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LABOR PAINS: NAVIGATING THE NLRB'S SHIFTING STANDARDS

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Overview

- Overview of National Labor Relations Act and National Labor Relations Board
- NLRB Structure and Outlook
- General Counsel Policy Changes

OVERVIEW

OVERVIEW OF NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act (NLRA) governs relations between employees and their employers.

Applies to private sector “employees” EXCEPT supervisors, managerial employees, agricultural workers, individuals who work for their parents or spouse, and railroad employees. Management includes employees who act in a capacity for persons who determine or administer policy.

Guarantees employees (including non-union) 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 concerted activities for the purposes of collective bargaining or other mutual aid or protection.”

WHAT IS PROTECTED CONCERTED ACTIVITY?

Employees covered by the NLRA have the right to join together to improve their wages and working conditions, with or without a union. When an employer or union interferes with these rights, it is an unfair labor practice, and it violates the NLRA.

This includes the following:

- Compensation, criticism of management, work processes, concerns about working conditions.

MY COMPANY IS NON-UNION – WHAT RELEVANCE IS THIS?

- The NLRA applies to both non-union employees and union employees.
- An employer can be in violation of the NLRA for the following:
  - Having certain work rules,
  - Terminating/disciplining/restricting certain communication by your employees, and
  - Having certain severance/noncompete terms.

IF THERE IS AN NLRA VIOLATION, SO WHAT?

- A violation of the NLRA is considered an unfair labor practice ("ULP").
- ULPs typically arise from protected concerted activity.
- A ULP charge is filed with the Office of General Counsel.
  - Respond to a ULP violation – if not, you lose.
    If an employer is found to have violated the NLRA, it will be ordered to pay damages to the employee including, but not limited to, backpay.

NATIONAL LABOR RELATIONS BOARD STRUCTURE

The National Labor Relations Board (NLRB) is an independent federal agency responsible for prosecuting and adjudicating violations of the NLRA.

The Board is the adjudicatory arm of the NLRB. The Board is made up of five members who are appointed by the President to staggered five-year terms.

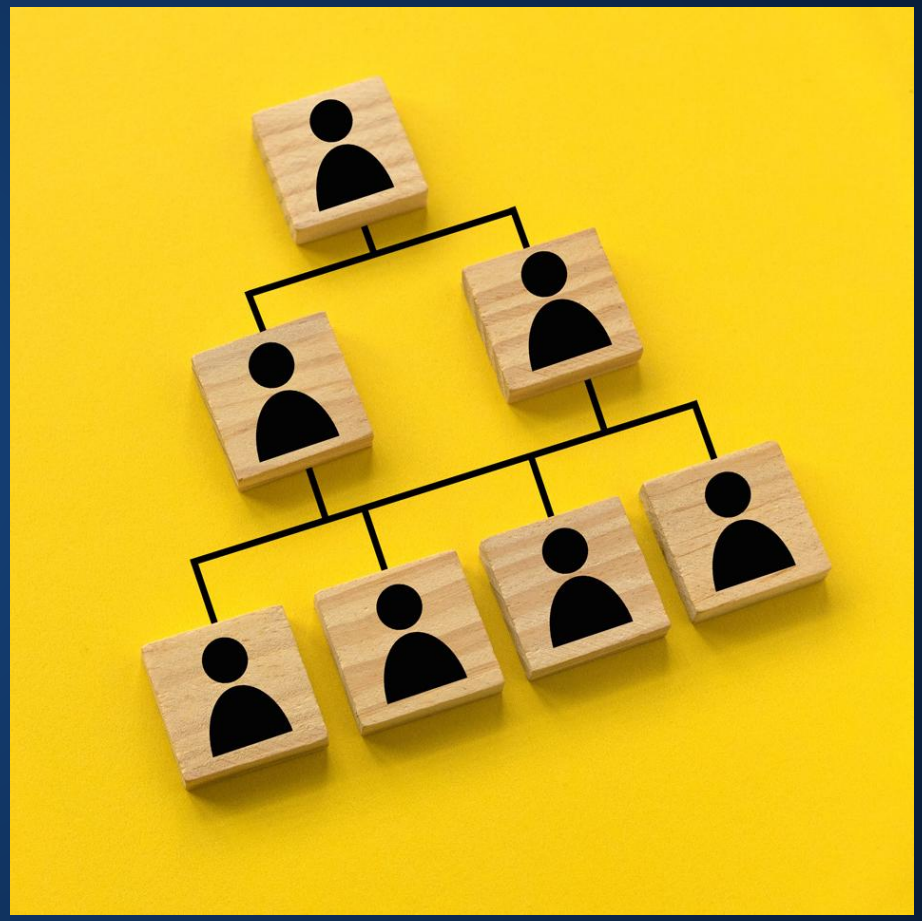
The Board oversees NLRB's Division of Administrative Law Judges ("ALJ"). ALJs hear and decide cases. ALJ decisions can be appealed to the Board.

