After 76 Years, the NLRB Declares Captive-Audience Meetings Unlawful

Alert
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On November 13, 2024, the National Labor Relations Board (NLRB) held in *Amazon.com Services LLC*, 373 NLRB No. 136, that "captive-audience" meetings are unlawful under the National Labor Relations Act (NLRA). Specifically, the NLRB held that "an employer interferes with employees' decision whether to exercise their Section 7 rights within the meaning of Section 8(a)(1) of the Act when it compels employees to attend a captive-audience meeting on pain of discipline or discharge." In doing so, the NLRB reversed 76 years of precedent recognizing the legality of captive-audience meetings.

WHAT IS A CAPTIVE-AUDIENCE MEETING?

A so-called "captive-audience meeting" is a mandatory meeting during regular working time where an employer has the right to share its views regarding unionization with its employees. Such meetings have been highly regulated by NLRB case law for decades. Employers have been prohibited from threatening, interrogating, or making promises to employees during such meeting. Before secret-ballot elections, however, many employers have found it useful to hold these types of meetings to provide truthful information about unions, and the employer's opinions about unionization, to employees in order to ensure employees are fully informed before voting.

The Taft-Hartley Act's significant amendments to the NLRA in 1947 expressly enshrined an employer's First Amendment rights in Section 8(c) of the NLRA. Specifically, since 1947, the NLRA's language makes clear that an employer may express its views on unionization so long as its free speech "contains no threat of reprisal or force or promise of benefit." Applying the 1947 amendments to the NLRA, the NLRB held that captive-audience meetings were lawful in a 1948 case called Babcock & Wilcox Co., which was in effect for 76 years, until yesterday.

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WHAT DID THE NLRB DECIDE?

Characterizing them as "an extraordinary exercise and demonstration of employer power over employees," the NLRB held that captive-audience meetings are unlawful because they "have a reasonable tendency to interfere with and coerce employees in the exercise of their Section 7 right to freely decide whether or not to unionize," which includes whether or not to listen to their employer's views concerning that choice. While acknowledging that both the NLRA and the First Amendment protect an employer's right to express its views about unionization, the NLRB stated, emphatically, that employers do not have the authority to compel employees to listen to their views about unionization (even during paid working time). The decision holds that captive-audience meetings interfere with employees' rights under the NLRA by:

1. Interfering with employees' ability to choose how (and if) they will participate in union organizing campaigns.
2. Giving employers an unfair opportunity to surveil employees' views on unionization.
3. Conveying the message to employees that the employer controls how they can participate in a union organizing campaign.

However, the NLRB also created a—somewhat ambiguous—"safe harbor" for voluntary meetings. It reiterated that employers can still lawfully hold *voluntary* meetings, in the workplace on work time, where they express their views on unionization. They simply cannot require employees to attend. The NLRB included in its decision the following guidance (which it called "clear guidance") to employers about a safe harbor from liability for those who wish to express their views concerning unionization with employees in a workplace meeting, during working hours. In order for a voluntary meeting regarding unionization to be lawful, the employer must, reasonably in advance of the meeting, provide the following assurances to employees and then follow through on them:

1. The employer intends to express its views on unionization at a meeting at which attendance is voluntary.
2. The employees will not be subject to discipline, discharge, or other adverse consequences for failing to attend the meeting or for leaving the meeting.
3. The employer will not keep records of which employees attend, fail to attend, or leave the meeting.

Whether an employer's conduct keeps it within the safe harbor will be determined based on whether employees could reasonably conclude that attendance was required as part of their job duties or that failure to attend and remain at the meeting could subject them to discipline or discharge. The NLRB left for another day and details about what an "adverse consequence" is. For example, the NLRB did not explain whether employees who chose not to attend the meeting could be required to work during it, or if the employer would simply have to pay them to do nothing during the meeting period. Issues involving details

of applying the "safe harbor" are likely to be resolved through litigation.

This decision will apply only on a going-forward basis only. Some employers are using the First Amendment to challenge state laws prohibiting captive-audience meetings. Yesterday's NLRB decision explains the majority's position that its decision is consistent with the First Amendment; it is accompanied by dissent asserting that it, in fact, violates the First Amendment.

NEXT STEPS FOR COMPANIES

Employers facing union organizing campaigns would be well-advised to strongly consider the pros and cons of holding voluntary meeting to express their views on unionization. Those meetings can still be very useful tools in sharing the employer's views regarding unionization, but employers must make certain that they comply with all aspects of the NLRB's guidance to ensure they stay within the "safe harbor."

In addition to providing the required assurances—clearly, unmistakably, and with as much advance notice as possible—employers should only hold voluntary meetings at the workplace and during work time. Employers must refrain from ordering employees to attend any meetings where unionization will be discussed. In a similar vein, employers must refrain from including such a meeting on employees' work schedules, as the NLRB made clear that such a meeting will be considered to be compelled.

In the face of this most recent challenge and others that employers face when confronting union organizing efforts, the best defense is a strong offense. Employers who proactively identify and acknowledge workplace challenges and ensure their employees are well-informed, involved, and recognized for their efforts, stand the best chance of maintaining a direct working relationship with their employees without third-party interference from a union. Accomplishing these lofty goals is not easy, but it can be done.

Stinson advises companies on these issues, and our services range from comprehensive positive employee relations audit, to supervisor/manager training, to behind-the-scenes consultation. For more information about Stinson's union vulnerability audit services, please contact Joel Abrahamson, Anne Marie Buethe, Patrick Busch, Dominic Cecere, Nicole Faulkner, Grant Mulkey, Ben Parker, Rick Pins, Joe Santucci, Austin Tapuro, Matt Tews, Luke VanFleteren, or the Stinson LLP contact with whom you regularly work.

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