Perkins Coie

2024 | Year in Review

Labor Law Today

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Introduction

In 2024, the labor landscape was marked by significant rulings from the National Labor Relations Board (NLRB or "Board") regarding union contract negotiations and strikes and the impact of automation and artificial intelligence (AI) on the workforce. Employers successfully challenged the constitutionality of the structure of the NLRB, and the NLRB banned captive audience meetings, among the more notable developments. Unions demonstrated a strong willingness to engage in prolonged strikes to secure better wages and working conditions, with notable examples including the International Longshoremen's Association (ILA) and the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA). The year also saw substantial wage increases for workers across various industries, driven by economic conditions and rising consumer prices. Additionally, the use of AI in the workplace emerged as a critical issue, prompting regulatory responses and new guidelines aimed at protecting workers' rights and ensuring ethical AI practices.

This report provides a comprehensive review of these key labor trends and disruptions of 2024, highlighting the evolving dynamics between employers, employees, politics, and technological advancements.

We hope this year's report will help you stay informed about this fast-paced and changing environment, which affects almost all employers.

General Updates in Labor Law

Constitutional Challenges to the Board's Structure

The NLRB faced constitutional challenges to its structure last year. One case advancing such challenges was filed by aerospace manufacturer and space transportation company Space Exploration Technologies Corporation (SpaceX). The case is currently pending before the U.S. Court of Appeals for the Fifth Circuit after the U.S. District Court for the Western District of Texas granted a preliminary injunction against the Board in SpaceX's favor. SpaceX's complaint claims the NLRB's structure violates the U.S. Constitution and the company's arguments focus on the removal of protections enjoyed by Board members and administrative law judges (ALJs).

Structure of the NLRB

The National Labor Relations Act (NLRA) divides responsibility over its administration and enforcement between the Board and the general counsel of the Board (GC). 29 U.S.C. § 153. Under the NLRA, the President appoints Board members to five-year staggered terms, following confirmation by the U.S. Senate. Once confirmed, the President may remove Board members only "for neglect of duty or malfeasance in office, but for no other cause." *Id*. The GC, also appointed by the President after consent from the Senate, has "final authority" to act on behalf of the Board in respect of the investigation and prosecution of unfair labor practice charges. *Id.* § 153(d). The GC utilizes field attorneys and regional directors at the investigation stage. 29 C.F.R. § 101.4. If a regional director believes a charge has merit, they will issue a complaint to be adjudicated before an ALJ. 29 C.F.R. § 101.10(a), 101.8. An ALJ's decision is appealable to the Board. *Id*. § 101.11. In this manner, the GC, assisted by the regional director, serves a prosecutorial function and the ALJs and the Board an adjudicatory one.

ALJs are appointed by the Board. 29 U.S.C. §§ 153–54. An ALJ may only be removed if (1) Board members bring an action to remove the ALJ and (2) the federal Merit Systems Protection Board (MSPB) determines that good cause exists for the removal of the ALJ. 5 U.S.C. § 7521(a). MSPB members who adjudicate the removal of an ALJ, in turn, may be removed by the President for neglect of duty or malfeasance in office, but for no other cause. 5 U.S.C. § 1202(d).

The Challenge

In *Space Exploration Technologies Corp. v. NLRB*, Civil No. W-24-CV-00203-ADA (W.D. Tex. July 23, 2024), the Western District of Texas court granted SpaceX's request for a preliminary injunction seeking to halt the NLRB's administrative proceeding against it for an alleged unfair labor practice. The unfair labor practice proceeding was based on SpaceX's nationwide use of certain separation and arbitration agreements.

The court found that SpaceX demonstrated a likelihood of succeeding on the merits that ALJs are unconstitutionally insulated from removal. The court relied on a recent case out of the Fifth Circuit, *Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446, 465–66 (5th Cir. 2022). In *Jarkesy,* the Fifth Circuit held that statutory removal restrictions for ALJs in a different agency, the U.S. Securities and Exchange Commission (SEC), were unconstitutional. 34 F.4th 446, 465–66. Both SEC and NLRB ALJs are to be removed only when the MSPB finds good cause, 5 U.S.C. § 7521(a), and MSPB members may only be removed by the President for "inefficiency, neglect of duty, or

malfeasance in office." 5 U.S.C. § 1202(d). With these similarities and the *Jarkesy* precedent in mind, the court found that SpaceX was likely to succeed on the merits of its argument that NLRB ALJs were indistinguishable from those of the SEC and "unconstitutionally protected from removal."

The court also found that SpaceX showed a likelihood of succeeding on its claim that, in addition to the ALJs, the Board members of the NLRB are unconstitutionally insulated from removal. The general rule is that the President may remove executive branch officers, like NLRB members, at-will. *See Myers v. United States*, 272 U.S. 52, 126 (1926). The SpaceX court noted that the Supreme Court of the United States in *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 218 (2020) has recognized a narrow exception to at-will removal "for multimember expert agencies that do not wield substantial executive power." However, the court determined that, unlike in *Seila*, the NLRB members clearly wield substantial executive power through their administrative, policymaking, and prosecutorial authority." This substantial executive power would likely remove them from the exception acknowledged in *Seila*.

The court declined to address the NLRB's argument that, even if the removal restrictions were unconstitutional, severance of the removal restrictions was the appropriate remedy. The court found determining the proper remedy should be resolved for a final determination on the merits of a permanent injunction and is not relevant to a preliminary injunction decision. The NLRB filed an appeal to the Fifth Circuit on August 1, 2024.

The Impact

The decision to grant the preliminary injunction prevents the NLRB from taking further action against SpaceX in the underlying administrative proceeding. Although this ruling is narrow, it has the potential for broader implications. Other employers in the Fifth Circuit could use the same process to halt NLRB proceedings, delaying the resolution of unfair labor practices. Moreover, if SpaceX succeeds, there are three potential outcomes in the likely event the case reaches the Supreme Court of the United States. First, the Court could determine that the removal protections for NLRB ALJs and Board members are not unconstitutional and the NLRB can continue operating as it has been. Second, the Court could find the removal protections unconstitutional but that severing those sections from the statute and allowing the President to remove NLRB ALJs and Board members at-will is the remedy. This outcome would leave the NLRB intact but give the President greater influence and control over ALJs, Board members, and Board policy. Lastly, the Court could determine that the removal protections are unconstitutional but severance is not possible without improperly overriding congressional intent. With this outcome, the NLRB would essentially be unable to enforce the NLRA, leaving employee, employer, and union rights unprotected unless and until Congress or individual state legislatures act.

Other companies, including Energy Transfer and Aunt Bertha, have advanced similar constitutional challenges. Given the evolving nature of these legal challenges and the potential for significant changes in how the NLRA is enforced, employers should seek experienced counsel when dealing with the NLRB.

NLRB Bans Captive-Audience Meetings

On November 13, 2024, in *Amazon.com Services LLC*, 373 NLRB No. 136 (2024), the NLRB overturned more than 75 years of precedent when it determined that an

employer violates the NLRA when it requires employees to attend meetings where the employer expresses its views on unionization. These types of meetings, termed captive-audience meetings, had been lawful since the 1940s under *Babcock & Wilcox Co.*, 77 NLRB 577 (1948).

The Board reasoned that captive-audience meetings (1) interfere with employees' Section 7 rights to freely decide whether to participate in debates about unionization, (2) provide a setting for employers to surveil employees as they discuss unionization in a manner that may interfere with their Section 7 rights, and (3) are coercive when attendance is mandated under the threat of adverse consequences. The Board also determined that neither Section 8(c) nor the First Amendment prevented the Board from finding captive-audience meetings unlawful.

Section 8(c) permits employer expression that contains no "threat of reprisal." The Board reasoned the plain meaning of Section 8(c) is "that employers may non-coercively express their views on unionization, but they may not coerce employees to listen." According to the Board, a captive-audience meeting necessarily contains a threat of reprisal, i.e., that the employee will suffer an adverse consequence if they fail to attend. The Board found that compelling employees to listen in a mandatory setting transforms otherwise permissible speech into an inherently coercive act. Consequently, Section 8(c), which does not protect speech that contains threats of reprisal, does not apply to captive-audience meetings.

Regarding the First Amendment, the Board determined that a ban on captive-audience meetings does not infringe on an employer's right to free speech. First, the First Amendment does not entitle employers to hold captive-audience meetings because the First Amendment does not give anyone the right to push their ideas on an unwilling recipient.