NATIONAL LABOR RELATIONS BOARD STRUCTURE

Much like courts, the Board sets precedent by reviewing ALJ decisions.

The General Counsel oversees the prosecutorial arm of the NLRB. The General Counsel is independent from the Board and is appointed by the President to a four-year term.

The General Counsel oversees regional offices that investigate and prosecute unfair labor practice charges.



CURRENT COMPOSITION OF NLRB

At the moment, there is only one member of the Board: Chairman Marvin Kaplan (Republican).

David Prouty's (Democrat) term expired on August 27, 2025.

The Senate failed to confirm two of President Biden's nominees at the end of his term, and after taking office, President Trump fired Gwynne Wilcox (Democrat), which has left the Board without a quorum.

CURRENT COMPOSITION OF NLRB

Without a quorum, the day-to-day operations of the NLRB are largely unaffected as regional offices can still investigate cases and ALJs can hear cases; however, the Board is unable to issue decisions on appeals, which have left ULPs unresolved.

CURRENT COMPOSITION OF NLRB

There is ongoing litigation over President Trump's decision to fire Wilcox. The U.S. Supreme Court ruled that Wilcox will not be reinstated while the litigation is pending. Wilcox's term was set to end in August of 2028.

In July, President Trump nominated Scott Mayer and James Murphy to fill vacant positions on the Board. While Mayer and Murphy still need to be confirmed by the Senate, if confirmed quorum would be restored.

Mayer currently serves as chief labor counsel for Boeing. Murphy has spent his career working for the NLRB, most recently serving as counsel to Chairman Kaplan.

CURRENT COMPOSITION OF NLRB

As expected, President Trump fired the General Counsel, who was appointed by President Biden. President Trump has nominated Crystal Carey to fill the position. Carey currently works for a large management side and a Senate Confirmation hearing has been held.

William Cowen is currently serving as Acting General Counsel. Prior to his appointment as Acting General Counsel, Cowen work as the director of NLRB's Los Angeles office until 2025. Cowen also worked in private practice and served a short stint on the Board after a recess appointment by President George W. Bush.

NLRB CASE BACKLOG

"We have seen our backlog of cases grow to the point where it is no longer sustainable." – William Cowen

- In FY 2024, 21,292 ULP charges were filed with the NLRB.
- The NLRB will typically make a merit determination in 7 to 14 weeks, but this can be much longer depending on the case.
- Budget cuts are expected to increase the backlog.

STRUCTURE & OUTLOOK

SHIFTING STANDARDS

The Board shifts policy by issuing opinions on appeals. The Board can also shift policy through administrative rule making, although this is somewhat rare for the Board.

During the Biden Administration, the Board and the General Counsel shifted precedent and implemented policy in a way that was very employee friendly.

Actions taken by the NLRB during the first Trump Administration offer a glimpse into what can be expected.

SHIFTING STANDARDS

The General Counsel can shift policy by issuing memorandums that direct regional offices on how they should investigate and prosecute unfair labor practice charges. Cowen has already rescinded the memorandums issued by the former General Counsel.

While precedent set by the Board during the Biden Administration will likely be overturned in the coming months and years, those decisions remain in effect.

