Perkins Coie

2025 | Year in Review

Labor Law Today

Table of Contents

Introduction

In 2025, the labor law landscape began undergoing a dramatic transformation as the new Trump administration moved swiftly to reshape labor policy and the National Labor Relations Board (NLRB or the Board). Within weeks of taking office, President Trump fired Board Chair Gwynne Wilcox, signaling a decisive shift away from the pro-union policies of the Biden administration, but also leaving the Board without the three-member quorum necessary to issue decisions. Further, the president dismissed the NLRB's Biden-appointed general counsel (GC), Jennifer Abruzzo. While President Trump worked to fill this important role, the Board's acting general counsel (AGC) William Cowen, immediately rescinded numerous Biden-era guidance memorandums, setting the stage for an anticipated rollback of significant Board precedents.

This period of transition created a dynamic environment for employers and unions alike. With the Board lacking a quorum, the resolution of unfair labor practice cases stalled, while ongoing constitutional challenges—including the closely watched *SpaceX* litigation in the Fifth Circuit—raised fundamental questions about the very structure of the NLRB and the enforceability of the National Labor Relations Act (NLRA). Meanwhile, Congress introduced several legislative proposals aimed at overhauling federal labor law, including bills addressing election procedures, worker privacy, and employment and representation of persons not authorized to work in the United States.

The year also brought continued attention to key Biden-era decisions that remain in effect but are widely expected to be eventually overturned. These include the *Cemex* framework, which permits bargaining orders when employers commit unfair labor practices that require setting aside an election; a decision banning so-called captive-audience meetings; and the *Stericycle* standard for evaluating employer work rules. The Board has a long-standing practice of waiting to overturn prior decisions with a three-member majority, and it currently has only two members appointed by a Republican president.

This report provides a comprehensive overview of these significant developments and explores the evolving dynamics between employers, employees, unions, and the government. We hope this year's report will help you stay informed about this fast-paced and changing environment, which affects almost all employers.

Acting General Counsel Stakes Out New Positions

William Cowen assumed the position of ACG of the NLRB on February 1, 2025. Shortly after moving into this role, AGC Cowen began issuing a series of memorandums rescinding many of the positions taken by the NLRB general counsel during the Biden administration and staking out new positions on various issues.

1. Rescission of Prior GC Memorandums

In GC Memo 25-05, AGC Cowen rescinded several Biden-era general counsel memorandums. The AGC cited a "backlog of cases" as the reason for the rescissions. GC Memo 25-05 rescinded the following memorandums:

- **GC Memo 23-05** provided detailed guidance instructing regional offices to enforce the Board's decision in *McLaren Macomb*, 372 NLRB No. 58 (2023), which held that the mere proffer of a severance agreement with overly broad confidentiality and non-disparagement clauses violates Section 8 of the NLRA. Although the AGC rescinded GC Memo 23-05 on February 14, 2025, and has not indicated whether there will be any further guidance on this topic, the Board's holding in *McLaren Macomb* remains precedential law. The rescission does not overrule *McLaren Macomb*'s "mere proffer" holding; it only removes the GC's expansive enforcement guidance, including guidance that regions should enforce *McLaren Macomb*'s holding retroactively to agreements already signed.
- **GC Memo 23-08** alleged that overbroad noncompetition agreements violate the NLRA because they chill employees from exercising Section 7 rights to secure better working conditions by concertedly threatening to resign or by accepting employment with a local competitor. The rescission of GC Memo 23-08 withdraws the prior, expansive theory that overbroad noncompetes are generally unlawful under the NLRA because they chill Section 7 activity.
- **GC Memo 25-01** found that certain "stay-or-pay" provisions, under which an employee must pay their employer if they separate from employment, infringe on employees' Section 7 rights. The memorandum directed regions to seek traditional make-whole remedies for unlawful noncompete provisions consistent with Board law. With GC Memo 25-01 withdrawn, the NLRA analysis returns to existing Board precedent and case-specific facts rather than a presumption of illegality and expansive make-whole concepts.

2. Remedies

Also in GC Memo 25-05, AGC Cowen rescinded GC Memos 21-06, 21-07, 22-06, and 24-04, which had urged the regions to seek the full remedies available in unfair labor practice cases, whether from the Board or in settlement agreements. AGC Cowen then issued GC Memo 25-06, which provides updated guidance to the regions on approaching settlement agreements in unfair labor practice cases.

