



INSTITUTE FOR THE
AMERICAN WORKER

STACKED DECK

**How the NLRB Favors Organized
Labor and Fails Workers**

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EXECUTIVE SUMMARY

The National Labor Relations Act (NLRA or “the Act”) was enacted with the promise of industrial peace that would be accomplished by, among other things, leveling the playing field between employers and employees. The Act provided employees the right to collectively bargain and created a process for resolving labor disputes through the National Labor Relations Board (NLRB or “the Board”), a new government agency.

In 2025, America commemorated the 90th anniversary of the NLRA. Today we find a law of unintended consequences — one that unions have manipulated and litigated to acquire more power. The interests of the workers, whom unions claim to protect, are often buried under legal precedents and arcane labor rules that make it hard, if not impossible, to make informed decisions regarding unionization. Moreover, the NLRA’s legal landscape is unpredictable and so complex that only the largest employers have a chance of successfully

navigating it. For Main Street America, the Act has become a series of landmines.

The imbalance in the law is stark when you look at how the NLRA is applied to unions as compared to employers — the majority of which are small businesses. This is most evident when looking at restrictions on employer communications with workers. For instance, employer activities deemed illegal “threats” under the NLRA include:

- policies that would discipline employees who use harassing or defamatory language;
- meetings that explain how having a union at the company would impact operations; and
- statements about how the direct employer-employee relationship would change with unionization.

Unions, on the other hand, enjoy a decades-old exemption from prosecution when they engage in activity undertaken to achieve “legitimate labor ends,” even actions that otherwise would be considered extortion, including violence.

WORKERS LOSE UNDER THE NATION'S LOPSIDED LABOR LAWS THAT INVITE UNION DECEPTION AND RESTRICT EMPLOYER COMMUNICATIONS TO EMPLOYEES.

While employers are prohibited from having mandatory employee meetings describing how unionization will impact the company, unions maintain virtually unlimited access to workers outside of working hours, including at workers' homes.

The NLRA prohibits employers from making any promise to an employee relating to wages or anything of benefit, but no such restriction applies to unions, allowing them to promise everything from improved wages and benefits to employee input in decision-making.

Unions may, and do, spy on workers by placing union members as employees at businesses they seek to organize. By contrast, while employers may observe public union activity on company premises, they may not even create the impression that they have surveilled workers.

Moreover, creating a union is far easier than eliminating one.

The formal unionization process leaves employers little time to prepare for a certification election and to ensure workers hear the employer's perspective on how unionization may impact the business and workforce. The process is overly complex and puts small employers at a significant disadvantage. Moreover, unions often use corporate campaigns to pressure employers to accept the union without an election ever being held, depriving workers of their say.

The process for decertifying a union is also extraordinarily convoluted and provides unions with multiple opportunities to prevent a decertification vote from even happening.

The NLRA and the NLRB's decisions are not where the disparity between unions and employers ends. Antitrust laws strictly govern what activities businesses can and

cannot engage in relating to the labor market. Again, unions enjoy an exemption from antitrust laws as they might apply to labor-related activities.

Workers lose under the nation's lopsided labor laws that invite union deception and restrict employer communications to employees.



INTRODUCTION

In 1935, President Franklin Delano Roosevelt signed the NLRA into law to guarantee the right of workers to organize and collectively bargain over terms and conditions of employment, such as wages and benefits. In 1947, Congress passed the Taft-Hartley Act, making significant changes to the law. Among other things, Taft-Hartley sought to establish a balance between unions and employers by creating protections for employers. Together, the NLRA and the Taft-Hartley amendments to it are meant to promote a balance of power between unions, workers, and employers.

Section 7 of the NLRA establishes that employees have the right to organize and “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” It also protects employees’ right not to join a union; however, in states without right-to-work laws, workers may still be required to pay union dues or fees as a condition of employment under a union security agreement.

Section 8(a) of the NLRA describes what constitutes an “unfair labor practice” (ULP), an act committed by an employer that violates workers’ federally protected right to unionize and engage in collective action. Section 8(b) defines ULPs committed by unions, including actions that coerce or discriminate against employees who choose not to join or support a union or that interfere with an employer’s rights under the Act.

In practice, the NLRA's imbalance between employees and employers has empowered unions as institutions. This report catalogs the rights unions, workers, and employers are guaranteed under the law, highlighting the great disparity in how those rights are applied to unions compared to the workers they represent and the employers with whom they negotiate.



T.I.P.S. — THREATS, INTERROGATION, PROMISES, AND SURVEILLANCE

Effective communication with workers is critical for both employers and unions during a union organizing campaign. However, the primary focus of federal labor policy should be safeguarding the informational needs of the worker. Workers require balanced and comprehensive information to make an informed decision about whether joining a union is the right choice for them.

Generally, Sections 8 (a) and (b) of the NLRA prevent employers and unions from coercing employees in a manner that hinders their ability to make their own decision on union representation. TIPS, which stands for “Threats, Interrogation, Promises, and Surveillance,” is a shorthand used by human resource professionals, union organizers, and labor lawyers to summarize key employer actions deemed ULPs under Section 8(a)(1) of the NLRA.

When it comes to union organizing, Section 8(c) of the NLRA vests employers with broad free speech rights to voice their opinions on unions to their workforces. (These free speech protections equally apply to unions.) The NLRA does, however, place limits on what employers can do if their employees express an interest in forming a union.

