How Employers May Need to Adjust Their Best Practices Under Trump's NLRB

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POLL QUESTION

Do you believe the government should be able to restrict what you discuss with your employees?

A. Yes
B. No
C. I prefer not to discuss things with my employees

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Captive Audience Meetings

Memorandum GC 22-04 – April 7, 2022

"The **Board years ago incorrectly concluded** that an employer does not violate the Act by compelling its employees to attend meetings in which it makes speeches urging them to reject union representation."

"when employees are (1) forced to convene on paid time or (2) cornered by management while performing their job duties. . . employees constitute a **captive audience** deprived of their statutory right to refrain, and instead are compelled to listen by threat of discipline, discharge, or other reprisal – a threat that employees will reasonably perceive even if not stated explicitly."

Amazon.com Services LLC – November 13, 2024

"[C]ompelling employees, on pain of discipline or discharge, to attend a meeting during which [the employer] expresses its views concerning unionization" **is a violation of Section 8(a)(1) of the National Labor Relations Act**.

Employees have a "**right to decide** whether, when, and how they will listen to and consider their employer's views concerning" their choice as to whether to unionize.

When **an employer "us[es] its power**" and requires employees to attend mandatory group meetings, this "reasonably tends to inhibit [employees] from acting freely."

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Wait… what is a captive audience meeting?

If "under all the circumstances, employees could reasonably conclude that attendance at the meeting is required as part of their job duties or could reasonably conclude that their failure to attend or remain at the meeting could subject them to discharge, discipline, or any other adverse consequences."

"[A]ttendance at a meeting that is included on employees' work schedules, as communicated by a supervisor, manager or other agent of the employer, will be considered to be compelled"

Both group meetings and "impromptu" one-on-one meetings

"Concerning their exercise of Section 7 rights"

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The “Safe Harbor”

In advance of the meeting, employers must inform employees:

- The employer intends to express its views on unionization at the meeting;
- Attendance is voluntary;
- No discipline, discharge, or other adverse consequences for failing to attend or deciding to leaving the meeting; and
- No attendance records will be kept

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What a Trump Administration means for all of this…

GC Memo 22-24

- ~~Jennifer Abruzzo~~ (terminated by President Trump on 1/28/25)
- William B. Cowen (appointed as Acting General Counsel on 2/3/25)

Amazon.com Services LLC

- ~~*Chairman McFerran*~~
- *Chairman Kaplan (appointed Chairman by President Trump on 1/20/25)*
- *Member Prouty*
- ~~*Member Wilcox*~~ *(terminated by President Trump on 1/28/25)*

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Kaplan's Dissent:

"Section 8(c) of the Act plainly states that '[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any provision of this Act, if such expression contains no threat of reprisal or force or promise of benefit. . . . The majority's attempt to ban so called 'captive-audience speeches' harkens back to an earlier era when the Board sought to impose on employers a policy of strict neutrality regarding unionization. This flagrantly unconstitutional overreach was decisively rejected by the Supreme Court as a violation of the First Amended guarantee of freedom of speech."

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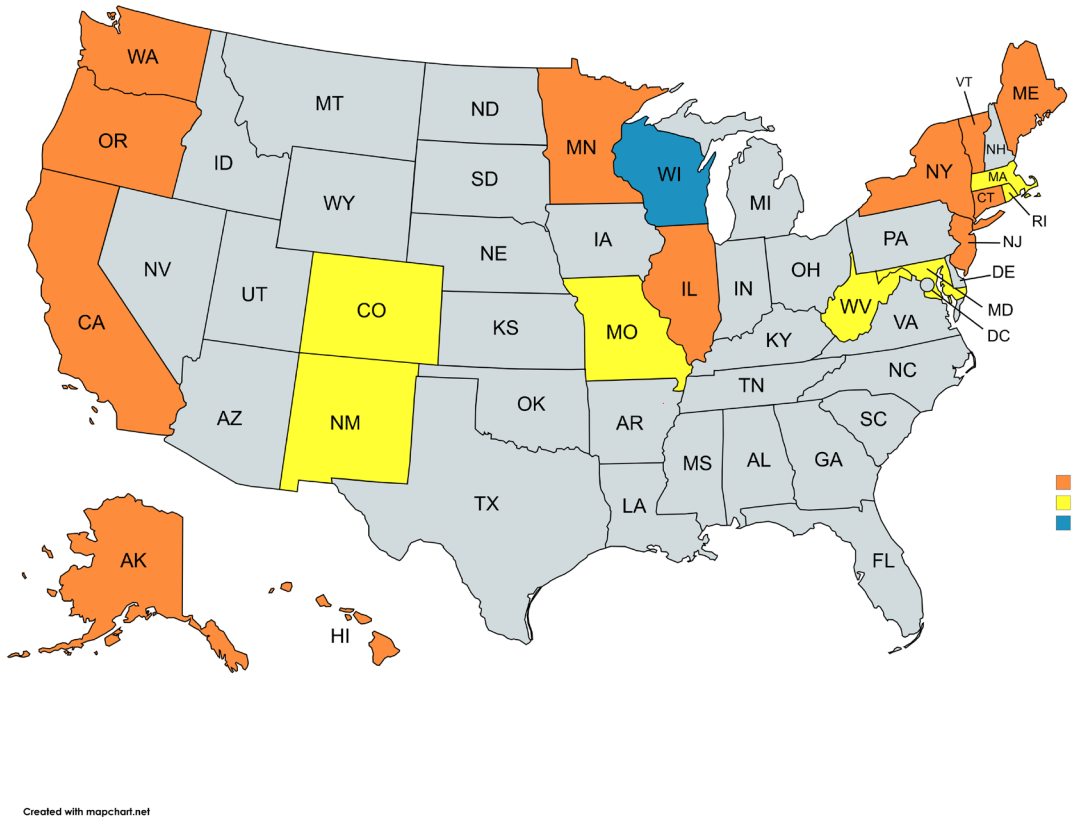
Why what's happening at the NLRB might not matter to some of you …



