practical effect. The NLRB is days away from having a functioning quorum and will once again be able to issue binding decisions. And although the NLRA's constitutionality is being challenged, employers shouldn't count on that law being completely invalidated as a result. The Supreme Court has sent signals that it will agree that the NLRA runs afoul of the U.S. Constitution. However, it may well order that the unconstitutional portions be "severed" from the rest of the law, which will be left intact. This would not interrupt the NLRB's ability to adjudicate cases (but NLRB Members and judges may need to keep their resumes updated). Thus, AB 288 becomes an academic exercise.



## a boxing day miracle: federal court grants national labor relations board's requested injunction against california assembly bill 288

---

What this means for employers in the immediate term: If you are a private sector that had a charge (or representation petition) filed before the PERB, you now have grounds to demand that the agency stop processing your case. If you are a private sector employer that did not have a PERB case pending, you won't have one anytime soon.

This might not be the end of this issue, and the NLRB may again lack a quorum in the future. The outcome of this dispute is still of interest to California employers. We will continue to monitor this case and report on any notable updates.