GC Memo 25-06 emphasizes promptly resolving unfair labor practice cases through settlements while exercising measured discretion in remedial demands. It directs that nonmonetary remedies should not

be sought automatically but should be reserved for cases involving widespread, egregious, or severe misconduct, reaffirming regional discretion to tailor relief to case circumstances. Regarding settlement drafting, the memorandum explains that default provisions are not mandatory and should be included only where appropriate to promote compliance, with stronger consideration for scenarios like recidivism or installment arrangements. Settlements should not typically fail solely over objections to default clauses.

The memorandum further notes that nonadmission clauses can be used to resolve cases in appropriate circumstances—particularly early in investigations or immediately after a regional determination—though they are generally inappropriate for recidivist violators and may never appear in Board notices. Finally, regarding remedies after *Thryv, Inc*., 2 NLRB No. 22 (2022), the memo concludes that the majority's "foreseeable harms" formulation lacks a discernible, administrable standard. It therefore directs regions to use the *Thryv* dissent's standard as guidance in settlements—focusing on foreseeable harms where the causal link is "sufficiently clear," as the only standard reasonably capable of application.

3. New Positions from Acting General Counsel

In addition to rescinding Biden era guidance, AGC Cowen issued memoranda announcing new positions of the NLRB on several important issues.

- **GC Memo 25-07** establishes a bright-line rule that secretly recording collective-bargaining sessions is a per se violation of the duty to bargain in good faith under Section 8. The AGC grounded this decision in the NLRA's purpose to promote open and effective bargaining and the Board's role in safeguarding the bargaining process rather than dictating outcomes. The memorandum draws on precedent of the Board and the Supreme Court of the United States concerning per se bargaining violations and the line between mandatory and permissive subjects—particularly *Borg-Warner, Katz*, and the Board's holdings in *Bartlett-Collins* and *Latrobe Steel*. While the presence of a court reporter is a permissive subject that cannot be insisted upon to impasse under *Bartlett-Collins*, surreptitious recording goes further by inherently undermining trust, candor, and open dialogue, rendering it unlawful without regard to subjective good or bad faith. The memorandum also highlights contemporary technology and artificial intelligence (AI) transcription tools that make high-quality secret recordings easy and searchable, exacerbating the chilling effect on bargaining candor and thereby conflicting with the openness and mutual trust contemplated by the NLRA.

  As a practical directive, GC Memo 25-07 instructs regions that when an investigation shows a party secretly recorded a bargaining session, they should issue a complaint alleging bad-faith bargaining and plead the conduct as a per se violation of the NLRA, while coordinating on settlement questions as needed with operations management. The rationale is that even the possibility of covert recordings stifles genuine dialogue, breeds suspicion, and encourages posturing, which can derail bargaining at its inception—precisely the harm the Board sought to prevent in cases rejecting insistence on recording devices, court reporters, or similar mechanisms that inhibit free exchange in negotiations and related meetings.

- **GC Memo 25-08** provides updated guidance for investigating "salting" refusal-to-hire/refusal-to-consider cases under the NLRA, superseding prior guidance and emphasizing the standard set forth in *Toering Electric Co*.[1] It reiterates that, in addition to the traditional *FES* elements,[2] the GC must prove by a preponderance that an applicant was a genuine jobseeker entitled to Section 2(3) protection, once the employer puts genuineness at issue. Evidence of stale or incomplete applications, antagonistic behavior, or irregularities can raise reasonable doubts about genuine interest, and regions should first gather robust charging-party evidence on both the existence of an application (including agency in mass/batch submissions) and sincerity before soliciting employer evidence. GC Memo 25-08 emphasizes an initial screening: If the charging party's evidence fails on application or genuine interest, regions should dismiss without a full investigation. Only where *Toering*'s factors appear satisfied or unresolved should regions proceed to a full investigation. The guidance details investigative steps (affidavits, document review including resumes, emails, social media, and scrutiny of application content and conduct) and clarifies that truthful union-related work history alone is not disqualifying, though combined factors may undermine genuineness.

  With respect to remedies, the memorandum applies *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007), to salting cases. It rejects a presumption of indefinite employment for backpay and instead requires affirmative evidence of the likely employment duration based on nonexhaustive factors, such as personal circumstances, union policies, specific plans for the employer, instructions/agreements on assignment length, and historical data. Regions must conduct a pre-complaint backpay investigation, avoid unsubstantiated duration claims—particularly given that salts typically do not seek indefinite employment—and allow the charged party to present evidence that could limit liability. The AGC also instructs regions to submit cases to the Division of Advice when agency in third-party submissions or genuine interest remains unclear after full investigation, or when unresolved issues under *Toering/Oil Capitol* persist, and to reassess complaint cases removed from trial in light of this guidance.

