HRPA HR POLICY ASSOCIATION®

# The NLRB for CHROs: The Minimization of Employer Voice

The National Labor Relations Board, which sets and enforces federal labor law and policy, is the vanguard of the Biden administration's aggressive workplace policy agenda. The Board and its General Counsel are operating under the premise that employees without a union are inherently disadvantaged or being exploited. Accordingly, their actions are directed at tipping the playing field in favor of unions, smoothing the path towards unionization, and in general, removing the employer and employer voice from the equation as much as possible. Whether your employees are unionized or not, and whether you are facing a potential union campaign or not, recent Board activity will have significant practical impacts on your ability to engage with your employees – including attracting and retaining talent – and manage your workplace. Below is a brief review of recent and forthcoming Board actions, what they mean, and why they matter.

| BOARD ACTION | WHAT IT MEANS | WHY IT MATTERS |
|---|---|---|
| **Card Check Union Recognition**<br><br>Recent Decision: *Cemex* (resurrecting (in part) the *Joy Silk* doctrine) | If employers commit any unfair labor practice during a union election campaign, and the union can show that a majority of employees have signed cards supporting the union ("card check"), the Board will order the employer to recognize and bargain with the union, without a secret ballot election ("card check recognition"). | ***There has never been an easier and faster way for your employees to become unionized.***<br><br>• Unfair labor practice allegations are extremely common during representation campaigns, and the current Board is likely to side with the union in many if not most circumstances.<br>• As discussed below, it has never been easier for an employer to commit an unfair labor practice.<br>• In practice, then, a union really only needs to get a majority of employees to sign authorization cards ("card check") to gain recognition. |

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|---|---|---|
| **Restrictions on Workplace Rules**<br><br>Recent Decision: *Stericycle* | The Board handbook police are back. Any workplace rules that the Board feels restrict employees' rights will be considered unlawful – whether actually enforced or merely maintained. | ***Even the most straightforward of workplace rules could be considered unlawful.***<br><br>• When this same standard was enforced by the Obama-era Board, even rules such as "behave in a professional manner" were considered unlawful.<br>• It will be extremely difficult to maintain or enforce any workplace rules or policies without running afoul of the Board.<br>• A slip up in this area – which again, will be easy to do – could result in card check union recognition (see above). |
| **"Quickie" Election Rules** | The Board issued new rules significantly condensing the timeline for union elections. | ***You will have much less time – and fewer avenues – for countering union campaigns.***<br><br>• The Board's new rules streamlines a union's path towards an election, and creates an uneven playing field in favor of unions and to the disadvantage of employers.<br>• Under the new rules, average election timelines could be condensed from roughly 8 weeks down to 3-5 weeks. |

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|---|---|---|
| **Offensive Language in the Workplace**<br><br>Recent Decision: *Lion Elastomers* | Employers are restricted from disciplining employees for using offensive language in the workplace, so long as the language was in some way connected to an employee exercising their NLRA rights. | ***You may have to choose between maintaining harassment free workplaces – in compliance with anti-discrimination laws – or complying with the Board and federal labor law.***<br><br>• In previous cases applying the same standard as the Board adopted here, racial epithets, sexually harassing language, and violent threats were all considered protected by the NLRA, meaning employer discipline of such language is unlawful.<br>• The current Board broadly defines "protected concerted activity" (*i.e.*, employee rights under the NLRA to engage collectively to address their terms and conditions of employment). Nearly all actions taken by an employee – and any offensive language used during – will be protected by the current Board. |
| **Protection for Protests on Behalf of Nonemployees**<br><br>Recent Decision: *American Federation for Children* | Employee protests or actions on behalf of nonemployees or issues unrelated to their own workplace or terms of conditions are protected by the NLRA. | ***You may be unable to discipline or prevent your employees from using work time to protest issues unrelated to your own workplace (e.g., BLM, climate change, or other social issues).***<br><br>• Social issues advocacy and protests have never been more prominent, and the Board has now given employees the greenlight to bring these issues into their workplaces on work time. |

