NLRB Continues Assault on Employers' Free Speech Rights: Bans Mandatory Captive-Audience Meetings

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Well, here we go again. On November 13, the National Labor Relations Board (NLRB or Board), in *Amazon.com Services LLC*, held that an employer violates the National Labor Relations Act (NLRA) by interfering with employees' Section 7 rights when it compels them, "on pain of discipline or discharge," to attend a meeting where the employer expresses its views on unionization. Such meetings, commonly known as "captive-audience meetings," have been utilized by employers as an effective tool to communicate directly with their employees during a union campaign. The *Amazon* decision only will apply prospectively and will certainly be subject to challenges by employers.

Prior Standard

In its decision, the *Amazon* Board jettisoned 76 years of precedent by overruling *Babcock & Wilcox Co.* That 1948 decision legally sanctioned mandating work-time meetings for employers to talk to their employees about unionization — provided the employer wasn't coercive and didn't make unlawful threats and promises. Thus, simply requiring employees to attend mandatory meetings was, until now, lawful. The clear and unbalanced agenda of the Biden Board, however, led the Board to the flawed "realization" that after 76 years, captive-audience meetings are unlawful.

Lawful Voluntary Meetings

To provide "clear guidance for employers," the Board established a "safe harbor" from liability for employers, during worktime, who wish to express their views about unionization in the workplace to a group of employees. Going forward, an employer will not violate the NLRA "if, reasonably in advance of the meeting, it informs

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employees" that:

- It intends to express its views on unionization at a meeting where attendance is voluntary;
- Employees will not be subject to discipline, discharge, or other adverse consequences for failing to attend, or leaving, the meeting; and
- The employer does not keep attendance records (e.g., who attended, who did not attend, who left early).

The employer must communicate these assurances (and follow through on them) to receive the "safe harbor" protection. The Board did not provide guidance on what constitutes reasonable advance notice.

In creating this "safe harbor," the Board cautioned that "an employer will be found to have compelled attendance at a meeting concerning the employer's union views" if, under all the circumstances, employees could reasonably conclude: (a) attendance is required as part of their job duties; and (b) failure to attend or leaving early could subject them to discipline, discharge, or other adverse consequences. Unfortunately, we assume the Biden Board will have little or no difficulty accepting employees' "I reasonably concluded …" arguments. Indeed, the Board emphasized that an express order from management to attend such meetings would be sufficient, but not necessary, to establish a violation of the NLRA. The Board gave one such example: a supervisor including attendance at that meeting on employee work schedules could violate the NLRA.

The Board's narrow definition of "voluntary" raises practical problems for employers who want to hold ***any*** meetings with employees about unions. Employers will find it difficult to give their workers a convenient meeting opportunity if this meeting cannot be included in employees' work schedules. Unions typically hide their organizing efforts then surprise the target employer with a sudden demand for recognition or election petition. The addition of the "reasonable notice" requirement (however defined) delays the employer's response when time is of the essence. And pro-union employees could use the "reasonable notice" of the meeting to

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discourage undecided employees from attending "voluntary" meetings.

NLRB'S Dubious Rationale

The Board listed four concerns with captive-audience meetings under the *Babcock & Wilcox* framework:

- First, they impinge on an employee's Section 7 right to choose, free of employer coercion, the degree to which they will participate in a debate about union representation.
- Second, they can readily serve as a mechanism for employers to observe and surveil employees as the exercise of their Section 7 rights is being addressed.
- Third, because attendance is compelled, "on pain of discipline or discharge," and the employer's message is, in the Board's opinion "anti-union," employees may reasonably conclude, because they have no real choice to attend the meeting, they also do not have free choice concerning union representation. The Board believes the employer's "economic power" over employees reasonably tends to inhibit them from acting freely.
- Fourth, an employer could hold these meetings repeatedly, for whatever length of time, and whenever it wants, with few legal limitations.

As aptly noted in Member Marvin Kaplan's dissent, discussed below, none of the Board majority's arguments withstand scrutiny.

Member Kaplan's Dissent

In his dissent, NLRB Member Marvin Kaplan's closing remarks succinctly expose the abject flaws in the Board's results driven decision-making:

Since its creation in 1935, the Board has repeatedly attempted to restrict the ability of employers to express their views concerning representation. Those past efforts have consistently been condemned by Congress and by the Supreme Court. And I think that my colleagues' decision today

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will fare no better. The majority's idea of good labor policy may include suppressing captive-audience speeches, but the policy established by Congress is "to encourage free debate on issues dividing labor and management." The reason for encouraging a "free debate" on labor issues, as with any other issue, is that "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly, but we [Americans] have staked upon it our all." The Board should strive to advance *that* policy. Today's decision contradicts it, and I must therefore respectfully dissent.

Member Kaplan's dissent, like his recent dissent in *Siren Retail Corp. d/b/a Starbucks*, creates a comprehensive blueprint for Amazon's likely appeal.

Next Steps

The Board's *Amazon* decision falls in line with a host of states (Alaska, California, Connecticut, Hawaii, Illinois, Maine, Minnesota, New York, Washington, and Vermont) that already have banned or limited captive-audience meetings. The constitutional issues (i.e., NLRA preemption) with those state efforts are beyond the scope of this advisory. For the time being, under the current Biden Board and NLRB General Counsel Jennifer Abruzzo's leadership, employers must ensure that any group discussions about unionization are conducted under the Board's *Amazon* parameters — referenced above. Moreover, in addition to holding "lawful" voluntary meetings, employers must be cognizant of ensuring their statements and conduct during those meetings comply with ever-changing, pro-union Board law.

There is hope on the horizon. Despite this body blow to employers' ability to accurately respond to union organizing campaigns (who remain, for the most part, unchecked on what they say or do), it is not fatal. The second Trump administration, in time, will significantly shift the Board to a more balanced agency — one that does not unapologetically cater to unions. That Board, in time, could reinstate the prior standard *if* an appellate court doesn't overturn the *Amazon* decision before the Trump Board has time to act.

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If you have any questions about this decision and the impact it may have on an employer's ability to communicate with its employees during a union campaign, please contact the authors or any member of Frost Brown Todd's Labor and Employment Practice Group.

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