Second, the employer's speech is made in the context of labor relations and "an employer's rights cannot outweigh the equal rights of the employees to associate freely."

Voluntary Meetings

The Board specifically found that *voluntary* meetings remain lawful and provided guidance to determine whether a meeting was in fact voluntary. An employer will be found to have mandated attendance if (1) under all the circumstances, employees could reasonably conclude attendance at the meeting is required as part of their job or (2) employees could reasonably conclude their failure to attend or remain at the meeting could subject them to an adverse consequence.

The Board also set forth a "safe harbor" for employers who want to express views on unionization during work hours. The Board will not find a violation if, reasonably in advance of the meeting, the employer advised employees that:

1. The employer intends to express its views on unionization at a meeting at which attendance is voluntary.

2. 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.

While providing these assurances will protect an employer from a captive-audience violation, the Board stated that failure to give these assurances will not automatically result in a violation.

Content of Meetings

In addition to confirming that meetings concerning unions are voluntary, employers must remain cautious about statements they

make about union representation at such meetings (and otherwise). For example, until recently, NLRB decisions supported that it was permissible for employers to say to employees that if they voted yes for a union, that a third party (the union) would be entering into the employee-management relationship, speaking to management on behalf of employees, and impairing employees' direct relationship with management. However, a recent NLRB decision, *Siren Retail Corp.*, 373 N.L.R.B. No. 135 (2024), has called into question what employers can say about the impact on the direct employee-management relationship if employees become union-represented. Employers are advised to consult with experienced labor counsel about any statements they plan to make to employees about the impact of a vote in favor of union representation.

What's Next

The Board declined to apply its *Amazon.com Services* decision retroactively, so employers who held captive-audience meetings prior to November 13, 2024, will not be liable for an unfair labor practice. The Board did not determine the lawfulness of other meetings in which unions are discussed but are not the intended topic.

This ruling is likely to face court challenges. Additionally, because the Republicans will hold the White House in 2025, a newly reconstituted Board with a Republican majority is likely to reverse this decision and return to the old standard in *Babcock*. However, any change would be at least a year or so in the future. Therefore, employers who face union-organizing campaigns should ensure that they understand the new "captive audience" standard. This is particularly important considering *Cemex*, which lowers the bar for issuance of a bargaining order. Employers that want to avoid unfair labor practice charges and the possibility of a bargaining order for discussing unions should provide safe harbor assurances when holding meetings where unions are discussed. Employers should also provide training to supervisors and managers to make sure they understand the rules.

Nearly a dozen states have already banned captive-audience meetings, including Connecticut, Hawaii, Illinois, Maine, Minnesota, New York, Oregon, Washington, Vermont, and California. These state bans would not be directly affected by a future Board reversal of *Amazon* under the new administration. However, these state-level captive-audience bans are currently subject to pending lawsuits asserting they are preempted by the NLRA and that regulating captive-audience meetings is the sole purview of the NLRB, not state legislatures. In light of this fluid environment, employers are encouraged to consult with experienced labor counsel before holding a meeting with employees to discuss union-related matters.

Supreme Court Limits Deference to Agencies

A recent landmark decision by the Supreme Court has called into question agency authority, including the NLRB, more broadly. On June 28, 2024, in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), the Supreme Court overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and the four-decades-old *Chevron* doctrine.

The Decision

Loper Bright involved a regulation adopted by the National Marine Fisheries Services (NMFS) that required commercial fishermen to contribute to the cost of having a federal "observer" on board to monitor compliance with the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA). While the MSFCMA included provisions that

pertained to the use of observers, it did not expressly provide that fishermen would be required to pay for the observers, which cost fishermen approximately $700.

The NMFS claimed it was entitled to *Chevron* deference, under which courts are required to defer to a federal agency's "reasonable" interpretation of ambiguous statutes (i.e., legal questions) even if it is not the best or most reasonable interpretation. The Supreme Court disagreed.

In rejecting the NMFS's argument, the Supreme Court overruled *Chevron* and eliminated *Chevron* deference. While the Supreme Court clarified its decision does not overrule prior agency rules and orders based on the *Chevron* doctrine, moving forward courts are instructed to exercise independent judgment over agency statutory interpretation and use traditional tools of statutory construction to find the best meaning of the statute. Put differently, it is no longer sufficient for an agency to simply present a reasonable or permissible construction of an ambiguous statute for the agency's interpretation to prevail. Instead, deference to the agency's interpretation will be based only on the thoroughness of the agency's consideration.

Impact on the NLRB

Although most federal agencies adopt regulations pursuant to the Administrative Procedure Act (APA) and the NLRB has started to do so more frequently in the last few years, for most of its history the NLRB has used individual adjudications to establish the Board's legislative policies. To do so, the Board, composed of five members appointed to staggered terms by the President, will hear cases filed by the GC. The Board will then issue orders that explain its application of the NLRA to the particular facts of the case before it. Because the Board does not follow the same *stare decisis* principles as courts, the shifting composition of the Board from administration to administration has led to the Board flipping on a number of standards and statutory interpretations whenever a new Board majority disagrees with a prior precedent.

The NLRB's power to do so has largely been predicated on the large degree of deference granted by courts. However, although *Loper Bright* may mark a shift in treatment toward agencies generally, it should be noted that deference to agencies, including the NLRB, is not dead. For example, Section 10(e)–(f) of the NLRA expressly grants the Board's factual

findings a high degree of deference if they are based on substantial evidence. In addition, the U.S. Court of Appeals for the District of Columbia Circuit recently issued a decision on the heels of *Loper Bright in Hotel De La Concepcion v. NLRB*, No. 22-01272 (July 5, 2024), where the circuit court signaled that special deference accorded to Board decisions will continue to be recognized by the court. Notably, however, this decision was limited to the Board's adjudication process—specifically its role in unfair labor practice proceedings.

While it remains to be seen how *Loper Bright* will affect the agency's traditional rulemaking authority pursuant to the APA, in addition to deference under Section 10(e)–(f), *Loper Bright* crucially did not eliminate all kinds of deference. One such deference, established by the Supreme Court 40 years prior to *Chevron in Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), is based on the agency's subject-matter knowledge and its history of dealing with the particular subject matter. Skidmore deference, while less deferential than *Chevron*, still entitles agency interpretations of statutes to respectful consideration.

Thus, with these other avenues of deference, the long-term impact of *Loper Bright* on the NLRB remains to be seen. While the NLRB may continue to receive a fair amount of deference under pre-*Chevron* caselaw, the *Loper Bright* decision may encourage more employer challenges to Board regulations.

Fair Choice – Employee Voice: The Board Shifts Back to Pre-2020 Blocking Charge Policy

In a significant shift, the NLRB has reinstated the pre-April 2020 blocking charge policy that allowed regional directors to decline to process an election at the request of a party filing an unfair labor practice charge that alleges conduct interfered with the laboratory conditions of an election. This shift effectively reverses the changes introduced by the April 2020 rule. This move, captured in the Fair Choice–Employee Voice Final Rule ("Final Rule"), restores a regional director's authority to delay an election if claims of unfair labor practice conduct are serious enough to interfere with employee free choice during an election.

As the NLRB explains, "a critical part of protecting employee free choice is ensuring that employees are able to vote in an atmosphere free of coercion, so that the results of the election accurately reflect the employees' true desires concerning representation." *General Shoe Corp.*, 77 NLRB at 126–27.

The April 2020 Rule: A Brief Overview

The pre-April 2020 rule allowed regional directors to delay an election when an unfair labor practice charge was pending. The April 2020 rule, which went into effect on July 31, 2020, altered this long-standing blocking charge policy. Under the April 2020 rule, regional directors were generally required to conduct an election even when an unfair labor practice charge and blocking request had been filed. The April 2020 rule also generally required regional directors to immediately open and count the ballots, except in specific cases where ballots could be impounded for a maximum of 60 days (unless a complaint issues within 60 days of the election).

The New 2024 Final Rule: Fair Choice–Employee Voice

Effective September 30, 2024, the new Final Rule restores the pre-April 2020 blocking charge policy and includes additional clarifying regulatory language. The Final Rule reinstates the ability of regional directors to delay election petitions if pending charges could interfere with employee free choice (Type I charges)

or are inherently inconsistent with the petition itself (Type II charges), aligning with practices before April 2020. The Final Rule clarifies the handling of charges, with specific provisions for holding petitions in abeyance or dismissing the petition based on the merit of the charges.

