The Shifting Trail: Navigating the New Terrain at the National Labor Relations Board (NLRB)

October 16, 2025

Objectives

A. Overview of Traditional Labor Law

- History
- Election Process

B. Recent Developments Impacting Labor Relations

- Trump’s Changes to the NLRB: Firing of GC and Removal of Board Members
- Acting GC’s Recission of General Counsel Memos Under Abruzzo
- California Captive Audience Ban and Recent Preliminary Injunction
- SpaceX Decision and Its Implications
- NLRB’s New Standards for Remedies in Settlements

Overview of Traditional Labor Law

Brief History of Modern Labor Law

- National Labor Relations Act ("NLRA") adopted in 1935
- Created rights for employees:
  1. Right to organize in workplace;
  2. Right to bargain collectively; and
  3. Right to engage in strikes, picketing, and other protected, concerted activities ("PCAs")
- NLRA created the National Labor Relations Board ("NLRB"), a federal agency, designed to enforce/protect employees' NLRA rights

Brief History of Modern Labor Law

- 1947 Taft-Hartley Act passed, but by then nearly 30% of private sector workers were represented by unions
- Union membership peaked in the 1950s with approximately 35% of private sector workers and has declined since then
- In 1938, 20% of private sector workers were represented by a union
- Since mid-1990s, less than 10% of private sector workers have been represented by unions

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The NLRB ("Board") and Its Functions

Board: 5 members; 5-year terms; Appointed by the President.

Office of General Counsel: Appointed by President, 4-year term.

Regional Offices: Investigates charges of unfair labor practices ("ULPs"); facilitates union election or Representation ("R-case") process

Section 7 of the NLRA

- 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….” 29 U.S.C. § 157

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Section 7 of the NLRA (cont.)

- **“[Employees] 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. § 157

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“Concerted Activities” Protected

- Section 7 protects employees’ right to engage in concerted activities, distinct from union activities, for the purpose of mutual aid or protection.
- Employees are engaged in protected concerted activities when they act in concert with other employees to improve their working conditions. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1982); *NLRB v. Washington Aluminum*, 370 U.S. 9, 14 (1962).

Section 8(a) of the NLRA

- Employer cannot interfere with, coerce, or restrain employees in exercising Section 7 rights.
- Employer cannot interfere with the formation or administration of any labor organization or contribute financial or other support to it.
- Employer cannot discriminate with respect to the terms and conditions of employment to encourage or discourage membership of any labor organization.
- Employer cannot discriminate against employee because the employee has filed charges or given testimony under the NLRA.
- Employer cannot refuse to bargain collectively with representatives of its employees.

29 U.S.C. § 158(a)

Section 8(c) of the NLRA

- Employers and Unions' views, arguments, or opinions shall not constitute or be evidence of an unfair labor practice if it contains no threat of reprisal or force or promise of benefits.

  29 U.S.C. § 158(c)

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Trump's Changes to the NLRB — Firing GC & Removal of Board Member

- Jan 27, 2025: Trump fires NLRB General Counsel Jennifer Abruzzo (term not expired)
- Same day: Trump removes Board Member Gwynne Wilcox (term through 2028) — first-ever midterm removal of a sitting NLRB member
- Statutory limit on removal: NLRA § 3(a) allows removal only for "neglect of duty or malfeasance"
- Effects: Board falls below quorum (only two members remain) — NLRB's ability to issue decisions halted

Acting GC's Rescission of Key GC Memos (Abruzzo Era)

- Feb 14, 2025: Acting GC William Cowen issues GC Memo 25-05, rescinding ~30+ prior GC memos
- Rescinded memos include those on:
  - Remedies / "full relief" mandates
  - Non-Competes/ stay-or-pay clauses
  - Captive audience / mandatory meetings
  - Student-athlete unionization
- Rationale: backlog of cases and desire to reset priorities
- Implication: policy shift away from aggressive enforcement framework

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California's Captive Audience Ban & Preliminary Injunction

- SB 399 (2025): prohibits mandatory employer-run meetings (captive audience) on unionization, political, or religious topics
- District Court Preliminary Injunction (Sept 30, 2025): enjoined enforcement of SB 399 on First Amendment grounds
- Legal challenges filed by business groups argue intrusion on employer speech rights
- Uncertainty ahead: Ninth Circuit review may reshape captive audience rules
- Implication: businesses in CA (and potentially states with similar statutes) must tread carefully

SpaceX v. NLRB: Structural Challenge to the Board

- Fifth Circuit (Aug 2025) finds NLRB structure (removal protections) likely unconstitutional
- Blocks NLRB from prosecuting ULP cases against SpaceX, Energy Transfer, Aunt Bertha
- Core holding: dual layers of for-cause protection (Board + ALJs) improperly constrain President's control
- Employers must preserve structural objections during proceedings

NLRB's New Standards for Remedies in Settlements (GC Memo 25-06)

- May 16, 2025: Acting GC Cowen issues GC Memo 25-06: "*Seeking Remedial Relief in Settlement Agreements*"
- Key shifts from prior policy:
  - Regions may approve settlements **without** Board-level clearance
  - Can accept settlements with **less than 100 %** of anticipated recovery
  - Default language now discretionary, not mandatory
  - Expanded focus on efficiency, not maximal remedy

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Thank you!

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