| POTENTIAL BOARD ACTION | WHAT IT MEANS | WHY IT MATTERS |
|---|---|---|
| **Restrictions or Prohibitions on Mandatory Employer-held Meetings** | The Board's General Counsel is pushing the Board to ban "captive audience" meetings. While this traditionally refers to mandatory anti-union meetings held by employers during union election campaigns, the General Counsel would ban nearly any employer-held mandatory meeting that involves employees' terms and conditions of employment – even a one-on-one with a supervisor in passing. | ***Requiring employees to attend meetings – even those that are unrelated to unionization – may soon be unlawful.***<br><br>• The General Counsel, and to a lesser extent the Board, are driving to minimize employer voice as much as possible, and not just in the context of a union election campaign.<br>• Employers may find their hands tied when it comes to trying to communicate effectively with their employees. |
| **Restrictions on Workplace Surveillance and Automated Management** | The General Counsel is pushing the Board to prohibit employers from using workplace monitoring or management practices that she believes infringe upon employee rights. | • Many current, standard employer workplace monitoring and management practices may become unlawful.<br>• The General Counsel believes the NLRA affords employees a general right of privacy.<br>• Monitoring computer usage, tracking use of employer vehicles, and using AI to analyze collected data are some of the practices identified as potentially unlawful.<br>• Even if the above and other practices are used primarily for safety purposes, they may be considered unlawful.<br>• This is another example of the General Counsel – and potentially the Board – restricting an employer's ability to manage the workplace (whether or not a union is present). |

The above actions are only a small sample of recent and forthcoming Board activity. Whether or not you have a union, these Board actions and others will have significant practical impacts on the ability to manage and meet the needs of your workforce. The chart below illustrates the significant differences in how employers will face union representation campaigns before and after the above actions. In short, between the above and the below, an employer could go from union free to a union in as little as a few weeks.

## The Union Election Campaign

| | BEFORE | NOW |
|---|---|---|
| **Overall Timeline** | On average, 6-8 weeks. Employers had several weeks (or even months) to contest a union campaign, challenge voter eligibility, and lawfully educate their employees on the implications of unionization. | On average, 3-4 weeks. Employers have limited time (days) to contest a union campaign and lawfully educate their employees on the implications of unionization, and can no longer delay an election through voter eligibility challenges. |
| **Start of Election Campaign** | Union solicits majority support amongst employees and eventually files a petition for election (if employer chooses not to recognize their support) | Union presents employer with proof of majority support, employer must either recognize the union or file its own petition for election within 2 weeks. |
| **Employer Speech** | In addition to having more time for campaign speech, employers could generally freely express their views on the implications of unionization to their employees. | In addition to having less time for campaign speech, employers are restricted from expressing their views on the implications of unionization to their employees, including potentially being prohibited from holding mandatory meetings on these issues and others. Nearly all employer speech during these campaigns will receive close scrutiny from the Board. |

| | BEFORE | NOW |
|---|---|---|
| **Unfair Labor Practices** | Unlawful employer conduct during the election campaign generally would result in the election itself being rerun. The Board would only require the employer to recognize and bargain with the employer if the conduct was so severe as to make it virtually impossible to hold a fair election. | Unlawful employer conduct during the election campaign will result in the Board requiring the employer to immediately recognize and bargain with the union, regardless of the severity of the conduct. |
| **Union-Free to Union** | Generally only after a months-long campaign concluding in an election in which a majority of employees casts ballots for the union. | In as little as three weeks, as long as the union has showed majority support at some point (often through signed authorization cards, but does not have to be), and the employer has committed at least one unfair labor practice.<br><br>Even if the employer is completely silent in the face of the union's campaign, even if not a single supervisor says anything considered unlawful, the employer could still face a union if the Board feels that any workplace rule the employer has on the books, or any workplace monitoring practice the employer uses (even if only for safety purposes) is unlawful. |