Key Changes and Implications

- **Written offer of proof requirement.** The Final Rule reintroduces the requirement that, when a party seeks to block the processing of an election petition, that party must simultaneously file a written offer of proof listing the names of witnesses who will testify in support of the charge, a summary of each witness's anticipated testimony, and promptly make its witnesses available.
- **Provide notice of abeyance.** The Final Rule provides that the regional director "shall" hold the petition in abeyance, absent special circumstances, and notify the parties if the offer of proof describes evidence that, if proven, would interfere with employee free choice in an election.
- **Provide notice of dismissal.** The Final Rule allows the regional director to dismiss the petition subject to reinstatement, with notice to the parties, when the regional director has determined that certain types of Type II charges have merit. Type II charges involve allegations of conduct that not only interferes with employee free choice but also is inherently inconsistent with the election petition itself.
- **Options to resume petition processing.** The Final Rule allows the regional director to resume processing the petition after holding a petition in abeyance if the regional director determines that special circumstances have arisen or that employee free choice is possible notwithstanding the pending unfair labor practice charges. The Final Rule also provides that, if appropriate, the regional director "shall" resume processing a petition held in abeyance upon final disposition of a charge that the regional director initially determined had merit.

The Final Rule will be applied only to cases filed after the September 30, 2024, effective date.

Former General Counsel Abruzzo Declares "Stay or Pay" Provisions Generally Unlawful Under the NLRA

Stay-or-Pay Agreements Generally

Memorandum GC 25-01 issued October 7, 2024, outlines former General Counsel Jennifer A. Abruzzo's stance that most "stay-or-pay" provisions violate the NLRA. Stay-or-pay contract provisions obligate employees to repay employers under certain conditions. Common repayment provisions include tuition repayment contracts, quit fees, damages clauses, and sign-on bonuses. The GC argues these provisions, whether voluntary or involuntary, are presumptively unlawful because they often deter employees from exercising their rights and create financial barriers to leaving jobs. However, the GC believes an "employer may rebut that presumption by proving that the stay-or-pay provision advances a legitimate business interest and is narrowly tailored to minimize any infringement on Section 7 rights."

The GC believes these provisions often undermine employees' rights under Section 7 of the NLRA by restricting their mobility and creating fear of retaliation for engaging in protected activities. The GC has indicated she would prosecute employers with unlawful stay-or-pay provisions if the provisions are not cured by December 6, 2024.

Proposed Framework for Assessing the Legality of Stay-or-Pay Agreements

The GC proposes the following criteria to evaluate whether a stay-or-pay provision "advances a legitimate business interest" and "is narrowly tailored":

- **Voluntary agreement.** The agreement must be voluntarily entered into in exchange for a benefit. Employees must have the freedom to decline such agreements without financial penalties or negative job consequences. The provision should apply only to optional benefits like optional training and education chosen by the employee, not mandatory training required by the employer, as mandatory arrangements inherently lack voluntariness and primarily benefit the employer.

  The GC also believes that cash payments, such as sign-on bonuses or relocation stipends, are only voluntary if employees are offered a choice between an up-front payment subject to a stay-or-pay provision or deferring the payment until after the required stay period. Otherwise, the arrangement is not voluntary.

- **Reasonable and specified repayments.** The repayment amount must be reasonable, meaning it should not be greater than the benefit's cost to the employer and the repayment amount must be specified up front. Employees must know the exact repayment obligation before accepting the benefit, ensuring "informed consent."

- **Reasonable stay periods.** The "stay" period must be reasonable. Reasonable stay periods are fact-specific and factors such as the cost of the benefit, its value to the employee, whether the repayment amount decreases over the course of the stay period, and the employee's income should be considered. Stay periods should be proportional, meaning higher-cost benefits may justify longer stay periods, while lower-cost benefits should require shorter commitments.

- **No repayment for termination without cause.** No repayment should be required if an employee is terminated without cause. The stay-or-pay provision must clearly state that **"the debt will not come due if the employee is terminated without cause."**

Proposed Compliance Deadline and Remedies for Violation

The GC advises employers with noncompliant stay-or-pay provisions to rescind or replace the provisions within 60 days from the date of the memo, meaning employers would need to make any necessary changes by December 6, 2024. Remedies for noncompliant stay-or-pay provisions may include nullifying employee debt, retracting collection actions, and compensating employees for financial harm caused by enforcement.

Prosecutorial Discretion

The GC warns that although some preexisting arrangements may be exempt from prosecution for reasons outlined in the memo, she plans to prosecute unlawful stay-or-pay agreements entered into after the 60 days.

Employer Next Steps

Employers are urged to ensure compliance by reviewing the current stay-or-pay agreements and addressing deficiencies like unreasonable repayment terms, disproportional stay periods, and nonvoluntary agreements as soon as possible.

Employers are also advised to consult with legal counsel to revise stay-or-pay agreements and before enforcing existing stay-or-pay agreements.

NLRB Protects Political Speech in the Workplace

On February 21, 2024, the NLRB issued its opinion in *Home Depot USA, Inc.*, 373 NLRB No. 25 (2024), holding that an employee, Antonio Morales Jr., engaged in protected concerted activity under Section 7 of the NLRA when they refused to remove a Black Lives Matter insignia from their company apron.[1]

When Morales began working at a Home Depot store in New Brighton, Minnesota, in August 2020, they witnessed and were subjected to racially discriminatory behavior by another employee. Morales and other employees of the store frequently discussed the racist conduct among themselves and repeatedly reported the conduct to management. During this time, Morales and other employees displayed the initials "BLM" on their company aprons in support of the Black Lives Matter social injustice movement.

During a meeting with Morales, the store's manager said that the BLM initials on Morales' apron were contrary to the company's dress code and apron policy, which bans displays of "causes or political messages unrelated to workplace matters." Morales was subsequently placed on leave, and their return to employment was conditioned on removal of the insignia from their company apron. Ultimately, Morales resigned, citing their experience of racial harassment and discrimination.

Section 7 of the NLRA protects employees when they are engaged in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." An individual employee's action is "concerted" under Section 7 if the action is a "logical outgrowth" of such employee's prior or ongoing concerted activity. Employee protests of racially discriminatory working conditions and an employer's failure to respond to those conditions qualify as mutual aid or protection.

The Board found that Morales engaged in concerted activity for the purpose of mutual aid or protection by displaying the

[1] Morales uses they/them pronouns.

BLM initials on their company apron. The display was a logical outgrowth of concerns they and other coworkers had raised about racially discriminatory working conditions. The Board further found that Home Depot failed to demonstrate special circumstances that justified the prohibition of Black Lives Matter–related markings. The Board held that Home Depot violated the NLRA by directing Morales to remove the BLM marking from their company apron.

Home Depot signals the NLRB's willingness to extend protection to political or social activity in the workplace that is linked to a workplace complaint. However, it is important to note that the Board declined the opportunity to adopt a broader objective proposed by the NLRB GC that protesting civil rights issues on the job is an "inherently concerted" activity that is protected by Section 7 of the NLRA.

Applying the New *Cemex* Framework, Court Grants Injunctive Relief Disregarding Union's Election Loss and Ordering Employer to Recognize and Bargain With Union

On May 14, 2024, in *NLRB v. I.N.S.A., Inc.*, the U.S. District Court for the District of Massachusetts applied the NLRB's new *Cemex Construction Materials Pacific, LLC* (*Cemex*) standard applicable to the representation election process. In so doing, the district court granted Section 10(j) interim injunctive relief ordering an employer to recognize and bargain with a union despite the fact that the union lost its election.

By way of background, in *Cemex*, the NLRB overturned decades-long precedent and adopted a new standard regarding the representation election process. Under the NLRB's new *Cemex* standard, an employer "confronted with a demand for recognition may, instead of agreeing to recognize the union, and without committing an 8(a)(5) violation, promptly file a petition pursuant to Section 9(c)(1)(B) to test the union's majority support and/or challenge the appropriateness of the unit or may await the processing of a petition previously filed by the union."

Importantly, the NLRB further held in *Cemex* that "if the employer commits an unfair labor practice that requires setting aside the election, the petition (whether filed by the employer or the union) will be dismissed, and the employer will be subject to a remedial bargaining order." In other words, under *Cemex*, if an employer is found to have engaged in unfair labor practices during an organizing campaign, the employer can be forced to recognize and bargain with the union despite the union's election loss.