- **GC Memo 25-11** outlines procedures and standards for pursuing Section 10(j) injunctive relief under the NLRA.[3] The AGC emphasizes timely intervention to prevent remedial failure and to protect employees' Section 7 rights during critical phases, including organizing campaigns, first-contract negotiations, withdrawals of recognition, successor refusals to

[1]Salting has been defined as "the act of a trade union in sending a union member or members to an unorganized jobsite to obtain employment and then organize the employees." *Toering Electric Co.*, 351 NLRB 225, fn 3 (2007) (quoting *Tualatin Electric, Inc.*, 312 NLRB 129, 130 fn. 3 (1993), enfd. 84 F.3d 1202, 1203 fn. 1 (9th Cir. 1996)).

[2]Under *FES*, the General Counsel must demonstrate that: (1) the employer was hiring or had concrete plans to hire; (2) the applicant had experience or training relevant to the announced or generally known requirements or, in the alternative, the employer has not adhered uniformly to such requirements, or the requirements were themselves pretextual; and (3) antiunion *animus* contributed to the decision not to hire the applicant for employment. *FES (A Division of Thermo Power)*, 331 NLRB 9, 12–13 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).

[3]Section 10(j) allows the NLRB to request temporary injunctions from federal district courts against employers and unions. These injunctions are intended to halt alleged unfair labor practices while the underlying case is still being considered by administrative law judges and the Board.

bargain or hire, and certain unlawful picketing or bad-faith bargaining by unions. The memorandum directs regions to apply the four-factor test from the Supreme Court's decision in *Starbucks Corp. v. McKinney* (2024)—likelihood of success, irreparable harm, balance of equities, and public interest—with particular focus on whether delay would cause irreparable harm that a final Board order cannot remedy. It further stresses prompt submission of both recommended and non-recommended 10(j) cases to the Injunction Litigation Branch (ILB) and warns that delay can diminish effectiveness. The AGC also encourages interim settlements (including settlements limited to the 10(j) aspect) with consultation from ILB to ensure complete relief, credits the program with positive outcomes in protecting rights and preserving collective bargaining, and invites regions to contact ILB for support on briefs, motions, and litigation strategy.

2025 Unionization Trends

Entering 2025, the union membership rate for all U.S. workers stood at approximately 9.9%, a figure that has remained relatively stable over the past several years.[4] Within the private sector, union density is markedly lower, at just 5.9%. In contrast, the public sector continues to see much higher rates, with about 32% of public employees belonging to unions.[5] Although public approval of unions has been historically strong in recent years, this sentiment has not necessarily translated into a marked increase in union density, and the trend of declining union membership since the mid-twentieth century has largely continued.[6]

Sector-Specific Trends

Industries that historically have been unionized remain mixed. Entering 2025, manufacturing's unionization rate stood near the single digits nationally, and the sector shed union members relative to pre-pandemic levels.[7] Other traditional union strongholds, such as construction and transportation, have seen modest gains in organizing activity.[8] While overall membership rates in these sectors have not returned to past peaks, there has been a surge in high-profile organizing campaigns, particularly in automotive manufacturing.[9]

The most significant developments in unionization trends have occurred in nontraditional sectors, especially in technology, healthcare, education, and service industries.[10] Healthcare has become the fastest-growing locus of organizing, with unionization rates for nurses hovering around the high teens and broader healthcare practitioner/support categories expanding their membership footprint. This momentum reflects persistent staffing, burnout, and wage concerns among healthcare professionals following the COVID-19 pandemic.[11] Organizing among graduate workers, nonprofit professionals, media, and cultural institutions (often college-educated workers) has also expanded, contributing to a notable, though still modest, shift of union presence into professionalized service sectors.[12]

Geographic Distribution

Union density remains highest in Hawaii (26.5%) and New York (20.6%), while North Carolina (2.4%), South Dakota (2.7%), and South Carolina (2.8%) sit at the bottom.[13] Combined, New York and California are home to nearly 30% of all union members in the United States.