While the TIPS framework defines ULPs for employers, we use it here to compare NLRA speech and behavioral

restrictions to both employers and unions, and illustrate their impact.

THREATS

EMPLOYERS

Employers cannot threaten employees with job loss if they choose to join a union.¹ Neither can they “[t]hreaten employees with adverse consequences, such as closing the workplace, loss of benefits, or more onerous working conditions, if they support a union, engage in union activity, or select a union to represent them.”² Employers also cannot threaten employees with adverse consequences if they engage in protected, concerted activity, including in cases where a single employee tries to initiate, induce, or prepare a group of employees to act against or bring a complaint to an employer’s attention.³

While the law narrowly construes what constitutes an illegal threat, the NLRA broadly interprets certain actions and policies employers undertake as illegal threats.

Employer Workplace Policies

In recent years, adverse NLRB rulings create uncertainty around commonplace and commonsense workplace policies designed to ensure a safe, professional environment for workers and customers alike.

For example, in the name of protecting employees from threatening activity by employers, another 2023 decision by the Board called into question the legality of other various workplace policies. In *Stericycle, Inc.*, the Board said that workplace rules would be evaluated based on whether employees would reasonably construe such rules as prohibiting their ability to engage in protected concerted activity under Section 7. This evaluation aims to ensure that employer policies do not discourage such activity.⁴ The decision throws into question the legality

1 [NLRB, “Employer/Union Rights and Obligations.”](#)

2 [NLRB, “Interfering with employee rights \(Section 7 & 8\(a\)\(1\).”](#)

3 *Id.*

4 *Stericycle, Inc.* 372 NLRB No. 113 (August 2, 2023).

EMPLOYER MEETINGS ON UNIONIZATION (EMUS) PROVIDE THE BEST OPPORTUNITY FOR EMPLOYERS TO INFORM EMPLOYEES ABOUT THEIR RIGHTS DURING A UNIONIZATION CAMPAIGN AND TO PRESENT THEIR VIEWS ON HOW A UNION WOULD IMPACT COMPANY OPERATIONS.

of many types of employee handbook and workplace policies, including rules that prevent (1) taking pictures at employer facilities; (2) recording conversations with managers; (3) sharing information with the media; (4) discussing wages with fellow employees; (5) revealing company investigations; (6) engaging in unprofessional or disrespectful communications or activities with employees or supervisors; (7) engaging in activities that reflect badly on the company or would damage its reputation; and (8) personal phone calls outside meal and break periods.⁵

Moreover, a 2023 decision by the Board in the case of *Lion Elastomers LLC* expanded the right of unions to engage in harassing behavior. Union organizers and workers can use offensive or abusive actions or language in the workplace against other workers, the employer, or even customers, so long as it is done while engaging in protected activity. This expansion raises concerns about potential conflicts with Title VII of the Civil Rights Act and other anti-discrimination laws that require employers provide safe, hostile-free workplaces.⁶ As the Institute for the American Worker explained in its report, “The Battle of the 7s,” the Board’s decision in *Lion Elastomers* ruled that Section 7 of the NLRA may prevent employers from

disciplining employees who use blatantly discriminatory or harassing language in the workplace, if such behavior can be tied to labor union activity.⁷

Employer Meetings

Employer meetings on unionization (EMUs) provide the best opportunity for employers to inform employees about their rights during a unionization campaign and to present their views on how a union would impact company operations. Until recently, EMUs were considered a lawful exercise of employer speech under the NLRA, a status they held since 1948.⁸ The guardrails of what employers could and could not say in these meetings are rigidly enforced by unions, who promptly file ULP charges whenever an employer crosses the line during a meeting. The NLRB and states, however, have moved to limit or reconsider whether employers may hold these meetings, arguing that EMUs are inherently threatening to employees. In an April 7, 2022, memorandum to NLRB regional directors, officers-in-charge, and resident officers, then-General Counsel Jennifer Abruzzo announced that she would urge the Board to find EMUs, which she referred to as “captive-audience meetings,” unlawful.⁹ In a press release accompanying the memorandum, General Counsel

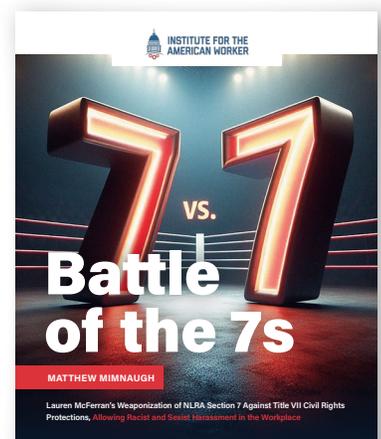
⁵ Robert M. Schartz, “*Does Your Employer Have Illegal Rules on the Books?*” Labor Notes (Oct. 6, 2023).

⁶ *Lion Elastomers LLC*, 372 N.L.R.B. No. 83 (May 1, 2023).

⁷ Matthew Mimnaugh, “*Battle of the 7s*,” Institute for the American Worker (June 2024).

⁸ NLRA § 8(c); *See also Babcock & Wilcox Co.*, 77 NLRB 577 (1948).

⁹ Jennifer A. Abruzzo, General Counsel, Office of the General Counsel Memorandum GC 22-04, “The Right to Refrain from Captive Audience and other Mandatory Meetings” (April 7, 2022).