GENERAL COUNSEL MEMORANDA

The following memorandums have been rescinded. It is expected that the permanent General Counsel will issue guidance implementing employer-friendly enforcement policy.

- Memorandums directing regional offices to seek wide breadth of consequential damages, including costs related to job searches such as gas, ride share payments, and daycare expenses; lost contributions into retirement funds; and expenses related to evictions.
- Memorandum directing regional offices to seek wide breadth consequential damages in settlement agreements and discouraging the use of non-admission clauses.

GENERAL COUNSEL MEMORANDA

- Memorandum directing regional offices to seek make-whole remedies for all employees harmed as result of an unlawful work rules.
- Memorandum directing regional offices to seek make-whole remedies for all employees harmed as result of an unlawful work rule of contract term.
- Memorandum expressing it is the General Counsel's opinion that non-compete agreements violate the NLRA and directing regional offices to submit cases involving non-compete agreements to the General Counsel's office for analysis.

GENERAL COUNSEL MEMORANDA

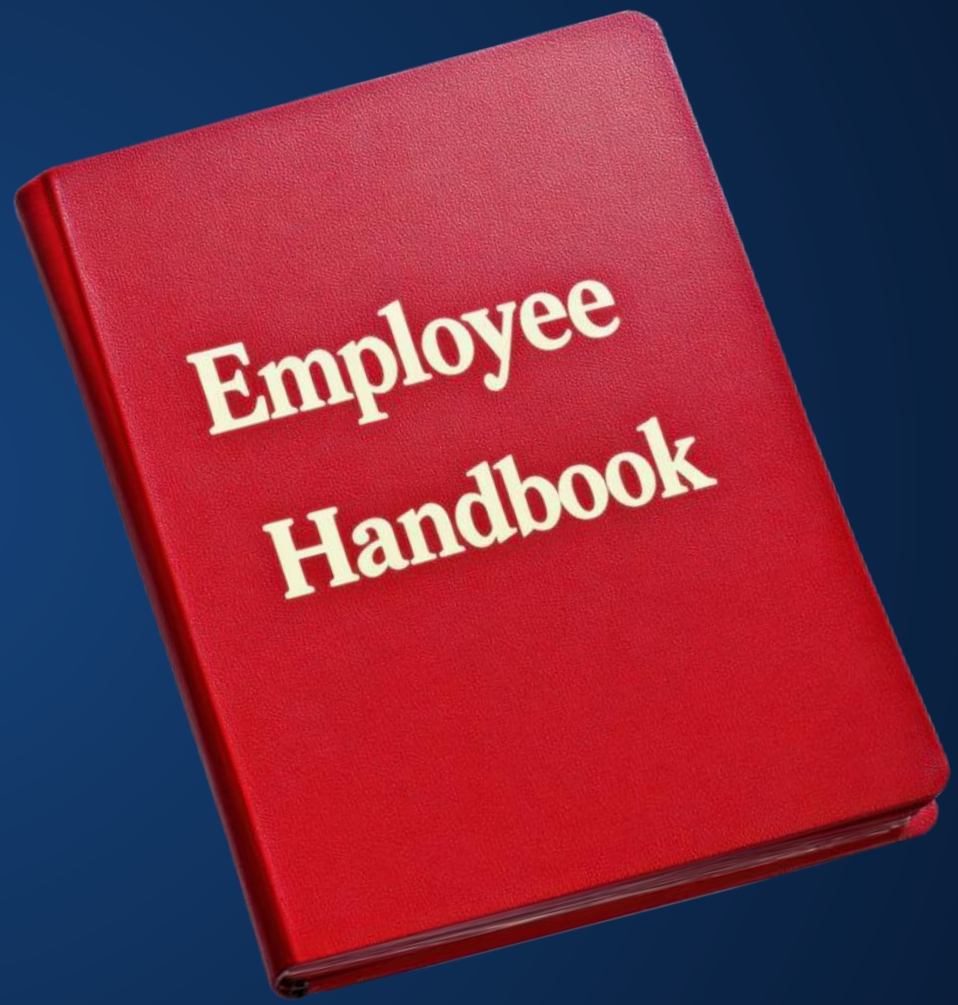
- Memorandum to regional offices reiterating the importance of seeking injunctive relief under the appropriate circumstances.
- Memorandum urging the Board to find certain types of “stay or pay” provisions unlawful under the NLRA.
- Memorandum encouraging “the Board to find that an employer has presumptively violated Section 8(a)(1) [of the NLRA] where the employer’s surveillance and management practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act.”