In *NLRB v. I.N.S.A., Inc.*, the district court became the first to analyze a petition for interim injunctive relief under Section 10(j) of the NLRA under the new *Cemex* standard. I.N.S.A. is a retail cannabis company that employs 28 employees at its Salem, Massachusetts, location. In December 2021, the United Food and Commercial Workers International Union (Union) began an organizing campaign at I.N.S.A.'s Salem location.

On January 14, 2022, after a majority of employees signed Union authorization cards, a group of employees presented I.N.S.A. with a Demand for Recognition letter. I.N.S.A. did not recognize the Union, and therefore the Union filed a petition for an election with the NLRB in January 2022. However, the Union lost the election, which occurred in May 2022.

The Union then filed numerous charges alleging that I.N.S.A. engaged in unfair labor practices that tainted the organizing campaign. The ALJ concluded that I.N.S.A. "committed certain serious unfair labor practices" that

required several remedial actions, including a bargaining order. For example, the ALJ found that I.N.S.A. (1) prohibited employees from talking about the Union during working time while permitting employees to talk about other subjects, (2) issued final warnings to employees and discharged two employees because of their Union activity, and (3) applied workplace rules more strictly against employees involved in unionizing efforts.

I.N.S.A. appealed the decision to the NLRB, and the NLRB regional director filed a petition for interim injunctive relief in the district court, pending the appeal, pursuant to Section 10(j) of the NLRA. Specifically, among other items, the NLRB regional director sought an order that the employer immediately recognize and bargain with the Union.

The district court held that reasonable cause existed to believe that I.N.S.A. committed unfair labor practices and decided that the relief requested by the NLRB regional director was "just and proper." Accordingly, in addition to other interim injunctive relief, the court ordered that, pending the final disposition of the appeal before the NLRB, I.N.S.A. must "[i]mmediately recognize and upon request bargain collectively and in good faith with the Union" despite the fact that the Union lost the election.

NLRB v. I.N.S.A., Inc. demonstrates the groundbreaking impact of the new *Cemex* framework governing the representation election process. It also underscores the need for quality supervisor training on lawful responses to organizing activity to ensure that employers do not inadvertently commit unfair labor practices that may now result in the NLRB imposing a bargaining order, even if the union loses an election.

NLRB Orders Employer to Recognize and Bargain With Union Without Employees Voting in Favor of Union Representation

On April 8, 2024, an ALJ issued a decision in *Brown-Forman Corporation d/b/a Woodford Reserve Distillery*, 09-CA-307806, applying the NLRB's new framework announced in *Cemex Construction Materials Pacific*, LLC, 372 NLRB No. 130 (2023). The ALJ held that Woodford Reserve Distillery must recognize and bargain with a union after determining the company violated the NLRA by announcing a $4 per hour wage increase and providing employees with bourbon bottles valued at $30 ahead of the union election.

In August 2022, the union notified Woodford Reserve Distillery that its employees were organizing. By October, the union had approximately 50%-60% support among employees. That same month, the union sent the company a letter stating it had obtained majority support and requesting recognition as the employees' bargaining representative. After the union sent the letter, the company announced an across-the-board wage increase and changes to existing policies affecting who was eligible for annual merit increases and when employees could use their vacation.

The wage increase began appearing on paychecks about one week before the election. In addition to the wage increase, employees received a bourbon bottle valued at $30 for exceeding an unannounced production goal. Ultimately, the union lost the election.

Cemex established a new standard for determining whether a bargaining order is appropriate without a representation election. Under *Cemex*, an employer has two options when a union requests recognition because

a majority of employees in an appropriate bargaining unit have designated the union as their representative: either recognize and bargain with the union or file a petition for an election. *Cemex* further provides that "if the employer commits an unfair labor practice that requires setting aside the election, the petition (whether filed by the employer or the union) will be dismissed, and the employer will be subject to a remedial bargaining order."

Here, the ALJ set aside the election results, noting the company "committed serious violations" of the NLRA when it provided a wage increase, policy changes, and bourbon before the election. The ALJ found that the Board's traditional remedies would not be sufficient and required Woodford Reserve Distillery to bargain with the union despite the union losing the election by a vote of 45 to 14.

Woodford Reserve Distillery appealed the ALJ's decision to the Board on May 13, 2024, and the case is still open.

Looking Ahead: Impact of the 2024 Presidential Election on the NLRB

The NLRB is a highly politicized entity. Both its members and the GC are appointed by the President, and we often see major swings in labor policies and precedent from administration to administration. For example, President Biden promised to be the most pro-union President in history and his administration has actively worked to expand protections for unions and to overrule employer-friendly precedent (including precedent established during President Trump's first term).

In addition to the recent updates detailed in the prior section, President Biden's Board has:

- Issued enhanced remedies for unfair labor practices.
- Enhanced access to company property by off-duty contractors.
- Reinstated setting specific standards for assessing an employer's response to employee misconduct.
- Found that certain confidentiality and non-disparagement restrictions in severance agreements violate the NLRA.
- Found that the mere maintenance of a work rule that has a "reasonable tendency to chill employees from exercising their Section 7 rights" may constitute an unfair labor practice.
- Provided a process for unions to demand recognition once they have reached 50% of cards signed in an appropriate unit.
- Imposed bargaining orders when employers committed unfair labor practices following a demand for recognition.

President Trump is expected to take actions that will ultimately lead to the reversal of these pro-union positions and return the state of the law to where it was during his first administration. However, it may take some time for many of these changes to take effect.

The Board's Structure

The NLRB is headed by a five-member panel, known as the "Board," that is situated in Washington, D.C. Each member of the Board is appointed by the President, with consent of the Senate, and serves a five-year staggered term. Traditionally, the Board has two Democrat members, two Republican members, and a chairman of the President's party. The Board members interpret the NLRA and establish precedent by reviewing decisions made by ALJs (in unfair labor practice cases) and by regional directors (in representation cases). At the time President Trump was inaugurated, the five-member Board consisted of Democrats Gwynne Wilcox (chair) and David Prouty and Republican Marvin Kaplan; the fourth and fifth seats were vacant.

The NLRB also has a GC who acts as the prosecutorial arm of the NLRB. The GC issues guidance, identifies precedent that she would like to see overturned, and can tee up issues for the Board to change precedent by selecting cases to prosecute. On his first day in office, President Biden fired the Trump-appointed GC, Peter Robb, and later nominated Jennifer Abruzzo for the position. General Counsel Abruzzo was confirmed by the Senate in July 2021 and has aggressively pursued President Biden's pro-union policies. Prior to her appointment, General Counsel Abruzzo had worked as the special counsel for strategic initiatives for the Communication Workers of America.

Outlook for Biden-Era Decisions

Although the 2024 Trump campaign made significant inroads with union members, the Trump administration will likely seek to roll back many of the pro-union decisions issued during the Biden administration. To do so, however, (1) the Board's membership must change and (2) the Board must receive a case in which an applicable issue is in controversy.

In December 2024, Senate Democrats attempted to confirm President Biden's nomination of former Board Chair Lauren McFerran for another term in hopes of retaining a democrat Board majority well into the Trump presidency. However, these efforts failed.

Additionally, shortly after taking office, President Trump fired Chair Wilcox, leaving just two members on the Board. With Chair Wilcox's removal, the Board no longer has a three-member quorum needed to issue decisions. In a statement released shortly after being fired, Chair Wilcox indicated that she would be "pursuing all legal challenges" to her removal. As of the date of this publication, however, no concrete legal challenges have been made.

President Trump now has the opportunity to fill the three open Board seats. Depending on the speed with which President Trump makes such nominations, and the Republican-controlled Senate confirms them, the Board will likely have a Republican majority by early autumn 2025, if not sooner.

Once the Board has a majority of members inclined to overturn the Biden-era decisions, it must still wait for appropriate cases to come before it. The Board does not select its own cases. Instead, it receives them in one of two ways: a case decided by an ALJ or regional director is appealed to the Board by the losing

party, or a decision from a U.S. appellate court is remanded to the Board for further proceedings.[2] This reality adds additional uncertainty to the timeline for the expected repeal of key Biden-era Board decisions.

Other Changes to the NLRB

Certain important changes can and will likely be made sooner. Although the terms of Board members traditionally overlap with presidential administrations to preserve some degree of autonomy from the White House, agency leadership reflects the policy preferences of the current president.

Upon taking office, President Trump followed President Biden's lead and fired General Counsel Abruzzo. Because of the way vacancies are filled, he is expected to make several other firings until a Republican could move into the acting GC role. President Trump will then likely nominate a pro-business Republican to fill the GC role.