Abruzzo described EMUs as a “license to coerce” and “at odds with fundamental labor-law principles, our statutory language, and our Congressional mandate.”¹⁰

Although the NLRB’s then Acting General Counsel William B. Cowen rescinded the April 2022 memorandum,¹¹ a recent NLRB decision effectively bans such meetings, overturning decades of legal precedent. In *Amazon.com Services LLC*, the NLRB ruled that employers who require employees to attend a meeting where the company discusses the disadvantages of joining a union violate NLRA Section 8(a)(1).¹² After *Amazon.com Services LLC*, companies may still hold employee meetings on unionization; however, they cannot make such meetings mandatory. Moreover, employers must follow certain procedures, which include clearly notifying employees that such meetings are voluntary and that unionization will be discussed. Notices must assure employees that they will not face negative consequences if they do not attend. In “Free Speech Under Fire: How Restricting Employee Meetings on Unionization Prevents Workers from Making Informed Decisions,” James A. Prozzi breaks down the legal and constitutional flaws of the NLRB’s *Amazon.com Services LLC* decision.¹³

Increasingly, states are also moving to limit or outlaw EMUs. In recent years, Alaska, California, Connecticut, Hawaii, Illinois, Maine, Minnesota, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington have enacted initiatives or legislation banning or severely restricting the use of EMUs.¹⁴ Several of these states have faced legal challenges that argue their actions are preempted by the NLRA, which generally governs employer-employee communications concerning unionization.¹⁵ Meanwhile, in Congress, Senator Josh Hawley (R-MO) proposed a “legislative framework” to reform private-sector labor law, which includes preventing employers from holding EMUs.¹⁶

Advocates for curtailing employer speech and banning EMUs perceive them as a threat to workers. Yet, on balance, voters favor them. According to 2022 polling released by the Institute for the American Worker, 41% of respondents had a positive view of EMUs, 43% a neutral view, and just 12% held a negative view of these meetings.¹⁷ Importantly, 59% of respondents who were union members viewed them positively.¹⁸

10 National Labor Relations Board Office of Public Affairs, “[NLRB General Counsel Jennifer Abruzzo Issues Memo on Captive Audience and Other Mandatory Meetings](#),” (April 7, 2022).

11 William B. Cowen, Acting General Counsel, Office of the General Counsel Memorandum GC 25-05, “Rescission of Certain General Counsel Memoranda,” (Feb. 14, 2025).

12 *Amazon.com Services LLC*, 373 NLRB No. 136 (Nov. 13, 2024).

13 James A. Prozzi, “[Free Speech Under Fire: How Restricting Employee Meetings on Unionization Prevents Workers from Making Informed Decisions](#),” Institute for the American Worker (Feb. 2025).

14 Douglas M. Oldham, Barnes & Thornburg LLP “The State of Employment Law: 12 States Prohibit Captive Audience Meetings” *The National Review* (Aug. 21, 2025).

15 For legal challenges to state captive audience meeting bans based on NLRA preemption and constitutional claims, see, e.g., *Cal. Chamber of Commerce v. Bonta*, No. 2:24-cv-03798-DJC-SCR, (E.D. Cal. Sept. 30, 2025) (order granting preliminary injunction against California SB 399 captive audience ban on NLRA preemption and First Amendment grounds); *Ill. Policy Inst. v. Flanagan*, No. 1:24-cv-06976 (N.D. Ill., E.D. Div. Sept. 30, 2025) (challenge to Illinois captive audience ban dismissed on sovereign immunity but raising NLRA preemption and free speech issues); *Minnesota Chapter of Associated Builders and Contractors; Nat’l Fed. of Independent Business, Inc.; Laketown Electric Corp. v. Ellison*, No. 24-3116, (8th Cir., Sept. 3, 2025) (dismissal of Minnesota captive audience ban challenge, with potential for renewed litigation); *Chamber of Commerce v. Bartolomeo*, 3:22-cv-01373 (D. Conn. Nov. 1, 2022) .

16 S. 844, “Faster Labor Contracts Act,” introduced by Sen. Josh Hawley (March 4, 2025). Institute for the American Worker, “[Backgrounder: Senator Hawley’s PRO Act Lite](#),” (Last updated on March 13, 2025).

17 Institute for the American Worker, “[Backgrounder: Polling Results for Employer Meetings on Unionization](#),” (August 2022).

18 *Id.*



Employer Statements

Non-unionized workers typically have more direct relationships with their employer than their unionized counterparts. In a non-unionized workplace, when the employee has an issue at work, he will contact his manager, a human resources employee, or even the owner of the company, depending on its size. For decades, courts have allowed employers to make statements about how the employee-employer relationship might change if unionization occurs.¹⁹ Yet in its 2024 decision in *Siren Retail Corp.*, the NLRB found that such statements could be perceived as threats if they suggested that unionization could lead to the loss of established workplace benefits.²⁰ The new standard imposes strict scrutiny on employer statements during union campaigns. It requires such statements be based on “objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control.”²¹

UNIONS

Unions, like employers, may not use threats to secure employee votes during a union election. The NLRB provides examples of the types of threats that unions cannot engage in under Section 8(b):

- Telling employees they will lose their jobs if they do not support the union;
- Punishing (e.g., disciplining) an employee for not joining a union;
- Refusing to process a grievance for an employee who has either criticized the union or not joined it;

- Fining employees who have resigned from the union for engaging in protected concerted activity or crossing the picket line;
- Engaging in picket-line misconduct, including threatening, assaulting, or barring non-strikers from an employer’s business;
- Striking over terms unrelated to employment or conditions; and
- Coercing neutral parties to get involved in a labor dispute.²²

Although there are examples of illegal union behavior, courts often have a narrow definition of what they consider threatening behavior by a union.

