NAVIGATING A SHIFTING NLRB

HOW EMPLOYERS SHOULD RESPOND TO RECENT RULINGS

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Whether you are a union or nonunion employer, the decisions issued by the National Labor Relations Board (the "NLRB" or "Board") affect your workplace. This article offers summaries of the latest NLRB rulings, along with strategies and tips to implement them effectively—and avoid legal missteps.

CURRENT STATE OF THE LABOR BOARD

The Board has been without a quorum since January 27, 2025, after President Trump removed Gwynne Wilcox, a Biden appointee, as a member from the Board. The National Labor Relations Act (NLRA) requires a quorum of three members for the NLRB to exercise its powers and conduct business, namely, to issue decisions in union representation and unfair labor practice cases.

Despite the Board's lack of a quorum, the NLRB appears to be preparing to take a much different path forward in administering and enforcing the NLRA under the Trump administration than under Biden's. On February 14, 2025, William Cowen, the acting general counsel ("GC") for the NLRB, rescinded several guidance memorandums that were previously issued by the NLRB's former GC, Jennifer Abruzzo. The recissions made through Memorandum GC 25-05 impact very significant and slightly controversial policy priorities under GC Abruzzo. How and to what extent is not yet known.

Further, it will take several months for the Board, once it has a proper quorum, to receive and rule on cases with any impact on Biden-era decisions. For now, it appears the Board's top policymaker is not going to continue to blow the proverbial "dog whistle" that inevitably invites labor organizations to file unfair labor practice charges over just about everything and anything coming from management.

Of particular significance, GC Cowen rescinded prior NLRB memorandums issued during the Biden administration that covered the Board's *Cemex Construction Materials Pacific, LLC and International Brotherhood of Teamsters* decision, the Board's attack on noncompete agreements, "stay or pay" agreements, severance agreements (including confidentiality and non-disparagement provisions), and captive audience meetings, along with other guidance.

CEMEX DECISION: REPRESENTATION ELECTIONS

In August 2023, the NLRB handed big labor a major assist when it comes to union organizing in its *Cemex* decision. In *Cemex*, the NLRB ruled that an employer

must essentially recognize a labor union claiming to represent a majority of its employees in an appropriate unit, unless the employer promptly files a petition (an RM Petition) to test the union's majority status or the appropriateness of the unit. The NLRB explained that, absent unforeseen circumstances that may be presented in a particular case, *promptly* will mean that the employer must file its petition within two weeks following the union's demand for recognition. This new procedure assumes the union has not already filed its own petition with the NLRB, an option that still exists.

GC Abruzzo argued in the *Cemex* case that the NLRB should reinstate the 1960s-era Joy Silk doctrine. Under that doctrine, employers are required to recognize and bargain with a union claiming to have majority support of the employer's employees unless the employer can affirmatively establish a good-faith doubt to the claimed majority status of the union. While the NLRB ultimately did not adopt the full Joy Silk doctrine in *Cemex*, it adopted certain key aspects of the doctrine. Namely, if and when a union claims majority representative status for a particular group of employees, the employer will be compelled to recognize the union and bargain with that union unless it timely moves for a petition to hold a secret ballot election. However, by not fully adopting Joy Silk, the NLRB need not have to demonstrate and prove an employer's lack of good faith in rejecting the union's claim of having representative status.

Of significant consequence, an employer moving for an election under this new standard cannot commit an unfair labor practice charge that would otherwise frustrate the election process. If the employer commits an unfair labor practice that would set aside an election, the employer's petition will be dismissed by the NLRB. Additionally, it should be noted that even if an employer's petition is processed and the election results are in the employer's favor, the union can file objections and claim that the employer committed unfair labor practices to a degree and nature that could overturn the election and result in a bargaining order that requires the employer to recognize the union.

The NLRB did not go so far in *Cemex* as to prevent lawful persuasive action by an employer when faced with potential or ongoing union organizing. In fact, the NLRB's decision in *Cemex* went on to state that an employer may continue to persuade employees with lawful expressions of its views under section 8(c) of the National Labor Relations Act.

AMAZON DECISION: CAPTIVE AUDIENCE MEETINGS

However, the NLRB reversed course in November of 2024 when the Board issued its decision in *Amazon.com Services LLC and Dana Joann Miller and Amazon Labor Union*, under which the Board outright banned mandatory meetings at which an employer can express its views on unionization and educate workers on the good, bad, and ugly of union membership ("captive audience meeting"). Since 1948, employers could lawfully require employee attendance at on-the-clock captive audience meetings, even under threat of discharge or discipline. This changed in *Amazon*, when the Board held that mandatory captive audience meetings constitute an automatic unfair labor practice that violates section 8(a)(1) of the NLRA—leaving employers with less of an ability to simply educate employees on union membership and express their views. The NLRB clarified in *Amazon* that requiring employees to attend such meetings is unlawful regardless of whether the employer expresses support for or opposition to unionization. To be clear, the NLRB did not ban voluntary captive audience meetings in Amazon, where employee attendance is not mandatory and employees can freely attend such meetings.

MCLAREN MACOMB DECISION: SEVERANCE AGREEMENTS

In February of 2023, the Board issued its *McLaren Macomb* decision, under which it held that the mere act of offering a severance agreement with terms that have "a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their [s]ection 7 rights" under the NLRA can constitute an unfair labor practice—regardless of other employer conduct or external circumstances (e.g., employer motive, employer animus against section 7 activity, or whether or not the employee accepts the agreement).

In *McLaren*, the Board took issue with overly broad confidentiality and non-disparagement provisions in severance agreements that prohibit employees from disclosing terms of a severance agreement or from making statements about their former employer without time limitations or exceptions for employees to speak with government agencies or report legitimate concerns the employee may have about the employer's potential violations of the NLRA. The Board also took issue with general waivers in severance agreements, relying on the long-standing principle that employers cannot ask employees to choose between receiving benefits (i.e., severance pay) and exercising their rights under the NLRA.

KEY TAKEAWAYS: EMPLOYERS MUST ADHERE TO NLRB DECISIONS—FOR NOW

Employers must keep in mind that, while the GC's memorandums that helped to usher in the Board's decisions in *Amazon*, *Cemex*, and *McLaren* are rescinded, the underlying decisions are not, as they remain in effect. Therefore, until the NLRB has a quorum, employers should continue to adhere to the NLRB's decisions until a quorum is reached and the Board takes action to overturn the decisions issued under the Biden Administration, which may or may not occur during the Trump Administration.

Simply put, employers should continue to narrowly tailor their severance agreements to include reasonable limitations and exceptions for employees to disclose terms of the agreement or make statements against their former employer in situations where the employee has a legal right to do so or is otherwise required to by law. Additionally, employers should not take any action to commit unfair labor practices when faced with union organizing efforts or a demand to recognize a bargaining unit, including that employers should not require attendance at captive audience meetings. Employers who hold captive audience meetings should allow employees to attend such meetings voluntarily.

Lastly, employers need to be mindful of applicable state laws, as states are taking action to pass their own laws in response to recent NLRB decisions. For instance, states are increasingly passing laws banning mandatory captive audience speeches.

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