Once a Republican moves into the acting GC Role, many of General Counsel Abruzzo's enforcement policies and agency guidance can be unwound immediately. For example, the following memoranda will likely be rescinded:

- **GC Memo 21-07.** Instructs regions that "in negotiating settlement agreements, in addition to seeking no less than 100 percent of the backpay and benefits owed, [they] should always make sure to seek compensation for any and all damages, direct and consequential, attributable to an unfair labor practice." The memo emphasizes that it is agency "policy to seek nothing less than reinstatement and full backpay in all cases involving unlawful firings" and, in cases where a discharged employee did not wish to return to work, regions are to "include front pay as part of their settlement calculations."
- **GC Memo 23-02.** Directs regions to allege that employers "presumptively violated Section 8(a)(1) where the employer's surveillance and management practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in" Section 7 activity. According to the memo, "surveillance and management practices" include security cameras, radio frequency identification (RFID) badges, GPS tracking devices and cameras in vehicles, employer-issued phones, and keylogging software on company-provided devices. The memo also seeks to limit the use of AI and algorithm-based employee productivity software, the use of personality tests, and scrutiny of applicants' social media accounts.
- **GC Memo 24-04.** Identifies a lengthy list of extraordinary remedies and consequential damages that regional offices have since sought against employers.
- **GC Memo 25-01.** Contends that certain "stay-or-pay" provisions are unlawful under the NLRA. Calls for employers to go beyond mere rescission of the noncompete provision and directs regions to seek traditional make-whole remedies for unlawful provisions consistent with Board law. Under current guidance, employers had through December 6, 2024, to cure any existing stay-or-pay provisions that advance a legitimate business interest.

The new general counsel—temporary or permanent—can also attempt to unwind major cases currently in the settlement process and remove any requirements for default language in Board settlement agreements.

[2] The Board cannot rule on an issue that is not alleged in a complaint unless: (1) "the issue is closely connected to the subject matter of the complaint" and (2) "the issue has been fully litigated." *Siren Retail Corp.*, Case 19-CA-290905 (2024), Member Kaplan dissenting, citing *Pergament United Sales*, 296 NLRB 333 (1989) and *Dalton Schools d/b/a The Dalton School*, 364 NLRB 132 (2016).

Amendments to the NLRA

Another possible avenue for changes to labor law is federal legislative action. Republicans will control both the U.S. House of Representatives and Senate through at least January 2027. This has led some to speculate that Republicans may seek to amend the NLRA.

Possible changes to the NLRA include: (1) increasing the revenue threshold for jurisdiction over small businesses; (2) prohibiting formal worker-management cooperative organizations such as works councils; (3) codifying the secret ballot election procedure; and (4) codifying employers' right to hold so-called captive audience meetings. It remains to be seen whether the administration or congressional Republicans will want to spend legislative capital on such efforts and whether any such changes can survive Republicans' narrow margins of control of the House and Senate.

In sum, employers should expect to see significant changes on the horizon. However, most of these changes will not occur immediately. Because of that, those who wish to stay out of the spotlight and avoid litigating costly unfair labor practice charges should continue to follow the Biden-era decisions for now.

AI Impacts in Labor Law

Statutory and Regulatory Landscape for AI in the Workplace

In response to the growth of AI and AI-related technologies in the workplace, a developing patchwork of federal and state statutes and regulations have sprung up to create new protections for employees from the potential for AI-related harms. Under the Biden administration, federal agencies have developed AI guidance for a range of AI uses, including uses of AI in the workplace. At the state and local levels, legislatures have passed AI-related job protection laws, augmenting the federal regulatory scheme.

However, with a change in presidential administration, this patchwork is in a clear state of flux. President Trump has indicated broad plans to undo the federal guidelines set out by the Biden administration. Many state governments are expected to respond to Trump administration changes to federal government AI policy by expanding, and further developing, new legislation aimed at reining in potentially harmful uses of AI in the workplace.

Setting aside that changes will likely come with the Trump administration, the following provides an overview of the current federal and state statutory and regulatory landscape that governs the use of AI in the workplace.

Federal Landscape: Executive Order 14110

Central to the current federal landscape for AI use in the workplace is the currently active Executive Order (EO) on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, which President Biden announced on October 30, 2023. (It is expected that the Trump administration will revoke the EO in its present form.) This EO, which provides a multipronged approach to regulating AI development and use, and follows earlier AI-related action by the administration, includes

key labor and employment-related directives that have laid the groundwork for the Biden administration's approach to AI uses in the workplace. Section 6 of the EO, which deals directly with workplace contexts, directs federal agencies to:

- Encourage employers to use AI in ways that improve workers' lives and positively augment human work.
- Establish programs to attract top talent in the AI industry and other emerging technologies.
- Assess the extent to which federal programs are designed to respond to AI-related job disruptions.
- Identify options to strengthen or develop additional support for workers displaced by the use of AI.
- Create new guidelines, both at the U.S. Department of Labor (DOL) and other agencies, to mitigate potential harms resulting from AI. Under this provision, the Secretary of Labor was required to release new rules regarding AI within 180 days of the EO's release.

Following the earlier publication of U.S. Equal Employment Opportunity Commission (EEOC) directives (discussed below), the EO has led to increasingly concerted efforts by federal agencies to reign in potentially harmful uses of AI in the workplace, including by prompting new DOL and Office of Federal Contract Compliance Programs (OFCCP) guidance.

U.S. Department of Labor AI Guidance

In May and October of 2024, the DOL followed President Biden's EO by releasing new guidance on AI and worker well-being, providing principles and best practices for developers and employers. That guidance emphasizes that:

- Workers should be informed and have input in the development and use of AI.
- AI development and design should be made to protect workers, including via testing, monitoring, identification of risks, and efforts to mitigate threats to workers.
- Organizations should have clear oversight processes for AI systems used in the workplace.
- Workers should be provided advance notice and appropriate disclosure of AI uses by employers.
- AI systems should not be used to violate or undermine workers' rights but rather should be used to assist workers and improve job quality.
- Employers should support or upskill workers during transitions related to AI.
- Workers' data should only be used to support legitimate business aims.

Additionally, the DOL released a companion *Field Assistance Bulletin* that addressed compliance risks under the Fair Labor Standards Act that may result from AI uses. That companion guidance clarifies that employers using AI in the workplace must still continue to pay workers for all hours worked "regardless of the level of productivity or performance" and also pay workers for travel between worksites, if applicable. Moreover, it reminds employers that the use of AI will not be a defense for any miscalculation of wages stemming from the technology.

OFCCP AI Guidance

The OFCCP, the subagency tasked with ensuring federal contractor compliance with nondiscrimination obligations, followed President Biden's EO by releasing its own guidance regarding the use of AI in the workplace. Providing both new AI-related nondiscrimination obligations and "promising practices" regarding the use of AI in the workplace, the guidance clarifies that federal contractors' nondiscrimination obligations, as they relate to AI, include:

- Ensuring that applicants or employees with known disabilities are reasonably accommodated.
- Retaining records on the impact and validity of AI-based selection procedures.
- Maintaining confidentiality in accordance with all OFCCP regulatory requirements regardless of AI use.
- Cooperating with OFCCP requests for information on AI systems.
- Cross-referencing AI systems against applicable nondiscrimination laws and the *Uniform Guidelines on Employee Selection Procedures*.
- Conducting routine independent assessments of AI systems for bias.
- Exploring potential alternative selection procedures to those presented by AI.
- Refraining from delegating nondiscrimination and affirmative action obligations to AI screening tools.

The OFCCP's "promising practices" similarly recommend, *inter alia*, that federal contractors provide notice to applicants of AI use, train staff on AI use, monitor AI use for potential bias, and create governance structures to ensure that AI systems have proper oversight.

Prior EEOC AI Guidance

Prior to President Biden's announcement of EO 14110, but as part of the Biden administration's broader push to create new AI-related legal frameworks, the EEOC earlier released its own guidance on the use of AI in the workplace. Similar in many respects to the more recent OFCCP guidance, the earlier EEOC directives seek to inform employers of how to manage their nondiscrimination obligations while using AI and AI-related technologies. In particular, the guidance focuses on disparate impact risks associated with using algorithmic tools in the hiring process.