The Hobbs Act criminalizes extortion and defines it as “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”²³ Yet, in 1973, the Supreme Court exempted unions from prosecution under the Hobbs Act when activities that would otherwise be considered extortion, including violence, were used to achieve “legitimate labor ends.”²⁴ “Legitimate labor ends” include “bargaining for higher wages, demanding that an employer who has discriminated hire more minorities, and seeking to make non-union jobs subject to collective bargaining.”²⁵ In *United States v. Enmons*, union members were charged with blowing up an electrical transformer substation, draining oil from a transformer, and shooting three transformers with high-powered rifles. The Supreme Court held that such activity was not “wrongful” under the Hobbs Act, since

19 *Tri-Cast Inc.*, 274 NLRB 377 (1985).

20 *Siren Retail Corp. d/b/a Starbucks*, 373 NLRB No. 135 (Nov. 8, 2024).

21 *Id.*

22 NLRB, “*Employer/Union Rights and Obligations*” (last visited Dec. 27, 2023).

23 18 U.S.C. § 1951(b)(2).

24 *United States v. Enmons*, 410 U.S. 396, 401 (1973).

25 Duncan Weinstein, “The Limits of Wrongfulness: What Exactly is Prohibited by Hobbs Act Extortion?” *Northwestern Journal of Law & Social Policy*, Vol. 18, Iss. 2, Art. 6, 147, at 159 (Spring 2023), citing *Enmons* at 397-401, *United States v. Taylor*, 92 F.3d 1313, 1319 (2d. Cir. 1996), *United States v. Burkho*, 871 F.3d. 1, 16 (1st Cir. 2017).

WORKERS LOSE UNDER OUR CURRENT SYSTEM, WHICH NARROWLY DEFINES THREATENING COMMENTS AND BEHAVIOR BY A UNION BUT BROADLY DEFINES IT FOR AN EMPLOYER.

the unions were undertaking such acts in the name of bargaining for higher wages.²⁶

Legislation to close the loophole allowing for unions to engage in actions that would otherwise be considered extortionate has been introduced over the last several sessions of Congress.²⁷

Unions also are given wide latitude by the NLRB and courts when they solicit employees of a company to sign “union authorization cards.” These cards authorize the union to negotiate employment terms and conditions on his or her behalf. Over the years, the NLRB and courts have excused numerous extortion tactics, including threats of violence to employees and even their children, when union officials are trying to obtain signed union authorization cards.²⁸

WORKER IMPACT

Workers lose under our current system, which narrowly defines threatening comments and behavior by a union but broadly defines it for an employer. It is important to recognize that condoning any form of extortion, even if it is for “legitimate labor ends,” can put workers at serious risk of harm. For example, what if a worker had been present when rifles and explosives were used to destroy the transformers in the *Enmons* case? Furthermore, current labor law can also create hostile work environments, which frequently lead to emotional harm.²⁹ Efforts to limit employers’ ability

to communicate with their employees will only limit workers’ ability to access the information they need to determine if joining a union is right for them.

INTERROGATION

Workers deciding on unionization should not be confronted with aggressive questioning regarding their support for a union. For this reason, the NLRA explicitly states that employers may not interrogate employees. Yet no similar prohibition exists in the Act for unions.

EMPLOYERS

Interrogation typically refers to actions taken by employers that involve questioning or seeking information from employees about their union-related activities, views, or affiliations. Interrogation can be perceived as a tactic employers use to gather information, discourage union support, or influence employees’ decisions regarding unionization.

As previously mentioned, employers may host EMUs to present their views on how unionization could impact the company and inform employees of their rights during a union campaign, but employee attendance must be voluntary, and the employer must follow certain notification and other procedures. Beyond EMUs, the NLRB has taken a broad view of employer

26 *Enmons*, at 398.

27 H.R. 4256, “Freedom from Union Violence Act of 2019,” introduced by Rep. Francis Rooney, (September 9, 2019); H.R. 5171, “Freedom from Union Violence Act of 2021,” introduced by Rep. Scott Perry (September 3, 2021); H.R. 5314, “Freedom from Union Violence Act of 2023,” introduced by Rep. Scott Perry (August 29, 2023); H.R. 5054, “Freedom from Union Violence Act of 2025,” introduced by Rep. Scott Perry (August 26, 2025).

28 F. Vincent Vernuccio, “*Protecting the Secret Ballot: The Dangers of Union Card Check*,” Mackinac Center for Public Policy (Oct. 22, 2019).

29 Scott Sleek, “*Toxic workplaces leave employees sick, scared, and looking for an exit. Here’s how to combat unhealthy conditions*,” American Psychological Association (June 27, 2024).

and employee interactions that it views as “coercive” interrogation and thereby illegal.