POLL QUESTION

How confident are you that the National Labor Relations Board would uphold your “independent contractor” classifications?

A. VERY confident
B. Fairly confident…
C. Not confident at all, the law is confusing
D. I had no idea the NLRA even dealt with this issue

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NLRB's Independent Contractor Test

- Independent contractors not covered under the NLRA
- NLRB test for classifying workers as "independent contractors" has fluctuated over the years
- Trump Administration (2017 – 2020)
  - *SuperShuttle DFW* decision
  - Emphasis on "entrepreneurial opportunity"
  - Gig workers
- Biden Administration (2021 - 2024)
  - *The Atlanta Opera Inc.* decision
  - Totality of the circumstances test

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Current Test under *Atlantic Opera*

- Various relevant factors, including:
  - Extent of control over the workers
  - Work performed under direction of employer
  - Whether there is a distinct occupation
  - Skills required for the work
  - Employer provides the tools, equipment & facilities
  - Length of working relationship
  - Method of payment
  - Work integral to employer's regular business
  - Intention of the parties
  - Workers engaged in an independent business
    - entrepreneurial opportunity
    - Realistic ability to work for other businesses
    - ownership interest in work
    - Control over important business decisions
- No one factor determinative

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Potential Return to *SuperShuttle DFW*

- *SuperShuttle DFW* – NLRB decision under Trump (2019)
  - Workers afforded significant entrepreneurial opportunity – gain or loss - are contractors
  - Worker's entrepreneurial opportunity is the "animating principle by which to evaluate" all other factors relevant to the independent contractor analysis
  - Still consider all of the common law factors
  - Relevant to significance of factors, particularly where there is a mix
- Entrepreneurial opportunity considered under *Atlantic Opera*, but less significant

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Practical Implications

- Easier to classify workers as independent contractors
  - Not subject to protections of the NLRA
- NLRB enforcement of *Atlantic Opera* under Trump
- Current *Atlantic Opera* standard remains the law, for now…
- Other agencies and courts impose different standards than the NLRB

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CLE Codeword

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POLL QUESTION

My company updates its handbook . . .

A. Every year
B. Every 2-3 years
C. Every 4+ years
D. We're supposed to have a handbook?

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Time to revamp your employee handbook?

- Workplace Rules Generally – the *Stericycle* 180°
- Social Media
- Confidentiality
  - Employer information
  - During investigations
- Non-Disparagement
- Civility Codes
- Outside Employment
- Use of Employer Equipment/Communication Systems
- Recording in the Workplace
- Media Comments

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The NLRB and Employment-Related Agreements

- Separation Agreements (*McLaren Macomb*)
  - Confidentiality
  - Non-Disparagement
- Non-Solicitation
- Non-Compete
- Stay-or-Pay

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POLL QUESTION

When are you negotiating a successor collective bargaining agreement?

A. Currently.
B. Within the next 6 months.
C. Within the next 4 years.
D. What's a CBA?

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Clear and Unmistakable Waiver

- *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141 (2024): Reinstatement of the "Clear and Unmistakable Waiver" Standard

- **Mandatory v. Effects Bargaining**: Unionized employers generally cannot make unilateral changes to mandatory subjects of bargaining – wages, hours, and other terms and conditions of employment – without first providing the union notice and an opportunity to bargain about the change.

- **Clear and Unmistakable Waiver Standard**: the Board will once again consider "the precise wording of relevant contract provisions" and will reject waiver defenses based on contract language "couched in general terms" that do not refer to "any particular subject area."
  - Examine:
    - Management Rights clauses
    - Bargaining History - "fully discussed and consciously explored"
    - Union clearly and unmistakable yielded its right to future bargaining.

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Likely Return to the Contract Coverage Standard

- *MV Transportation*, 368 NLRB No. 66 (2019) - Trump-era Board dispensed with the "clear and unmistakable waiver" standard and replaced it with the "contract coverage" standard.

- **Contract Coverage Standard**: ordinary principles of contract interpretation would apply to determine whether the decision fell within "the compass or scope" of contract language granting the employer the right to act unilaterally.

- The Board would not require the CBA to specifically mention, refer to or address the decision at issue.

- Contract coverage standard is applied by the D.C., First, Second, and Seventh Circuits.

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What Should Employers Do Now?

- Likely return to Contract Coverage Standard

- Develop and continue to bargain for a robust Management Rights Clause
  - Determine staffing levels
  - Assign work
  - Lay off
  - Hire
  - Promote
  - Transfer
  - Schedule work hours and shifts
  - Promulgate work rules and policies

- Favorable outcome at the Board and federal appellate court levels

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Questions?

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