Under that guidance, employers are instructed to:

- Regularly monitor the use of AI tools to determine if a statistically significant disparity between the selection rates for members of various protected categories exists.
- Determine whether the use of the algorithmic decision-making tool is consistent with business necessity.
- Explore less discriminatory alternatives and implement such alternatives, if available.
- Consult vendors and other third parties using relied upon AI tools on their methodology and monitoring.
- Seek to adopt alternative, less discriminatory AI models if any are discovered during the development process.

The EEOC's guidance has been influential in both the development of later federal frameworks and parallel state level initiatives.

State Statutory Landscape

The range of federal guidance on the use of AI in the workplace has been matched with a rush of AI-related legislation[3] at the state level, adding new compliance requirements for employers that seek to use AI in hiring and firing. The following are some of the most impactful state laws covering AI in the workplace.

[3] State activity related to the use of AI in the workplace has not been limited merely to legislation. In January 2025, the New Jersey Attorney General's Office issued new guidance pertaining to employers' uses of AI. Under that guidance, the New Jersey Attorney General's Office clarified that the New Jersey Law Against Discrimination, N.J.S.A. Section 10:5-1 et seq., applies to employers' uses of AI and identified ways that AI tools may contribute to discriminatory outcomes, such as through design defects, lack of training, and the deployment of such tools for intentionally discriminatory purposes. Although the guidance does not impose new requirements, it does state that covered entities can violate New Jersey law when using AI tools even without intending to discriminate.

California's Suite of AI-Related Legislation

Between September 17, 2024, and September 19, 2024, California, in rapid succession, passed a series of laws pertaining to the use and development of AI that will be going into effect over the next two years and include important requirements for workplace uses of AI. Amid that raft of new legislation are a few provisions that relate to the use of AI in the workplace that may be models for future state legislation across the country.

Mirroring union efforts to prevent the uncompensated use of individuals' voices and likeness, AB 2602 and AB 1836 both target the use of so-called digital replicas (readily identifiable, computer-generated representations of an individual's likeness). Under AB 2602, contractual provisions that permit the creation or use of a digital replica must include a reasonably specific description of how the digital replica will be used. Contracts lacking such language may only be enforced when the individual was represented by legal counsel or a labor union with a collective bargaining agreement (CBA) expressly addressing the use of digital replicas (e.g., the recent SAG-AFTRA CBA). Under AB 1836, which addresses posthumous rights, estates are granted legal rights for any digital replicas for up to 70 years after an individual's death. Failure to receive an estate's consent before using a covered digital replica incurs a minimum $10,000 penalty outside of a few, specifically identified exceptions.

The suite of California AI laws also included one bill, SB 926, which is aimed at preventing the creation and distribution of sexually explicit digital content that may require employers to more closely monitor internal chats and message boards for employees. Under that new law, any person who intentionally distributes "or causes to be distributed" the covered sexually explicit content may be charged with a criminal misdemeanor. Employee sharing of such content on employer platforms may create liability for employers under this broadly defined law.

Colorado SB 24-205

Passed on May 17, 2024, and set to take effect on February 1, 2026, Colorado's SB 24-205 creates significant new requirements for developers and deployers of "high-risk" AI systems, defining these systems as those that make or significantly influence "consequential decisions" in areas such as employment, housing, credit, education, and healthcare. In the employment context, concerns exist that this new law may cover a wide range of employment decisions beyond merely hiring, promotion, or termination due to the broad definition for a "consequential decision" in the employment context, which is a decision that has a "material legal or similarly significant effect on the provision or denial to any consumer of . . . employment or an employment opportunity." Under the law, employers using high-risk AI systems will need to provide job applicants with information on how to opt out of personal data processing, notification as to the use of the system and its purpose, disclosures of any reasons for an adverse employment decision taken as a result of the system, and notice to individuals that they are interacting with the AI system.

Illinois HB 3773

Signed into law on August 9, 2024, HB 3773 amends the Illinois Human Rights Act to prohibit discriminatory uses of AI in employment decision-making and recruitment. Under HB 3773, employers must provide employees with notice of the use of AI in any employment decisions. The text of HB 3773 provides little clarity for this notice requirement. Instead, the statute empowers the Illinois Department of Human Rights to determine

the "conditions that require notice, the time period for providing notice, and the means for providing notice."

In addition to prohibiting employment uses of AI that have a discriminatory effect, HB 3773 also expressly prohibits the use of "zip codes as a proxy for protected classes" in an employment context. In contrast, the amendment is silent as to more general geolocation data. HB 3773 goes into effect on January 1, 2026.

New York City AI Bias Law

On July 5, 2023, New York City's AI-in-hiring law went into effect, requiring employers that use AI to hire or promote workers to submit their algorithms for an independent audit with results to be made public. Under NYC Local Law 144, job candidates who are New York City residents must receive prior notice from potential employers before an employer uses AI tools for an employment purpose but only when the AI tools play a predominant role in the decision-making process. Employers must also submit such AI tools for a bias audit before such use.

Developing Collective Bargaining Provisions Regarding AI

The increased use of AI tools in the workplace has been paired with a burst of recent union activity aimed at addressing employee concerns regarding AI abuses, with unions seeking to include new AI-related job protection provisions in CBAs. These AI-related provisions have begun to appear in CBAs across a range of industries, including the entertainment and technology industries, the hospitality industry, and in the field of education. The following provides an overview of some of the latest AI-related CBA provisions.

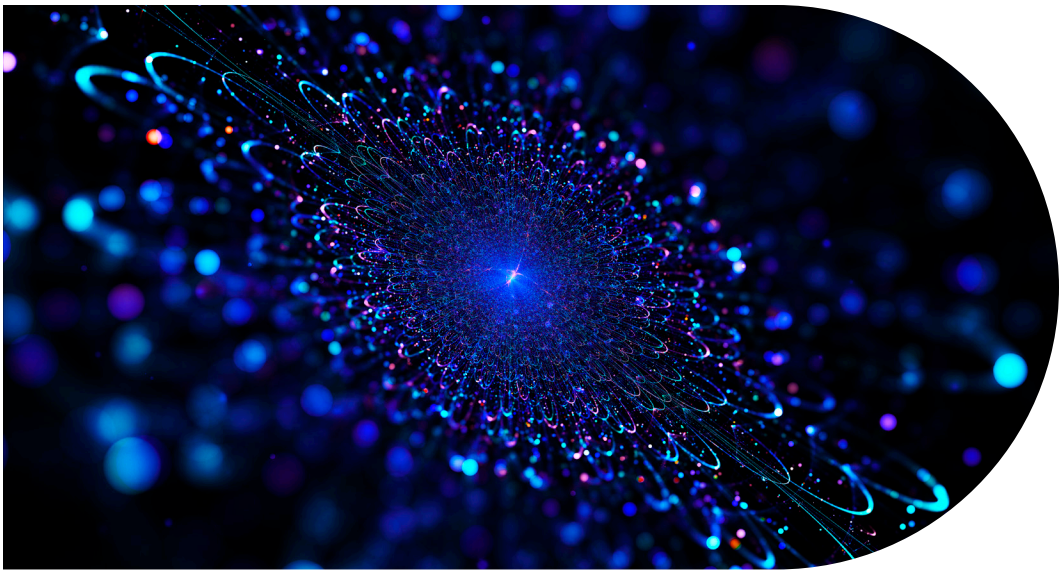
SAG-AFTRA and Writers Guild of America (WGA) Contracts Tackle Generative and Nongenerative AI

For the past two years, union efforts in the entertainment industry have targeted both generative and nongenerative AI in applicable CBAs for performers and writers in the film, television, and video game industries.

Over the course of 2023, the SAG-AFTRA and the WGA engaged in a much-discussed double strike against the Alliance of Motion Picture and Television Producers (AMPTP), halting the making of movies and TV shows throughout much of the year. Those strikes ended in late 2023 once SAG-AFTRA and WGA were able to receive concessions from AMPTP regarding both generative and nongenerative AI, including how those AI tools can be used in the film and television industries.

The following are some of the key AI-related provisions that SAG-AFTRA and WGA reached an agreement over in those latest CBAs:

- **Authorship requirements (WGA).** Under the 2023 WGA agreement, neither generative nor nongenerative AI may be treated as a "writer" for purposes of authorship, and thus written material created by AI cannot be considered "literary material"—the form of content protected under the WGA's CBA—by the AMPTP.
- **Credit for generative AI content (WGA).** Company-provided unpublished and/or unused generative AI content may not be treated as "assigned material" or "source material" for credit or compensation purposes, allowing a writer using such AI content to be credited as the first writer of a screenplay.