Employers, for example, cannot “coercively” question employees to learn their or their co-workers’ opinions on or activities regarding a union.³⁰ Deciding whether the employer has engaged in coercive questioning is a subjective process based on many factors. These include who is asking the questions, where and how the questions are being asked, what information is sought, whether the questioned employee openly supports the union, and whether the questioning happens in the context of other ULPs.³¹ Except under significant constraints, employers also may not poll their employees to determine overall worker support for a union.³²

Whether an interrogation is unlawful if, given the totality of the circumstances, the questioning tended to restrain, coerce, or interfere with the employee’s exercise of his or her protected rights under the Act.³³

An interrogation will be considered a ULP if certain factors are met, including: (1) employer history of hostility toward or discrimination against union activity; (2) the kind of information the employer seeks; (3) the relative power of the person doing the questioning; (4) where and how the interrogation occurred; and (5) the truthfulness of the interrogated employee’s reply.³⁴

Underpinning this analysis is the longstanding *Johnnie’s Poultry* standard, reaffirmed by the NLRB in its 2022 *Sunbelt Rentals, Inc.* decision. It requires employers conducting interviews to: (1) clearly communicate the purpose of questioning; (2) assure the employee that no reprisal will occur; (3) obtain the employee’s

voluntary participation; (4) conduct questioning free from employer hostility or coercion; and (5) limit questions to the legitimate purpose of the investigation without prying into employees’ subjective union views.³⁵ Failure to comply with these safeguards renders the interrogation *per se* unlawful.

In applying this standard, the Board has found that employer interrogation occurred in the context of the unionization of a company with just two employees. The NLRB found an illegal interrogation had occurred when the owner of the company asked one of its two employees, on the worksite, whether he had signed a union authorization card.³⁶

Moreover, the NLRB has found that illegal interrogation by an employer does not need to occur face-to-face. It can happen through a written job application form³⁷ and even by text message.³⁸

UNIONS

Under current law, most union speech is implicitly sanctioned, except for threats to employees that they will lose their jobs if they oppose the union.³⁹ Unions have much more flexibility than employers in how they engage prospective members when they make the case for voting for a union in their workplace, whether through individual meetings or in small or large groups.

Non-employee union officials may visit employees before and after work and during breaks on company property (1) in limited cases where the worksite is inaccessible, and no other channels are available for

30 NLRB, *“Interfering with employee rights (Section 7 & 8 (a)(1))”*

31 Id.

32 Id.

33 *Rossmore House*, 269 NLRB 1176, 1178 (1984).

34 *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964).

35 *Sunbelt Rentals, Inc.*, 372 NLRB No. 24 (2022); *Johnnie’s Poultry Co.*, 146 NLRB 770 (1964).

36 *Bristol Industrial Corp. and C.O. and C.O. Sabino Corp.*, [366 NLRB No. 101 \(June 7, 2018\)](#).

37 *NLRB v. Bighorn Beverage*, 614 F.2d 1238 (9th Cir. 1980).

38 *RHCG Safety Corp. and Construction & General Building Laborers, Local 79, LUNA*, 365 NLRB No. 88 (June 7, 2017).

39 NLRB, *“Employer/Union Rights and Obligations.”*

the employee and the union to communicate; or (2) if the employer allows other non-employee groups to solicit on company property (i.e., the employer cannot discriminate against unions).⁴⁰ Unions also may contact employees at home, by phone, or by mail. Within two business days after the NLRB has called for a union election (or longer if that is agreed to), employers must provide the “full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ‘cell’ telephone numbers)” of all employees who can vote in the election concerning the union. These voting list requirements are historically known as the “*Excelsior* list” in reference to the case where it was first established, *Excelsior Underwear, Inc.*⁴¹

Home visitation is the most powerful tool available to unions. While employers are prohibited from visiting employees’ homes during a union election, the NLRA allows union representatives to visit employees at their homes throughout the unionization process.⁴² Union representatives can encourage them to join a union at the beginning stage when they are collecting union authorization cards and also once a unionization campaign is underway.⁴³ There is no limit to the number of home visits a union can make.⁴⁴ The only restriction is that union representatives conduct home visits in a non-coercive manner.⁴⁵ Yet, unions have routinely exploited home-visit rules to coerce workers into signing authorization cards. Testimony from former organizers and employees describes

coordinated “blitz” tactics – unannounced home visits marked by intimidation, implicit threats, and repeated pressure.⁴⁶

WORKER IMPACT

Interrogation of an employee by an employer or a union directly interferes with a worker’s ability to make a free choice regarding unionization. Employers are subject to limitations so strict that virtually any question to an employee may be viewed under the law as illegal interrogation. Yet the law seemingly invites illegal interrogation by unions through broad access to employees in even the most intimate of settings – the home.

Instead of this unbalanced standard, workers should control how much personal information unions receive and unions should be penalized if they misuse sensitive employee information. The Employee Rights Act, discussed further on Page 25, would restore legal balance and return power to workers.

PROMISES

EMPLOYERS

Section 8(c) of the NLRA specifies, “[t]he expressing of any views, argument, or opinion, or the dissemination thereof ... shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat

40 *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); See *Lucile Salter Packard Children’s Hospital at Stanford v. NLRB*, 97 F.3d 583 (D.C.Cir. 1996).

41 29 CFR §102.62(d); NLRB, Office of the General Counsel, An Outline of Law and Procedures in Representation Cases, at 315, 336 (January 2025) (Hereinafter “NLRB Outline”); *Excelsior Underwear, Inc.*, 152 NLRB 1236 (1966).

42 *Id.*, at 365-366, citing *F.N. Calderwood, Inc.*, 124 NLRB 1211, 1212 (1959). (Subsequent “See also” citations omitted.)

43 *Id.*, citing *Plant City Welding & Tank Co.*, 119 NLRB 131, 133-134 (1957).