Unionization efforts have traditionally been concentrated in the Northeast, Midwest, and West Coast. However, 2024 saw increased

[4]U.S. Bureau of Labor Statistics, Union Members—2024, News Release (Jan. 28, 2025).
[5]*Id.*
[6]Frank Manzo IV & Robert Bruno, The State of the Unions 2025 (Illinois Econ. Policy Inst. & Univ. of Ill. at Urbana–Champaign, Aug. 28, 2025).
[7]Hayley Brown & Emma Curchin, Union Density Continues to Decline, Ctr. for Econ. & Pol'y Research (Jan. 28, 2025).
[8]U.S. Bureau of Labor Statistics, Union Members—2024, News Release (Jan. 28, 2025).
[9]*The New York Times*, U.A.W. Wins Vote at Volkswagen Plant in Tennessee, April 2024.
[10]Ruth Milkman & Joseph van der Naald, The State of the Unions 2025: A Profile of Organized Labor in New York City, New York State, and the United States (CUNY Sch. of Labor & Urban Studies 2025).
[11]Rich Daly, Staffing Issues Fuel Healthcare Unionization Efforts Nationwide, Healthcare Financial Management Association (Oct. 21, 2025).
[12]National Center for the Study of Collective Bargaining in Higher Education and the Professions, 2024 Directory of Bargaining Agents and Contracts in Institutions of Higher Education (2024).
[13]U.S. Bureau of Labor Statistics, Union Members—2024, News Release (Jan. 28, 2025).

activity in the South and Southwest, regions historically resistant to organized labor. Notably, successful campaigns in Tennessee, Alabama, and Texas in 2024 signaled a potential shift in the geographic landscape of unionization, driven in part by large employers expanding operations in these areas. Policy environments also continue to shape outcomes: Collective bargaining protections at the state level correlate with membership gains, while states with right-to-work policies are associated with lower union density.[14] Michigan's 2024 repeal of right-to-work coincided with an uptick in unionization in the state, while policy shifts like Utah's 2025 ban on public-sector collective bargaining signal potential declines in union density.[15]

NLRB 2025 Case Activity Overview

The total number of unfair labor practice (ULP) charges and election petitions filed with the NLRB in 2025 declined a bit from 2024 but has remained elevated by traditional standards.[16] The Board also conducted significantly fewer union elections in 2025, with the total number of elections held declining by approximately 16% from 2024.

Unfair Labor Practice Charges

ULP filings declined roughly 7% from 2024. Additionally, dispositions show both heightened early case closures and increased negotiated resolutions. Of the charges filed, approximately 30% were withdrawn (up from 22% in 2024), 29% were dismissed (up from 18% in 2024), 36% were settled or adjusted (up from 30% in 2024), and 1% were closed on compliance with a Board order (up from 0.7% in 2024). The NLRB issued complaints in roughly 4% of cases in 2025—a substantially similar rate as the preceding year (approximately 3%). Taken together, these trends indicate a higher incidence of nonmerit closures and voluntary resolutions, along with a modest uptick in complaints, even as overall ULP filings receded.

Representation Petitions and Elections

Representation case activity similarly subsided from the 2024 peak but remained active. Across case types, the NLRB conducted roughly 16% fewer elections than in 2024—1,567 representation elections, 133 decertification elections, and 103 employer-filed elections, with a small remainder undetermined.

Further, fewer overall petitions for election were filed in 2025. For representation petitions, there were 2,100 petitions filed (about an 11.4% decline from 2024) and, of those, 1,406 elections were held, 27 petitions were dismissed, and 531 petitions were withdrawn. As compared to the previous year, this represents about a 13% decrease in the number of representation elections and a small uptick in withdrawn petitions (25% of petitions compared to 23%). The union win rate in these matters reached approximately 82%, an increase from 80% in 2024. Decertification activity likewise cooled: 296 petitions were filed (about a 9% decline from 2024), 33 were dismissed, and 94 were withdrawn. The union win rate in these matters reached around 43%, a marked increase from the previous year's win rate of 35%. The size of bargaining units remained substantially similar to the prior year, with a median of 20 and an average of 67.5 employees.

[14]Illinois Economic Policy Institute, New Research Shows Increasing Union Membership and Faster Wage Growth in States that Protect Collective Bargaining Rights – The Illinois Update (Sept. 8, 2025).
[15]Frank Manzo IV & Robert Bruno, The State of the Unions 2025 (Illinois Econ. Policy Inst. & Univ. of Ill. at Urbana–Champaign, Aug. 28, 2025).
[16]Based on a review of NLRB Case Activity Reports as of December 31, 2025.

Employer Takeaways

For employers, 2025 combined lower filing volumes with higher union success rates in representation and decertification elections and greater early attrition of ULP cases through withdrawals and dismissals. The modest rise in settlements and the small increase in complaint issuances underscore the continued need for front-end issue spotting, documentation discipline, and calibrated risk assessment in ULP responses. On the organizing front, even with fewer petitions and elections than in 2024, unions continued to prevail at elevated rates, making timely campaign readiness, supervisory training, and unit composition analysis critical to improving outcomes. With unit sizes holding steady and decertification success mixed, proactive employee-relations strategies and prompt compliance reviews remain central to mitigating risk and preserving operating flexibility.