- **Notice of AI use (WGA).** Writers must be informed as to whether any provided content has been generated, in whole or in part, by AI.
- **Ban on required uses of AI (WGA).** Companies cannot require writers to use AI to create content, although writers may choose—with consent from the company—to use AI. Regardless, the resulting material will be considered the writer's literary material.
- **Consent and compensation for actors' digital replicas (SAG-AFTRA).** Under the 2023 SAG-AFTRA agreement, in order for a digital replica of an actor to be used, the actor must have first provided clear and conspicuous consent for the usage. For replicas created during an actor's employment, and with their participation, separate consent needs to be provided for the initial use and any subsequent uses and compensation for the usage must be based on the number of days the actor *would have* worked. For independently created replicas created outside of an existing engagement, the actor must be allowed to freely negotiate compensation.
- **Requirements for background actors' digital replicas (SAG-AFTRA).** Background actors' digital replicas are also protected via consent requirements for both the initial and subsequent uses. Additionally, background actors must receive at least a full day's work of pay for initial uses regardless of the amount of content created. Subsequent uses may be compensated as negotiated between the parties. The use of background actors' digital replicas cannot be used to avoid hiring other background actors.
- **Post-mortem rights (SAG-AFTRA).** Consent for the use of a digital replica continues after an actor's death unless explicitly limited. For already deceased performers that have not granted consent for the use of a digital replica, an authorized representative (or if none exists, SAG-AFTRA) may grant such consent.
- **Synthetic performer use (SAG-AFTRA).** SAG-AFTRA must be given notice and an opportunity to bargain for compensation when companies use a synthetic performer, which is a digitally created performer that does not resemble a real person or use a

real person's voice. When the synthetic performer has features recognizable as those of a real actor, that actor must be able to consent to the use and bargain for compensation.

- **Digital alterations (SAG-AFTRA).** Actors must provide clear and conspicuous consent in order for digital alterations unless the photography or soundtrack remains substantially as scripted, performed, and/or recorded. Background actors must be upgraded to day actors if lips or facial movements are altered to make it appear that they are providing dialogue.

Although the WGA has not engaged in further strikes over AI, in 2024, SAG-AFTRA led another strike—this time against video game employers—to force implementation of AI-related protections for voice actors, performers, and other individuals involved in the video game production process. CBA negotiations between SAG-AFTRA and these video game employers are currently underway. Although those negotiations are still pending, it is expected that similar provisions to those sought for film and television performers will be included in any eventual agreement.

Severance and Notice for AI Automation: The Culinary Workers Union Targets AI in Recent CBAs

In late 2023, the Culinary Workers Union entered into new CBAs with unionized employers, Caesars Entertainment Inc., MGM Resorts International, and Wynn Resorts Ltd., each of which included new pay requirements and job protections for hospitality workers. Those new job protections have included AI-related notice and severance requirements, which have been used as a blueprint for collective bargaining negotiations by the Culinary Workers Union since.

Under these CBA terms, bound employers are required to provide six months' notice before introducing AI, robotics, or other new technologies into the workplace. Additionally, Culinary Workers Union members who are laid off or otherwise affected by AI-related job losses are required to receive retraining, severance, and continued benefits. Severance payments for such AI-related job losses are tied to years of service.

The Culinary Workers Union has sought to have similar terms applied to contracts negotiated throughout 2024. In August 2024, the Culinary Workers Union succeeded in unionizing The Venetian and the Palazzo, two of the last nonunionized casinos on the Las Vegas Strip. Although the applicable CBA terms have not been publicly released, it is believed that the AI-related job protections set forth in the Culinary Workers Union's earlier contracts have been included in these more recent agreements. The Culinary Workers Union may also seek to include these terms in any resolution to its ongoing strike against Virgin Hotels.

New Guidelines for Educators: NEA and AFT Seek Guardrails for AI Use in Classrooms

Both the National Education Association (NEA) and the American Federation of Teachers (AFT) have begun to take public stances on the use of AI in classrooms through the release of AI-related guidance for their union members. In general, these recommendations focus on ensuring that humans—and not AI or other technologies—remain at the center of the education process.

On July 4, 2024, the NEA approved a policy statement and accompanying report regarding the use of AI and other technologies in the classroom. These documents, which seek to lay a foundation for AI-related advocacy by NEA members, provide a range of recommendations on AI uses, including:

- Students and educators must remain at the center of the education process.

- Evidence-based AI technology must enhance, rather than dominate, the educational experience.
- AI technology must be ethically developed and used, including through the maintenance of strong data protection practices.
- AI tools' access and use must be equitable.
- Educators and students must receive ongoing education regarding AI.
- The development of NEA direct policy resources to ensure new regulations for AI and other technologies, including as it relates to protecting students' civil rights and educator hiring processes.

On July 18, 2024, in a quick follow-up to the NEA's policy statement, the AFT launched a similar set of comprehensive resources regarding the use of AI in education, which created new AFT-approved guardrails for using AI in classrooms. Those resources recommend, among others, that:

- Any considerations related to implementing new technology in the classroom must maximize students' and educators' safety and privacy.
- AI and other technologies cannot be allowed to replace individuality or human interaction, including direct, in-person contact, in the educational context.
- Educators' autonomy must be maintained, and educators must be empowered to make classroom education decisions—AI and other technologies may only "serve, not drive, [educators'] decisions and priorities."
- The implementation of AI and other technologies may not widen digital divides and other inequities in schools.
- Technologies, including AI, must not be used to advance misinformation, disinformation, and/or students' radicalization.

It is expected that the recommendations from both the NEA and AFT will form the basis for any future collective bargaining negotiations by the unions. Given the growing concerns of AI-related abuses across various industries, further innovations in AI-related collective bargaining provisions are expected.

Labor Risks in the Use of AI

Applied practically to the workplace, AI-related technologies can dramatically increase employee efficiency and help employers identify and respond to employee speech incidents, such as inappropriate workplace postings. However, left unchecked, AI-related technologies may lead unaware employers to violate the NLRA, potentially upending existing business operations. The following is an overview of various contexts in which AI-related workplace technologies may create labor risks and strategies for mitigating those risks.

Employee Monitoring and Unfair Labor Practice (ULP) Risks

Employee monitoring, especially during union campaigns, has received increased focus from the NLRB and become a rising source of ULP charges. Although AI-related monitoring technologies have not been the primary target of this shift, such monitoring tools may present additional risks.

On August 25, 2023, in *Cemex Construction Materials Pacific*, LLC,[4] the Board issued a high-profile ruling on union recognition that pushed employer monitoring further into the spotlight. In that highly publicized decision, the NLRB ordered the employer to recognize and bargain with a union after finding a range of

[4] https://www.nlrb.gov/news-outreach/news-story/board-issues-decision-announcing-new-framework-for-union-representation.

misconduct on the part of the employer during the petition and pre-election periods. Among other misconduct found, the Board specifically identified the employer's monitoring of union social-media messaging and its creation of the appearance of surveillance around the time of the election to be objectionable. As a result, under the Cemex framework, the risks associated with monitoring employees have greatly increased.

Although AI-related technologies were not at issue in the *Cemex* decision, the decision has increased the risks that may result from AI-related monitoring technologies. Efforts to monitor employee activity with AI-related technologies, even if done with benign intentions, could form the basis for a ULP when those AI-related technologies can be shown to be (1) tracking employees' organizing activities, (2) interfering with efforts by employees to engage in protected activity, or (3) creating the appearance that an employer is monitoring such efforts. During petition and election periods, these ULP risks may further risk union recognition.

Former General Counsel, Jennifer A. Abruzzo, elevated some of these potential concerns in a memorandum pre-dating the *Cemex* decision, issued on October 31, 2022.[5] In that memorandum, former General Counsel Abruzzo urges the NLRB to require disclosure of AI-related monitoring technologies used by employers and to adopt a framework for finding presumptive violations of the NLRA where monitoring interferes with Section 7 rights.

Employers that use AI-related technologies for monitoring purposes are advised to ensure that any outputs from these technologies are not related to employees' protected activities, perform regular audits of these monitoring systems, and minimize their use during periods during and between a union petition and an election.

Safety and Performance Tracking

Employee safety and performance tracking is one particular area where monitoring efforts may pose additional labor law risks. Although many employers find tracking of employee safety and performance metrics vital to their business needs and to avoid workplace injuries, it is possible for such data to be used for other purposes that could implicate the NLRA, such as using the data as a proxy for tracking union support. Employers must also ensure that any proposed decision-making that results from such data is reviewed before implementation. Throughout, employers should stay transparent on how AI-related technologies track their employees' safety and performance metrics.