44 Richard Epstein, “The Case against the Employee Free Choice Act,” Chicago Unbound, Coase-Sandor Working Paper Series in Law and Economics, Coase-Sandor Institute for Law and Economics at 29 (2009).

45 NLRB, “[Coercion of employees \(Section 8\(b\)\(1\)\(A\)\).](#)”

46 [Statement of F. Vincent Vernuccio, President, Institute of the American Worker](#) before the House Committee on Education and the Workforce, Subcommittee on Health, Employment, Labor, and Pensions, “Protecting Workers and Small Businesses from Biden’s Attack on Worker Free Choice and Economic Growth,” at 5 (Dec. 13, 2023) (Hereinafter “Vernuccio Dec. 13 Testimony”).

THE NLRA RECOGNIZES THE COERCIVE EFFECT PROMISES CAN HAVE ON WORKERS BUT ONLY WHEN MADE BY EMPLOYERS.

of reprisal or force or *promise of benefit*.”⁴⁷ The NLRB’s “Employee Rights Under the National Labor Relations Act” clearly states, “Under the NLRA, it is illegal for your employer to: ... Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.”⁴⁸

Two Supreme Court cases established the precedent prohibiting employer promises of benefits in the context of unionization. In *Labor Board v. Exchange Parts Co.*, the Supreme Court found that the employer interfered with employees’ ability to join a union when it promised and gave benefits during a union organizing campaign.⁴⁹ Subsequently, in *NLRB v. Gissel Packing Co., Inc.*, the Supreme Court established the principle that employers could be found guilty of ULPs for making promises of benefits or improvements to dissuade employees from supporting a union.⁵⁰ The Court held that such promises could have a coercive effect on employees’ exercising their rights under the NLRA.⁵¹

Since the *Exchange Parts* ruling, the NLRB has consistently found that employer promises or provision of benefits to employees during a union organizing campaign violate the NLRA.⁵²

UNIONS

Although Section 8(c) of the NLRA applies to both unions and employers, courts have found that union promises are permissible. As the NLRA explains, “[e]mployees are

generally able to understand that a union cannot obtain benefits automatically by winning an election but must seek to achieve them through collective bargaining. Union promises ... are easily recognized by employees to be dependent on contingencies beyond the union’s control and do not carry with them the same degree of finality as if uttered by an employer who has it within his power to implement promises of benefits.”⁵³

During a unionization campaign, unions may make promises to employees to garner support without consequence, regardless of the likelihood of fulfilling those promises or whether the union ever attempts to do so. Common promises include improved wages, job security, better working conditions, fair treatment and due process for disciplinary proceedings, improved health and safety practices, employee input for decision-making, additional training and professional development, formalized grievance procedures, and union representation and legal support.

The result is a legal regime in which unions may freely make sweeping, aspirational promises to secure employee support, even though those promises are unenforceable and may never be pursued.

WORKER IMPACT

When evaluating the benefits of unionization versus non-unionization, employees need accurate information to effectively weigh their options. The NLRA recognizes

47 NLRA § 8(c) (emphasis added).

48 NLRB, “*Employee Rights Under the National Labor Relations Act*,” (Sept. 2011).

49 *Labor Board v. Exchange Parts Co.*, 375 U.S. 405 (1965).

50 *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

51 *Id.*

52 Daniel V. Johns, “Promises, Promises: Rethinking the NLRB’s Distinction Between Employer and Union Promises During Representation Campaigns,” 10 U. PA. J. Bus. L. 433 at 437 (Winter 2008).

53 NLRB Outline at 361 (January 2025) citing *Smith Co.*, 192 N.L.R.B. 1098, 1101 (1971).

THESE TECHNOLOGIES ALSO MAY REPRESENT A NEW FRONTIER FOR ILLEGAL SPYING CHARGES AGAINST EMPLOYERS.

the coercive effect promises can have on workers but only when made by employers. One would be hard-pressed to find a union promise to an employee that would be deemed illegal under the Act. Yet, as with interrogation, decades of NLRB and court decisions have found that virtually any promise made by an employer will be viewed as coercive and, as a result, illegal under the NLRA.

SURVEILLANCE

EMPLOYERS

While employers may observe public union activity on company premises, the NLRB is clear that employers may not “spy” on employees.⁵⁴ Employers violate Section 8(a)(1) when they engage in direct surveillance of employees’ union activities or create the impression of surveillance. The test for determining whether an impression of surveillance exists is whether employees would reasonably assume their activities were being monitored.⁵⁵

In a case when no actual surveillance occurred, the NLRB found an employer unlawfully created the impression of surveillance by inquiring about discussions at a union meeting, which could lead its employees to reasonably believe their union activities were being monitored.⁵⁶ In another case, the NLRB

found an employer unlawfully created the impression of surveillance by installing surveillance cameras in break areas where union meetings occurred.⁵⁷ When considering the legality of monitoring techniques, the Board weighs an employer’s justification for employee surveillance against its tendency to intimidate employees and interfere with their right to engage in concerted activity.⁵⁸

New technologies play an important role in documenting employee compliance with recordkeeping, safety, and other workplace policies. This capability is particularly valuable given the wide range of lawsuits employers face today, including claims involving unsafe employee behavior and allegations of failing to pay employees for hours worked. But these technologies also may represent a new frontier for illegal spying charges against employers.