Case activity reports can be found here and here.

Labor Board Constitutionality

Constitutional Challenges to the Board's Structure

The NLRA divides enforcement between the Board and its GC, both appointed by the president and confirmed by the U.S. Senate. Board members may be removed only for neglect of duty or malfeasance under 29 U.S.C. § 153, while administrative law judges (ALJs), appointed by the Board, may be removed only for good cause as determined by the Merit Systems Protection Board under 5 U.S.C. § 7521(a).

In 2025, the NLRB's structure continued to face major constitutional scrutiny. In August, a unanimous U.S. Court of Appeals for the Fifth Circuit panel held that the NLRA's structure is likely unconstitutional under Article II, finding that Board members and ALJs are improperly insulated from presidential removal. By contrast, in October, a unanimous U.S. Court of Appeals for the Ninth Circuit panel rejected similar Article II challenges, as well as arguments under the Fifth and Seventh Amendments.

Space Exploration Technologies Corp. v. NLRB, No. 24-50627 (5th Cir. Aug. 19, 2025)

In this consolidated appeal, the Fifth Circuit reviewed three district court injunctions. In *Space Exploration Technologies Corp. v. NLRB*, the Western District of Texas granted a preliminary injunction, acknowledging the public interest in NLRA enforcement but concluding that Congress "exceeds its power" by insulating NLRB members and ALJs with "good cause" removal protections that impair the president's Article II authority. In *Energy Transfer, LP v. NLRB*, the Southern District of Texas likewise enjoined proceedings, finding the two-step ALJ removal scheme likely unconstitutional under the Take Care Clause and declining to reach other arguments. In *Aunt Bertha v. NLRB*, the Northern District of Texas granted similar relief, adopting *Energy Transfer's* reasoning. On review, the Fifth Circuit held that the NLRB's structure was likely unconstitutional because removal protections for both Board members and ALJs unduly constrain the president's Article II authority. The court emphasized that district courts may enjoin NLRB proceedings on structural constitutional grounds, distinguishing such challenges from ordinary labor disputes and underscoring the need for immediate judicial review.

- **ALJ removal process.** Relying on *Jarkesy v. SEC*, the court concluded that the two-layer removal scheme for NLRB ALJs likely violates Article II by excessively limiting presidential removal power.
- **Board member removal.** The court rejected the NLRB's reliance on *Humphrey's Executor*, reasoning that NLRB Board members exercise substantial executive power and do not neatly fit within *Humphrey's* narrow exception for independent agencies. The absence of a statutory partisan-balance requirement further distinguishes the NLRB from the Federal Trade Commission model examined in *Humphrey's*.
- **Irreparable harm.** Adopting a "here-and-now" injury standard, the court held that being compelled to participate in proceedings before officers insulated from presidential control constitutes immediate, irreparable harm.
- **Severability.** The court declined to resolve severability of the NLRA's removal protections at the preliminary injunction stage, reserving that issue for final judgment.

NLRB v. North Mountain Foothills Apartments LLC, No. 24-2223 (9th Cir. Oct. 28, 2025)

The Ninth Circuit affirmed an NLRB order finding that North Mountain Foothills Apartments violated Section 8(a)(1) by interrogating and disciplining an employee for discussing wages and workplace conditions. After a supervisor berated and terminated the employee following a closed-door meeting, an ALJ found multiple violations, including threats and an overly broad rule restricting workplace discussions. The remedies (reinstatement, back pay, and removal of discharge references) were adopted in full by the Board and affirmed by the court.

The employer raised several constitutional challenges, which the Ninth Circuit rejected:

- **Article II removal challenge.** The employer argued that removal protections for Board members and ALJs violate Article II. The court held that, even assuming a defect, the employer failed to show harm on the record before it. Notably, this differs from the Fifth Circuit's approach, which treats subjection to allegedly unconstitutional agency authority as an injury in itself.
- **Seventh Amendment challenge.** The employer claimed that the NLRB's adjudicatory process violates the right to a jury trial. Relying on its prior precedent (including *Thryv Inc. v. International Brotherhood of Electrical Workers, Local 1269*), the Ninth Circuit held that the Board's remedies are equitable in nature and therefore do not trigger a jury-trial right.
- **Fifth Amendment due process/separation-of-powers challenge.** The employer argued that the NLRB's combination of investigative, prosecutorial, and adjudicatory functions violates due process. The court rejected this argument, citing long-standing Supreme Court and Ninth Circuit precedent upholding administrative regimes that combine such functions without offending separation of powers or due process principles. On the case-specific record, the court also found no showing of bias by the ALJ or Board members.

