COALITION FOR A
DEMOCRATIC WORKPLACE

Labor Board Abandons Secret Ballots, Informed Debate in Effort to Push Unions on Workers

The NLRB has abandoned its role as a neutral enforcement agency, solely focused on manipulating the law to push unionization without regard to the rights of workers, entrepreneurs, and small businesses. The Board's actions threaten to exacerbate economic troubles by increasing inflation, slowing supply chains, and harming economic growth.

Congress enacted the National Labor Relations Act (NLRA) to minimize "strikes and other forms of industrial unrest. . . which impair the free flow of such commerce." The Act tasked the National Labor Relations Board (NLRB) with protecting workers' "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, [or] refrain from any or all of such activities." In short, the Board's job is to protect the right to choose. The current NLRB and the agency's General Counsel, Jennifer Abruzzo, however, are engaged in an effort to rewrite the law to push unionization. The General Counsel is seeking to limit workers' access to the information they need to make an informed choice about union representation, limit workers' right to cast secret ballots in representation elections, gerrymander bargaining units, restrict opportunities for independent contractors, and limit the ability of employers to ensure safe, discrimination-free workplaces.

Informed Decisions and Free Speech Rights

Since 1941, the Supreme Court has repeatedly held that an employer may express "its view on labor policies or problems." As recently as 2008, the Court made clear that Congress intended "to encourage free debate on issues dividing labor and management," noting that the NLRA's protections of employers' right to express their views "merely implements the First Amendment."

This free debate equips employees with the knowledge needed to make an informed choice. Without hearing from employers about possible disadvantages of unionization, employees only get the union's sales pitch prior to deciding whether or not to unionize. While unions have made clear they want the Board to silence employers, the NLRB is responsible for implementing the NLRA, including protecting employer speech rights and employees' right to reject union representation. Thus, the Board should not—for both legal and policy reasons—use its power to grant unions a monopoly on communication with workers.

Nonetheless, on April 7, General Counsel Abruzzo issued a memo to NLRB regional offices announcing her intention to ask the Board to find any mandatory meetings held by employers in which the employer expresses their opinion about unionization to be a violation of the NLRA, and the Democratic majority on the Board will likely grant her request. Abruzzo also filed a brief in the NLRB's *Cemex* case saying employers should be prohibited from discussing with employees how their relationship will change if a union enters the workplace. Additionally, the NLRB and Abruzzo are expected to reinstate an Obama-era policy (known as the "persuader" regulation) that would infringe on employers' attorney-client privilege, essentially chilling employers in their effort to understand the complexities of federal labor law and lawfully communicate with employees about potential unionization.

All together, these policies would result in employers being unable to discuss the pros and cons of unionization generally or a particular union with their workers, and it will leave workers without all the facts needed to make an informed decision about whether union representation is right for them and their workplace.

Secret Ballot Elections

The ability to vote via secret ballots with no coercion or outside pressure is a vital safeguard in democratic elections. General Counsel Abruzzo, however, wants to eliminate secret ballots in union representation elections. Under current law, to petition for a representation election, a union must produce signed authorization cards from at least 30% of the workers in the proposed bargaining unit. If the union produces cards from over 50% of the proposed unit, the employer may recognize the union without an election. Employers rarely choose to do so, however, because card check is notoriously flawed, leaving workers vulnerable to coercion and harassment by union organizers and their supporters by forcing them to express their support or opposition to union representation in front of others. In 2015, the NLRB's then-General Counsel announced it would accept "electronic cards," exacerbating existing problems with card check and opening the process to hacking, identify theft, and online fraud.

Abruzzo wants to force employers to agree to card check in most circumstances, essentially depriving most workers of secret ballot elections. She has repeatedly called for reinstatement of the Board's *Joy Silk* doctrine, which was overturned nearly 60 years ago. Under *Joy Silk*, the Board could force an employer to recognize a union if the union claims to have majority support via card check. Employers could only demand a secret ballot election if they can prove "good faith doubt" as to the validity of the cards.

Meanwhile, Democrats in the House of Representatives passed a resolution allowing Capitol Hill staff to unionize, but mandated that they can only do so via ***secret ballot elections***.

Gerrymandered Bargaining Units

The NLRB is attempting to radically change how the Board determines the appropriate composition of bargaining units, or the group of employees a union would represent. In December 2021, the Board invited interested stakeholders to submit amicus briefs in *American Steel Construction* on whether the Board should adopt an Obama-era standard that made it difficult for employers to prove the petitioned-for unit was inappropriate. Allowing unions to gerrymander the workforce into these "micro-unions" effectively allows union organizers to disenfranchise employees that do not support unionization, infringing on their right to vote on unionization.

Independent Work and Flexible Work Arrangements

The ability to work independently is a critical lifeline for many workers, including many caregivers. Others choose independent work to make extra money while avoiding the regular hours associated with being a traditional employee. Independent workers routinely say they want to remain independent contractors and keep the flexibility and autonomy that comes with that status. Independent contractors, however, cannot unionize, so the NLRB is working to restrict independent work and force workers into more rigid traditional employment arrangements.

In December, the Board invited amicus briefs in *The Atlanta Opera* to reinstate an Obama-era standard that made it much harder for workers to qualify as an independent contractor. The Obama-era standard severely undervalued the significance of a worker's entrepreneurial opportunity for economic gain when considering classification. California attempted to use the ABC test, but it's been so difficult to implement that the legislature was forced to exempt over 100 occupations and the construction industry. Abruzzo also highlighted limiting independent work in her memo outlining her priorities.

Civility in the Workplace

The Board and General Counsel are pursuing policies that make it impossible for employers to maintain safe, respectful workplaces for their workers. The Board recently asked for stakeholders to submit amicus briefs in *Stericycle* to determine if they should alter the standard used to determine if an employer's facially neutral handbook or workplace rules violate workers' collective bargaining rights. These rules could be as simple as expecting workers to engage with each other and customers in a professional manner, prohibiting the use of expletives, or prohibiting videotaping in the facility. Additionally, Abruzzo cited the issue in her memo outlining her priorities, specifically questioning current NLRB policy that considers the legitimate business needs of a workplace rule.

General Counsel Abruzzo has even filed a petition to force Amazon to reinstate a former employee who was caught on camera shouting degrading, sexually charged obscenities at a female coworker outside their workplace. The incident was livestreamed on social media, further disseminating the abuse. Abruzzo's actions are creating direct conflicts with federal antidiscrimination laws. Employers are being forced to choose between complying with her radical interpretations of federal labor law and antidiscrimination laws that require employers to provide workplaces free of harassment and intimidation, especially as they relate to race, gender, and other protected classes.

What the Board Should Be Doing to Protect Workers' and Employers' Rights

The NLRB and General Counsel should not be working to tip the scales in favor of unions but instead should strive to protect workers' rights to join *and refrain from joining* a union. The NLRB should implement clear policies that encourage labor stability without infringing on workers' or employers' rights.

Additionally, the Board should invest its resources into ensuring as many eligible workers as possible participate in their union elections. Currently, unions only need a majority of the votes cast in an election to win, and they often have very little participation. In the recent Amazon election in Staten Island, for example, only 58% of eligible workers voted in the election, and only 32% of the total unit voted in favor of unionization. That means 68% of the workers in the bargaining unit did not actively support the union. The NLRB should strive to implement policies that do not incentivize limiting worker participation but instead ensure the majority of workers in a workplace truly want to be represented by the union.