In an October 31, 2022, memorandum, then NLRB General Counsel Abruzzo expressed concern that technological advances that allow electronic monitoring and algorithmic management of employees could interfere with employees’ exercise of Section 7 rights.⁵⁹ Specifically, Counsel Abruzzo cautioned that “omnipresent surveillance and other algorithmic-management tools” would make it hard for employees “to engage in protected activity and keep that activity confidential from their employer, if they so choose.”⁶⁰ Among other things, Counsel Abruzzo expressed concern about wearable

54 NLRB, *Interfering with employee rights (Section 7&8(a)(1))*; *Charter Communications, LLC*, 366 NLRB No. 46 (2018).

55 *Starbucks Corp.*, 374 NLRB 8 (Dec. 16, 2024), citing *Camaco Loraine Mfg. Plant*, 356 NLRB 1182, 1183 (2011) (citing *Frontier Tel. of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005) enforced, 181 F. Appx 85 (2d Cir. 2006).

56 *N.L.R.B. v. Inter-Disciplinary Advantage*, Nos. 07-2276/07-2357 (6th Cir. 2008).

57 *S. Bakeries, LLC v. Nat’l Labor Relations Bd.*, 871 F.3d 811 (8th Cir. 2017).

58 *F.W. Woolworth Co.*, 310 NLRB 1197 (1993).

59 Jennifer Abruzzo, General Counsel, Office of the General Counsel Memorandum GC 23-02, “Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights,” (Oct. 31, 2022).

60 *Id.*

devices that track employee movements and record their conversations; GPS tracking devices and cameras that “keep tabs on drivers”; and “keyloggers and software that takes screenshots, webcam photos, or audio recordings throughout the day” to monitor administrative employees who work on computers whether they are at home, in the office, or at a call center.⁶¹

Although then Acting General Counsel Cowen has rescinded the Abruzzo memorandum,⁶² under existing case law, employers are forced to walk a tightrope when they use monitoring and management tools to mitigate liability and promote productivity.

UNIONS

Not only are unions free from the bounds of strict rules against “spying,” but the NLRB has long held that a union surveillance technique known as “salting” is not just legal but a protected activity under the NLRA. “Salting” is a tactic by which individuals employed by the union (“salts”) seek employment at a non-unionized workplace for the primary purpose of organizing the business. In many, if not most, cases, the salt is paid by a union in addition to the targeted company. While “salting” is a decades-old organizing tool, it has enjoyed somewhat of a resurgence in the last few years. For example, salting was used extensively in the recent organizing campaigns targeting Starbucks and Amazon employees.⁶³

By contrast, unions can engage in many forms of covert activity without any legal oversight. Salts (union

affiliates who gain employment for the main purpose of unionizing a workplace) can either operate overtly or covertly. Overt salts are clear with the employer about who they are and what they are trying to accomplish. When applying to work at a business, the salt will tell the prospective employer that he is seeking employment to unionize the business. By being open about his desire to unionize the business, the salt can trap the employer into committing a ULP.⁶⁴ Employers cannot refuse to hire a worker who is a union salt. In *NLRB v. Town & Country Electric, Inc.*, the Supreme Court held that the NLRA protects union salts from discrimination in hiring.⁶⁵ Once hired, a salt is protected from being fired or otherwise discriminated against because of their support for unionization.⁶⁶ The NLRB and courts have subsequently found that salts who have been terminated in violation of the NLRA be awarded back pay.⁶⁷ Additionally, if the salt is open about his status, he takes away the employer’s ability to claim lack of knowledge regarding an employee’s support of a union when defending against a ULP charge.⁶⁸

Covert salts, on the other hand, operate in secret — from both the employer and other workers. By operating “undercover,” they can learn about and capitalize on causes of employee dissatisfaction and disrupt production at the business.⁶⁹

Currently, the NLRA only protects salts who demonstrate a genuine interest in establishing an employment relationship with the employer.⁷⁰ The burden of proof initially falls on the employer to demonstrate that an individual’s status as an employee is in doubt, because

61 Id.

62 Cowen, *supra* note 11.

63 James R. Redeker, “Pouring Salt Into Self-Inflicted Wounds: The Reemergence of Salts to Unionize Employees,” *Duane Morris, Employee Relations Law Journal* (Summer 2023).

64 Id.

65 *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995).

66 Id.

67 *NLRB v. Ferguson Electric Co. Inc.*, 242 F.3d. 426 (2d Cir. 2001); *Tualatin Elec., Inc. v. NLRB* 253 F.3d. 714 (D.C. Cir. 2001); *Aneco Inc. v. NLRB*. 285 F.3d. 326 (4th Cir. 2002) (upholding award of backpay but reducing award amount).

68 Redeker, *supra* note 63.

69 Id.

70 Id., citing *Toering Electric Co.*, 351 NLRB 225 (2007).

ONCE AGAIN, THE BIGGEST LOSER IS THE AMERICAN WORKER, AS EVIDENCED BY THE FACT THAT 95.1% OF PRIVATE SECTOR UNION MEMBERS HAVE NEVER VOTED TO JOIN A UNION.

they lack a genuine interest in seeking employment. If the employer makes this showing, the burden then shifts to the General Counsel to prove that the individual did, in fact, genuinely want to work for the employer.⁷¹

On July 24, 2025, then Acting General Counsel Cowen updated Board guidance on the standard for proving refusal-to-hire violations under the NLRA, stressing that applicants must show genuine interest in the job, not just an intent to organize.⁷² It directs investigators to focus first on the charging party's evidence of bona fide intent, scrutinizing behavior, qualifications, and follow-up.⁷³ The guidance also encourages identifying red flags in applications — like listing union organizing as a skill — and confirming authorization by applicants who are part of mass filings, signaling a more disciplined, evidence-driven approach to these cases.⁷⁴