In sum, the Ninth Circuit affirmed the Board's findings and reiterated that discussing wages is protected concerted activity, concluding that the employee's termination resulted from the exercise of that protected activity.

Implications Ahead

The emerging circuit splits make these issues ripe for potential Supreme Court review. Questions about the scope of the Board's remedial authority may also reach the Court, as some circuits—such as the Sixth—have expressed skepticism about expansive remedies, while others, including the Ninth, have sustained them. With the Fifth, Third, and Sixth Circuits aligning in various respects against aspects of the Board's structure or remedial reach and the Ninth taking a contrary view, the conflict appears to be deepening.

The Board's structure, its investigative and adjudicatory processes, and the breadth of its remedies will continue to be contested in the courts, creating uncertainty for employers and employees until there is a higher-court resolution.

Congressional Proposals To Overhaul Federal Labor Law

Congress is considering several bills that would reshape key aspects of federal labor law and NLRB procedures. While each proposal targets a different part of the NLRA framework, together they signal a potential shift in union election administration, case filing standards, NLRB authority, and employee data privacy.

Below are summaries of each of the bills introduced:

S. 3117 – Worker RESULTS Act

Sen. Bill Cassidy
Introduced: November 6, 2025

This bill would significantly revise the NLRA's representation case processes. Specifically, the bill would do the following:

- **Certification timeline adjustment.** The bill creates a new "decertification window" allowing employees to seek a new election if they believe their representative is not bargaining in good faith. Under current practice, employees generally cannot pursue a subsequent election until after a first collective bargaining agreement is reached.
- **Secret ballot elections.** All representatives would need to be selected by NLRB-conducted secret ballot elections.
- **New quorum requirements.** Certification would require a majority of votes cast in a secret ballot election, with a minimum participation of two-thirds of the unit.

The bill also contemplates changes to election timing, petition procedures, and added election-related definitions.

S. 3115 – NLRB Stability Act

Sen. Bill Cassidy
Introduced: November 6, 2025

This proposal focuses on judicial consistency and forum clarity in NLRB matters. Specifically, the bill would do the following:

- **Alignment with appellate precedent.** NLRB orders would be constrained from conflicting with decisions of the appellate court in the circuit where the alleged unfair labor practice occurred.
- **Clarify judicial review venues.** The bill clarifies where parties may petition for review of NLRB orders, aiming to streamline litigation pathways.

S. 3116 – Fairness in Filing Act

Sen. Bill Cassidy
Introduced: November 6, 2025

This bill raises the bar for initiating unfair labor practice charges. Specifically, the bill would do the following:

- **Good faith filing and documentation.** Amendments to Section 10(b) would require a good faith certification and supporting documentation with the charge.
- **Penalties for repeated insufficient filings.** Repeat filers who submit charges without adequate documentation could face civil penalties of up to $5,000.

S. 3114 – Union Members Right to Know Act

Sen. Bill Cassidy
Introduced: November 6, 2025

This measure would expand union member disclosure requirements. Labor organizations would need to provide members with:

1. A copy of the Union Members Right to Know Act
2. A summary of an individual's rights under the Civil Rights Act of 1964
3. A summary of the employee rights as established by *Communications Workers v. Beck*

S. 3124 – Protection on the Picket Line Act

Sen. Tommy Tuberville
Introduced: November 6, 2025

This bill clarifies the discipline standard for misconduct occurring during otherwise protected activity.

Disciplinary action taken in response to harassment or abuse occurring during protected activity would not constitute an unfair labor practice unless:

1. The employee was engaged in protected activity
2. The employer knew of the protected activity
3. The employer acted with bias or negative intent toward that protected activity

S. 3128 – Worker Privacy Act

Sen. Tim Scott
Introduced: November 6, 2025

This proposal narrows the scope of employee contact information shared for organizing purposes. Specifically, the bill would do the following:

- **Limited contact disclosure.** When an election is scheduled, employers must provide unions with a list of employees and only one piece of contact information per employee, selected by the employee.
- **Restrict use and require confidentiality.** Unions may use the information solely for the election and must keep it confidential.

S. 3215 – Put American Workers First Act

Sens. Jim Banks, Bill Cassidy, Tommy Tuberville, Ted Budd, and Bernie Moreno
Introduced: November 19, 2025

This bill links NLRA rights and obligations with worker authorization status.