BOARD DECISIONS

- *Lion Elsatomers LLC II*, 372 NLRB No. 83 (2023)
  - In determining whether "an employee's conduct during Sec. 7 activity loses the protection of the Act, the Board considers: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice."
  - At the moment, employees have more latitude to act out and be disruptive while engaging in protected concerted activity; however, under the Trump administration, this standard is expected to shift back to the test that mirrors *Wright Line*.

BOARD DECISIONS

- *McLaren Macomb*, 372 NLRB No. 58 (2023)
  - The Board found that severance agreements that include non-disparagement clauses that require employees to waive their rights under the NLRA are unlawful.
  - The Board's decision overturned the 2020 decision of *Baylor University Medical Center and IGT d/b/a International Game Technology* that held similar non-disparagement clauses were lawful. It is likely that this precedent will be reinstated.



BOARD DECISIONS

- *Amazon.com Services LLC*, 373 NLRB No. 136 (2024)
  - This decision held that captive audience meetings are unlawful and overturned precedent from 1948, so it is likely this decision will be reversed during the Trump Administration.
  - If employers want to hold meetings to express their views on unionization, the following conditions must be met: (1) the employer intends to express its views on unionization at a meeting at which attendance is voluntary; (2) employees will not be subject to discipline, discharge, or other adverse consequences for failing to attend the meeting or for leaving the meeting; and (3) the employer will not keep records of which employees attend, fail to attend, or leave the meeting.

BOARD DECISIONS

- *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141 (2024)
  - The Board reinstated the clear and unmistakable waiver standard for determining whether a union has waived its right to bargain over mandatory subjects. This standard had been in place for nearly 70 years before it was overturned in 2019 by a decision that implemented the "contract coverage standard."
  - This decision "requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term."

BOARD DECISIONS

- *The Atlanta Opera, Inc.*, 372 NLRB No. 95 (2023)
  - The Board overturned *SuperShuttle* (2019) and returned to the use of common-law factors for determining whether a worker is classified as an employee or independent contractor.
  - The 2019 standard of analyzing a worker's entrepreneurial opportunity will likely be reinstated in the coming years.

BOARD DECISIONS

- *Thryv, Inc.*, 372 NLRB No. 22 (2022)
  - Board held that make-whole remedies include "all direct and foreseeable pecuniary harms suffered" as a result of unfair labor practices.
  - It is likely that in the near future, the Board will return to limiting damages to back pay.

RETROACTIVE APPLICATION

- NLRB decisions can be applied retroactively.
- This means employers should exercise caution when operating under standards that have shifted.

POLICY CHANGES

LEGISLATIVE OUTLOOK

- Richard L. Trumka Protecting the Right to Organize Act (The PRO Act)
  - If passed, the PRO Act would do the following:
    - Revise definitions of employee, supervisor, and employer,
    - Weaken right-to-work laws,
    - Expressly outlaw captive audience meetings,
    - Increase the NLRB's injunctive relief power,
    - Hold corporate officials personally liable for unfair labor practices, and
    - Prohibit employers from replacing striking employee.
  - Despite the inroads President Trump made with organized labor at the ballot box, it is very unlikely the PRO Act will get passed.

LEGISLATIVE OUTLOOK

With standards expected to shift, states are attempting to regulate private sector labor relations.

- New York, California, and Massachusetts have introduced bills that would give the states authority to enforce matters governed by the NLRA when the Board is without quorum.
  - Preemption challenges are expected.
- Thirteen states have banned captive audience meetings.
  - Free speech and preemption challenges have been initiated in certain states.
- New York, New Jersey, Oregon, and Washington offer unemployment benefits to striking workers.

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QUESTIONS

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