Workplace Speech and AI

AI-related technologies may also create additional labor law risks when such technologies are used to regulate employee speech.

Recently, in *Home Depot USA, Inc.*,[6] the NLRB weighed in on employee speech rights, holding that an employer violated the NLRA when it told an employee who had previously complained of workplace discrimination that he must remove the Black Lives Matter abbreviation, BLM, from his work outfit. The employer repeatedly asked the employee to remove the lettering on the basis that it was a violation of the employer's dress code. The employee refused and resigned shortly thereafter. The NLRB found that the employee's refusal to remove the BLM message constituted a protected concerted activity under Section 7 of the NLRA, and that by pressuring the employee to remove the message, the employer had violated those Section 7 rights.

[5] https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-unlawful-electronic-surveillance-and.

[6] https://www.nlrb.gov/news-outreach/news-story/board-rules-employees-black-lives-matter-action-at-home-depot-was.

Following, and as a result of, the *Home Depot* decision, the salience of workplace speech issues in the labor context has greatly increased. Although the decision does not directly address the use of AI-related technologies to regulate employee speech, by expanding upon the framework for protected speech under the NLRA, it does provide some insights on the risks that may result from applying AI technology to speech incidents.

Although AI-related technologies can be helpful tools for tracking and responding to abusive, discriminatory, or otherwise inappropriate employee speech, employers using AI tools for such purposes should be mindful to consider the extent to which flagged speech may itself constitute a protected activity, considering both the content of the speech and the context in which it is made. When responding to employee speech incidents that are flagged through AI-related technologies, employers should consider both the statement itself and any prior statements or activities by the employee that may make the speech protected concerted activity. Then, when making decisions based on flagged employee speech, employers should ensure that any final decision-making processes require human involvement and review.

AI in Hiring

As with the broader employment context, the use of AI as a tool for hiring has raised concerns of potential labor abuses. Specifically, there are concerns that AI hiring tools may be used to aid employers in avoiding hiring potential union supporters. Under the NLRA, it is unlawful for an employer to refuse to hire an individual because of that individual's union activities or sympathies. Here, as with safety and performance tracking, AI technologies may at times be used to make calculated guesses as to potential union support based on facially nondiscriminatory data.

To mitigate the risk that workplace AI technologies are found to be discriminating against potential union supporters in hiring, employers should be transparent throughout the application process as to the employer's use of AI technology and disclose the specific uses for any such tools. Regular review of such systems, including through risk audits, should be performed to ensure that any such systems are not creating discriminatory outputs. Decisions recommended by AI-related technologies should then receive human review, preferably performed by outside legal counsel. For employers that use third-party hiring services, confirmation should be obtained from any such third-party hiring services that these risk mitigation strategies are being employed during uses of AI in the hiring process.

2024 Labor Disruptions and Lessons Learned

The prevalence and impact of strikes continued to grow in 2024, building on several trends that have emerged in recent years. Since 2001, there have been only two years (2019 and 2023) with more than 24 major work stoppages (that is, work stoppages involving at least 1,000 employees and lasting at least one full shift). *See* U.S. Bureau of Labor Statistics, *Work Stoppages* (last visited Nov. 15, 2024). In the first 10 months of 2024, there were 24 major work stoppages nationwide.

The main factor driving this increase in strike activity appears to be demand for higher wages. Interestingly, workers are willing to strike longer than ever before to secure increased pay; 2024 saw the longest union-authorized work stoppage at any U.S. college or university in at least a decade, as well as a multimonth strike at Boeing. Workers are also concerned about the role of AI and automation in the workplace.

Economic Conditions Spur Demands for Higher Wages

In August 2024, the Consumer Price Index was up 22% since January 2020, according to Pew Research Center. With such a spike in consumer prices, it's not surprising that union demands for large wage increases were a hallmark of labor unrest in 2024. Several unions secured sizable wage hikes for workers following the strikes. For example, after a seven-week strike, more than 33,000 Boeing machinists reached an agreement with the airplane manufacturer that guaranteed them a 38% wage increase and a $12,000 signing bonus. Notably, the final deal provided slightly less of a pay increase than the machinists asked for—they originally called for a 40% raise. For comparison, the last Boeing machinists' strike, in 2008, resulted in a 15% wage increase over four years.

Dockworkers also secured a big win on wages. Although the issue of automation remains unresolved, dockworkers agreed to a 62% wage increase over the next six years. As a result of the wage deal, dockworkers agreed to suspend their three-day strike by extending their existing contract to January 15, 2025.

Substantial wage increases were also secured by IAM members at Textron's Wichita facility and Boston University's Graduate Workers' Union. At Textron, the new CBA covers a five-year term and provides a total wage increase of 31%, including an immediate 11% raise upon ratification. On top of that, the IAM secured promises that the company would pay each employee a lump sum of $3,000 annually during the life of the contract ($15,000 total per employee). And the maximum cost of living adjustment doubled from $700 to $1,500 annually.

Likewise, the Boston University Graduate Workers' Union secured a contract that provides Ph.D. students with a minimum $45,000 annual stipend—which amounts to a roughly 70% raise for some of the lowest-paid students. But here, too, the union didn't get all it wanted. The students originally sought $62,400 annual stipends for Ph.D. students and free tuition for all graduate workers (not just Ph.D. students).

In sum, unions were not afraid to make big asks this year. And while their demands were rarely met in full, unions were still able to secure significant wage increases for their employees in 2024.

Automation and AI Drive Strike Activity

In addition to increased wages, one of the primary issues at the negotiation table this year was automation. For example, on October 2, 2024, more than 45,000 dockworkers represented by the ILA walked off the job at ports across the East and Gulf Coasts after the ILA and the U.S. Maritime Alliance (USMX) failed to reach an agreement on the use of automated technology in ports. The USMX, which represents ports and shipping companies, has pushed for the broader use of semi-automated equipment like cranes, which are already in use at several terminals. In contrast to manually operated cranes that require workers to be physically located in the crane, semi-automated cranes are operated by workers using a remote-control system. While it's unclear how or if such semi-automation would reduce the need for labor to operate cranes, the union has refused to accept anything short of a complete automation ban. This applies to automated gates and driverless trucks as well.

ILA President Harold J. Daggett has accused overseas shipping companies of trying to eliminate U.S. jobs by replacing longshoremen with robotic equipment. Meanwhile, USMX argued that automation is necessary to meet supply chain demands. As mentioned, the three-day strike was suspended, and the parties continue to bargain on these issues.

Relatedly, workers also continue to raise concerns about AI. In July, more than 2,500 video game voice actors and motion capture performers went on strike over generative AI protections. The workers, represented by the SAG-AFTRA, argued studios could train AI to reproduce their work without their consent. As of November 2024, the strike was still ongoing. In 2023, SAG-AFTRA Hollywood actors went on strike over AI protections as well. The

nearly four-month long strike ended with a deal that required companies to obtain the actors' consent before producing digital replicas and to compensate them.

Unions Striking for Longer Periods of Time

Finally, 2024 established that union members are, for the most part, willing to wait until they can secure a deal they like. The strike at Boeing lasted for seven weeks, and employees at Textron were on strike for about a month.

The longest-running strike this year was conducted by the Boston University Graduate Workers' Union, which staged a seven-month work stoppage from March to October—the longest union-authorized work stoppage on a college campus in at least a decade. While certain conditions that make such a long strike possible are unique to the academic setting, the Boston University strike is notable because it is part of a larger pattern of employees across all kinds of companies being willing to wait for their demands to be met.

The number of strikes lasting more than 30 days represented roughly 21% of total strikes in the first 10 months of 2024. That is up by 6% compared to what the numbers were nearly two decades ago. In 2005, just 15% of strikes were longer than 30 days.

Conclusion

Overall, strike activity in 2024 was largely consistent with that in 2023, in terms of both themes and frequency. That said, the modern trend is toward more and longer strikes that result in bigger wage increases for employees. Particularly in industries where automation could have a prevalent role or at companies where wages have remained relatively stagnant, employers should be alert to the possibility employees may consider a strike during any upcoming contract negotiations.

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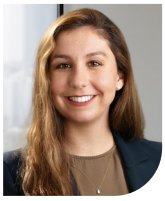

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