- **Unfair labor practice exposure.** The bill would make it an unfair labor practice for employers to hire or for unions to represent workers not authorized to work in the United States.
- **Good faith safe harbor.** Employers and unions would not be penalized if they made a good faith effort to verify work authorization using federal verification systems.
- **Adverse action clarification.** Terminating an unauthorized worker would not, by itself, evidence anti-union animus or other unlawful bias.

Looking Ahead: NLRB Outlook for 2026 and Beyond

Congress finally restored the NLRB's quorum on December 18, 2025, when it confirmed Donald Trump's two nominees to the Board and his nominee for the NLRB's general counsel role. In addition to Democratic appointee David Prouty—who, for much of the year, was the NLRB's only member—the Board now includes Scott Mayer and James Murphy. Crystal Carey is now the general counsel.

With a quorum in place, the Board can begin to tackle its backlog of pending ULP charges and election challenges. Consistent with trends observed during the first Trump administration, decisions in these cases are expected to be more employer friendly. That said, the Board is unlikely to immediately overturn precedent established during the Biden administration, because both Mayer and Murphy indicated during their confirmation hearings that they would wait until a full, five-member Board is seated to revisit major decisions. That commitment is consistent with long-standing Board practice, which waits to overturn prior decisions until there is a three-member majority to do so. Trump has not yet nominated anyone to fill the Board's two remaining open seats.

Even so, significant changes are presumably on the horizon for everything from captive audience meetings and so-called "quickie elections" to the standards applied when reviewing the legitimacy of workplace rules and worker classifications.

Captive-Audience Meetings: Revisiting *Amazon.com Services*

For decades, so-called "captive audience meetings" were generally considered to be lawful. *See Babcock & Wilcox*, 77 NLRB No. 577 (1948). But in late 2024, the Board held that employers violate the NLRA when they require employees to attend meetings where the employer expresses its views on unionization. Under *Amazon.com Services*, 373 NLRB No. 136 (2024), employers can meet with employees to discuss unions only if employees are given reasonable advance notice of the meeting and that notice contains certain information.

Specifically, employers need to tell employees: (1) The employer intends to express its views about unions at the meeting; (2) attendance is voluntary; (3) employees will not be subject to discipline for failing to attend or for leaving the meeting early; and (4) no records will be kept regarding who attended or for how long.

Rolling Back *Cemex*

Cemex Construction Materials Pacific, 372 NLRB No. 130 (2023), fundamentally altered the organizing landscape by presenting employers with a choice: recognize a union when a majority of employees have designated it as their representative, or promptly file an election petition to test majority support. Notably, the *Cemex* decision further explained that if the employer committed certain ULPs that required setting aside an election, the Board would dismiss the petition and impose a bargaining order.

However, in February 2025, then-AGC William Cowen rescinded a guidance memo issued by his predecessor regarding the *Cemex* decision, and the Board is now widely expected to overturn *Cemex* and return to the standard set out in *Linden Lumber*, which allowed employers to refuse certain evidence of union support and insist on an election.

Even so, employers should continue to carefully calibrate their campaign-related conduct while *Cemex* remains the law of the land.

Work Rules, Handbooks, and Misconduct During Protected Activity: *Stericycle* and *Lion Elastomers*

In *Stericycle*, 372 NLRB No. 113 (2023), the Board supplanted the more employer-accommodating framework of *The Boeing Co.*, 365 NLRB No. 154 (2017), and *LA Specialty Produce*, 368 NLRB No. 93 (2019), with a standard that presumes workplace rules are unlawful if they tend to chill Section 7 activity. The decision shifted the burden to employers to prove challenged rules are narrowly tailored and supported by legitimate business justifications.

As with much of the Biden-era precedent, the current Board is expected to overturn *Stericycle* and return to a more employer-friendly standard. Here, that means restoring a *Boeing*-like categorization or balancing approach that affords greater latitude for neutral rules addressing civility, confidentiality, and management prerogatives, so long as the rules do not explicitly restrict protected activity.

The Board is also likely to revisit *Lion Elastomers*, 372 NLRB No. 83 (2023), which created setting-specific standards that made it more difficult to discipline employees for misconduct during labor disputes—even when their conduct involved racist or misogynistic threats. Presumably, the Board will look to return to a more objective, setting-neutral standard that allows employers to consistently apply discipline rules, including in the context of labor activity.

