

RELIEF MAY SOON BE ON THE WAY FOR EMPLOYERS BEFORE THE NLRB

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On August 26 the General Counsel of the National Labor Relations Board, Crystal S. Carey, issued a memorandum in which she identified a number of past decisions issued by the Biden-era NLRB for which she intends to seek reversal before the newly reconstituted Board.

<https://apps.nlr.gov/link/document.aspx/09031d4584351740>

Until recent appointments approved by the Senate, the Board had been in a state of “suspended animation” for nearly a year because it lacked a quorum. Because the Board now has a majority of members who are Republicans, it is reasonable to expect that the General Counsel will succeed in obtaining a reversal of all, or nearly all, of these Biden-era decisions, all of which were detrimental to the interests of employers.

These decisions affect employers in both the unionized and non-unionized sectors, and are discussed in detail below.

DECISIONS THAT AFFECT ALL EMPLOYERS

WORKPLACE POLICIES, EMPLOYMENT AGREEMENTS, AND EMPLOYEE CONDUCT

CONFIDENTIALITY AND NON-DISPARAGEMENT PROVISIONS IN SEVERANCE AND OTHER EMPLOYMENT AGREEMENTS.

In a 2023 decision (*McLaren Macomb*, 372 NLRB No. 58 (2023)) the Board held that broad confidentiality and non-disparagement provision in a severance agreement, which prohibited an employee from making statements critical of the employer, violated an employee's rights under Section 7 to form and support labor unions and engage in concerted activities with their co-workers. Confidentiality and non-disparagement provisions such as these are commonly included in severance, separation and employment agreements. This decision marked a departure from existing NLRB case law, and the General Counsel is seeking to reverse the decision and restore employer rights to permit such provisions.

DRESS CODES. In *Tesla, Inc.*, 371 NLRB No. 131 (2022), the Board held that restrictions on employees wearing union apparel or union insignia on their uniforms were presumptively unlawful unless the employer proves “special circumstances”. The decision places a heavy burden on employers to justify any limitation on union display, and departs from longstanding Board case law. The General Counsel is seeking reversal of *Tesla, Inc.* and is requesting that the Board reinstate *Wal-Mart Stores, Inc.*, 368 NLRB No. 146 (2019), which held that employers could enforce partial rules on the size and look of union insignia in customer-facing areas without needing to prove strict “special circumstances”.

WORK RULES: In *Stericycle*, 372 NLRB No. 113 (2023), the Board issued a draconian decision which placed employers at risk with respect to many common employers' policies concerning workplace conduct (such as courteous treatment of coworkers and members of the public, civility, and non-disparagement of the employer). In short, *Stericycle* held that: (1) a work rule is *presumptively unlawful* if

an employee could reasonably interpret it to restrict or chill Section 7 rights (the right to engage in protected concerted activity); (2) the rule is judged from the standpoint of an “economically dependent” employee who wants to engage in protected activity; (3) the burden is on the employer to show that the rule advances a legitimate and substantial business interest and that a narrowly tailored rule will not be possible.

The General Counsel is seeking reversal of *Stericycle*. If successful, the change in the law will eliminate potentially significant risks that employers might otherwise have in discharge situations and union organizing campaigns arising from many commonly implemented rules governing employee conduct.

EMPLOYEE PROTECTED CONCERTED ACTIVITY: In a pair of cases (*Miller Plastic Products, Inc.*, 372 NLRB No. 134 (2023), vacated in part, 141 F. 4th 492 (3d Cir. 2025) and *Lion Elastomers, LLC*, II 372 NLRB No. 83, (2023), vacated and remanded, 108 F.4th 252 (5th Cir. 2024)), the Board substantially expanded employer liability concerning “concerted activity” and what constitutes “protected conduct.” In *Miller Plastics*, the Board concluded that it would look at the “totality of the circumstances” to determine whether an individual employee’s conduct was, in fact, “concerted” and thus protected by Section 7 of the NLRA. This is a very ambiguous test that opens up many individual complaints and employee “gripes” to protection. In *Lion Elastomers*, the Board held, among other things, that employee abusive, disruptive or profane conduct or language may be protected if it happened during protected activity (such as at a safety meeting, on a picket line, or during a grievance meeting) and that the Board must consider the “specific setting” in which the misconduct occurred.

The General Counsel is seeking reversal of both cases, noting that they have “led to the protection of generally prohibitable employee conduct that is tenuously connected with rights protected under the Act.”

Partial Success Achieved. On September 23, 2026 the NLRB issued a new decision, *Lion Elastomers LLC*, 375 NLRB No. 41 (2026) (“*Lion Elastomers III*”) that restored the Board’s previous standard (the “*General Motors*” standard), thereby providing employers much needed relief from legal constraints or risks associated with disciplining employees for abusive conduct. Instead of a vague “setting specific” or “totality of the circumstances” test, the Board will now look to whether the employer imposed discipline because of the misconduct itself or on the basis of a motive founded on the employee’s protected activity. If the discharge or other adverse action is shown to be based on an unlawful motive, the employer may still defend by showing that it would have taken the same action regardless of any protected activity. This mirrors the so-called “*Wright Line*” test that has traditionally been applied in discrimination cases under Section 8(a)(3) of the NLRA.

NOVEL AND UNPRECEDENTED ENHANCED REMEDIES: Traditional remedies in unlawful discharge or failure to bargain situations have been limited to back pay, restoration of benefits, and reinstatement. In *Thryv Inc.*, 372 NLRB No. 22 (2022), vacated in part, 102 F.4th 727 (5th Cir. 2024), the NLRB added as remedies consequential financial damages, such as out-of-pocket medical bills, credit card debt, or moving costs directly tied to a wrongful layoff or labor violation. *Thryv* remedies have been struck down by some federal Circuit Courts, and approved by others. The General Counsel seeks to reverse *Thryv* and restore the more limited remedies that had historically been available.

UNION ORGANIZING AND ELECTION CONDUCT

Non-union employers who may be the target of union organizing campaigns may benefit from reversal of several cases identified by the General Counsel.

CAPTIVE AUDIENCE MEETINGS. When a union attempts to organize an employer, employers have traditionally been entitled to conduct “captive audience” meetings to convey to employees the employer’s views on unionization. Such meetings have frequently been cited as an effective way for employers to educate employees about unionization and its possible disadvantages. (Such meetings were subject to a longstanding NLRB rule that no captive audience meeting could be conducted within 24 hours of an election.)

In *Amazon.com Services LLC.*, 373 NLRB No. 136 (2024), the Board held that any employer captive audience meetings constituted an unfair labor practice and were grounds for setting aside an election. The General Counsel plans to seek reversal of the *Amazon* case, which would return to employers their right to conduct captive audience meetings consistent with prior law.

PREDICTIONS ON IMPACT OF UNIONIZATION: Departing from longstanding precedent, the Board held that an employee committed objectionable conduct warranting the setting aside of an election and committed an unfair labor practice when it told employees that if they wanted to “maintain a direct relationship” with management, they should oppose the union in the election. *Siren Retail Corp. d/b/a Starbucks*, 373 NLRB No. 135 (2024). Under this decision, an employer could only make such appeals if they were grounded in objective fact, and describe demonstrably probable consequences that lie outside the employer’s control – a standard that is difficult if not impossible to meet.

Appeals such as this (i.e., that employees would lose the opportunity to deal one-on-one with management) had been deemed categorically lawful employer conduct for nearly 40 years, and have been frequently used by employers in aid of their opposition to a union in an NLRB election. The General Counsel will argue to the Board to reinstate this long standing prior rule.

RECOGNITION WITHOUT AN ELECTION AND BARGAINING ORDERS: In one of its most troubling decisions (*Cemex Construction* 372 NLRB No. 130 (2023)) the Biden-era Board radically revamped the legal landscape. Prior to *Cemex*, when faced with a union demand for recognition, employers could decline the demand and force the union to file an election petition. Additionally, if an election was held and the employer committed unfair labor practices, the Board’s normal remedy was to order a rerun of the election, unless the employer’s violations were egregious. *Cemex* reversed the playing field by requiring an employer to petition for an election within 14 days, and if it failed to do so, would be deemed to have recognized the union without an election. Additionally, under *Cemex*, the commission of any unfair labor practices could result in a bargaining order, even though the union lost the election. *Cemex* has not in all cases been enforced by the federal courts. The General Counsel plans to seek its reversal.

DECISIONS THAT DIRECTLY AFFECT UNIONIZED EMPLOYERS

EMPLOYERS' DUTY TO BARGAIN PRIOR TO CHANGING TERMS AND CONDITIONS OF EMPLOYMENT: The Biden-era Board issued two decisions that required parties to bargain over all issues before an employer could implement a change in terms and conditions of employment, notwithstanding that there was longstanding precedent of prior action by the employer. (*Wendt Corporation*, 372 NLRB No. 135 (2023), and *Tecnocap, LLC*, 372 NLRB No. 136 (2023)). The General Counsel plans to seek reversal of these decisions. If successful, this reversal will restore employer flexibility in implementing changes (in, for example, health care plans) while bargaining on other subjects is still in progress.

WAIVER OF RIGHT TO BARGAIN: Since at least 2019, the Board had evaluated whether a contract permits an employer's change in terms of employment without bargaining by "applying ordinary principles of contract interpretation." The Board did not require the contract language to specifically "mention, refer to or address the [challenged] employer decision." In *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141 (2024), the Board departed from this rule and instead held that a waiver of bargaining required a "clear and unmistakable" waiver of bargaining in the contract.

The General Counsel intends to urge that the Board reverse *Endurance Environmental Solutions*, and restore the previous "contract coverage" standard, which will afford employers greater flexibility in implementing management decisions about changes in terms of employment in unionized workplaces.

DUTY TO CONTINUE DUES CHECKOFF AFTER CONTRACT EXPIRATION. In *Valley Hospital Medical Center, Inc.*, 371 NLRB No. 160, (2022), enfd., 93 F.4th 1120 (9th Cir. 2024), the Board held that an employer was obligated to continue to check off dues under a union security agreement after the contract expired. This decision departed from longstanding Board case law. The General Counsel will urge the Board to reconsider and return to the longstanding prior rule that an employer's statutory obligation to check off union dues ends when its collective-bargaining agreement containing a checkoff provision expires.

TIMETABLE FOR PROBABLE CHANGES AND EMPLOYER RESPONSES AND PLANNING

Due to the Board's current case backlog, and the delay associated with litigation, it is possible that one to two years may elapse before significant progress is made in achieving a reversal of the decisions identified by the General Counsel. It is possible that the Board will prioritize scheduling hearing to consider reversal of some of the more important decisions. In the meantime, employers should consult labor counsel to best advise them on the best course of action in light of these uncertainties in the law.