Severance Agreements and *McLaren Macomb*

McLaren Macomb, 372 NLRB No. 58 (2023), made it unlawful to offer employees severance agreements containing broad confidentiality and non-disparagement restrictions. The previous Board reasoned that such terms tended "to restrain, coerce, or interfere with the exercise of Section 7 rights of employees" even when the employee did not execute the offending agreement.

McLaren marked a reversal from precedent set under the first Trump administration, which looked not only at the text of a proposed agreement, but also the circumstances under which the agreement was presented to an employee. *See, e.g., Baylor Univ. Med. Ctr.*, 369 NLRB No. 43 (2020); *International Game Technology*, 370 NLRB No. 50 (2020). With a newly constituted conservative majority, the Board is expected to reverse course once again. Although the *McLaren* decision itself remains in effect for now, the Trump-appointed AGC has already rescinded a broadly worded guidance memo from previous General Counsel Jennifer Abruzzo interpreting the *McLaren* decision. Presumably, once the Board returns to full strength, it will be looking foran opportunity to formally overrule *McLaren* in full.

Additional Areas Likely To See Movement

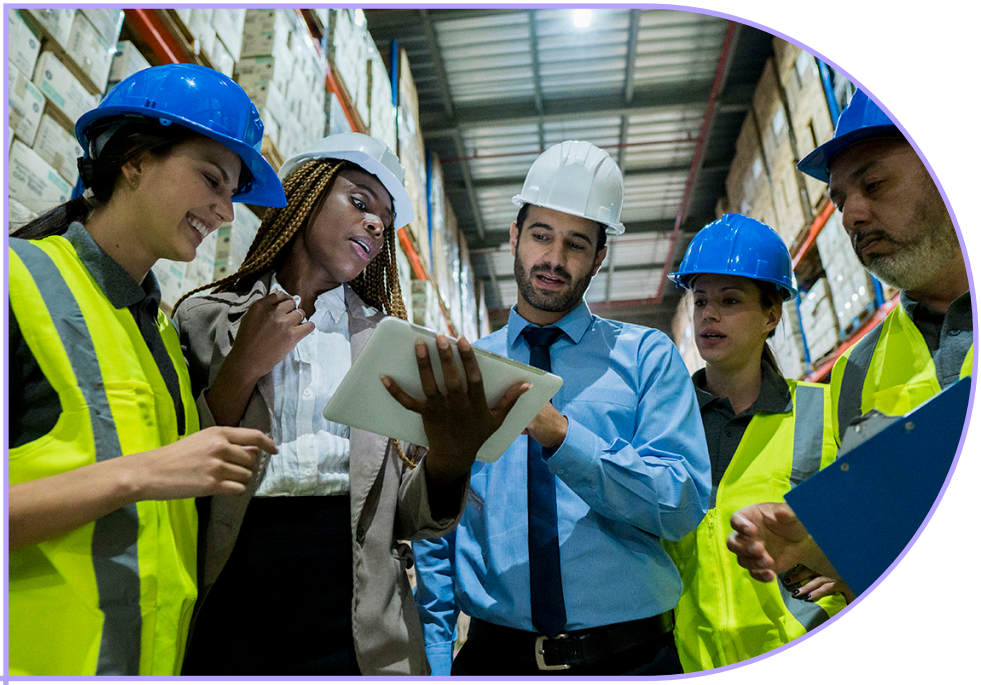
Independent contractor classification. In *Atlanta Opera*, 372 NLRB No. 95 (2023), the Board re-embraced a totality-of-the-circumstances test akin to that set out in *FedEx Home Delivery*, 361 NLRB No. 610 (2014). The decision marked a move away from *SuperShuttle DFW*, 367 NLRB No. 75 (2019), which emphasized entrepreneurial opportunity as the "animating principle" of classification analyses. The new Republican-led Board will likely look to reinstate that approach to classification cases.

Protected concerted activity scope. Finally, decisions like *Miller Plastic Products*, 372 NLRB No. 134 (2023), and *American Federation for Children*, 372 NLRB No. 137 (2023), broadened

the scope of what constitutes protected concerted activity to include, for example, certain individual complaints and advocacy on behalf of nonemployees. The Board will likely seek to rein in that definition and (re)focus on conduct tied more closely to the terms and conditions of employees' employment as it decides cases in 2026 and beyond.

Bottom Line

With a quorum restored, Board policy is set to swing back toward more employer-friendly outcomes. Even so, employers should continue to follow the law established by decisions like *Cemex* and *McLaren* unless and until they are expressly overruled. Marquee reversals may still be a long way off, but employers should track developments closely as the Board's docket and composition evolve.



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