Moreover, NLRA protections do not extend to salts who engage in illegal activities or seriously disrupt the workplace, and employers are not required to extend extraordinary measures to accommodate salts, such as hiring unqualified individuals or retaining employees who are not meeting job expectations.⁷⁵

WORKER IMPACT

I4AW polling reveals that 75% of Americans want greater transparency of salts.⁷⁶

Rep. Burgess Owens (R-UT) has reintroduced the Start Applying Labor Transparency “(SALT) Act,”⁷⁷ legislation that would require unions to fully disclose their organizers' identities and activities, whether those individuals are official or undercover salts.⁷⁸ Such a reporting system would mirror existing federal rules requiring employers to report payments and arrangements with consultants hired to influence union organizing — promoting transparency and helping to create a level playing field in union organizing.

Subjecting workers to deceptive surveillance tactics, including via salts, robs them of the opportunity to make an informed, uncoerced choice regarding whether they believe they would benefit from union representation. Unions and employers should both be transparent about their surveillance of workers.

71 Id.

72 William B. Cowen, Acting General Counsel, Office of the General Counsel Memorandum GC 25-08 “Guidance for Investigating Salting Cases,” (July 24, 2025).

73 Id.

74 Id.

75 Id.

76 Institute for the American Worker Press Release, “Polling Results on Union Salting and Union Elections” (Oct. 24, 2023).

77 H.R. 2952, “[Start Applying Labor Transparency Act](#)” or “[SALT Act](#),” introduced by Rep. Burgess Owens. See Institute for the American Worker, “[Start Applying Labor Transparency \(SALT\) Act Background](#).”

78 H.R. 2952, the “[Start Applying Labor Transparency Act](#)” or “[SALT Act](#),” introduced by Rep. Burgess Owens (April 17, 2025).



LABOR'S HOTEL CALIFORNIA — EASY TO VOTE A UNION IN, BUT HARD TO LEAVE

Thus far, this study has exposed the uneven playing field that exists when employers and unions engage workers, particularly during a unionization campaign. Sadly, this inequity can also be found in the law concerning both union creation and decertification. Once again, the biggest loser is the American worker, as evidenced by the fact that 95.1% of private sector union members have never voted to join a union.⁷⁹

UNION CREATION

The home visitation technique and salting tactics previously discussed play an instrumental role in giving unions a head start when it comes to organizing a workplace. With the broad speech and access rights unions have, as compared to those of employers, it is easier for them to effectively blindsides an employer with a union organizing drive. Moreover, even workers — particularly those a union expects oppose the union — may be caught off guard by a union organization effort.

PROFESSIONAL UNION ORGANIZERS ARE IN THE DRIVER'S SEAT

While union campaigns can be initiated by a group of non-union employees, most organizing drives are supported by professional union organizers. These organizers may work directly for a union and approach employees on its behalf, or they might be contacted proactively by employees of a non-unionized workplace. In sectors with higher union density, professional organizers are more likely to be proactive in initiating campaigns. In sectors with lower union density, however, campaigns may often begin with grassroots employee efforts. Professional organizers bring resources and experience, which can be crucial in navigating the legal

complexities of the NLRB process and in campaigning effectively against employer opposition.

Whether a union campaign is initiated by a professional organizer or a non-union employee, much of the groundwork often occurs well before employers (and often many workers) learn an organizing campaign is underway.

Initial discussions between employees and a union typically happen off-site or in private settings to ensure confidentiality. Through private meetings, distribution of union literature, and one-on-one conversations, organizers discuss the benefits of unionization and ask prospective members questions about what changes they would like to see at work.

Organizers also ask employees to sign a union authorization card or petition indicating their support for the union. If at least 30% of employees sign union authorization cards or a petition saying they want a union, the union can petition the NLRB to conduct an election.⁸⁰ Importantly, union authorization cards and petition signatures are often obtained without the employers' knowledge, and for many employers, the first time they learn about a union-organizing effort in their facility is when union authorization cards are presented to them.

To hide these efforts from the employer, unions often exclude workers who are believed to be anti-union from these discussions, so even some workers may not be aware that a union is actively trying to organize their workplace.

Even big campaigns can start and grow in secret. Daisy Pitkin, a veteran union organizer, details efforts she undertook to unionize three industrial laundries outside of Phoenix, Arizona:

The first phase of that was to build as much information as we could on the laundries that we had decided to target. We dumpster dove, we got license plate numbers, and we talked to people who lived in communities where these workers might live to build contact lists. ...

79 F. Vincent Vernuccio & Akash Chougule, [“Unions Need Democracy: 95 Percent of Union Workers Never Voted for Their Union,”](#) Institute for the American Worker (Sept. 2024).

80 NLRB, [Your Right to Form a Union.](#)

THE BOTTOM LINE IS THIS: UNION RECOGNITION AND ELECTION RULES PUT A THUMB ON THE SCALE IN FAVOR OF UNIONS BY ALLOWING THEM TO OPERATE IN SECRET AND PERSUADE EMPLOYEES FOR POTENTIALLY MONTHS BEFORE THEY ARE “MADE.”

We also were running a blitz model — when you quietly build lists of workers ahead of a weekend when you’re going to kick off the campaign publicly. You’ve quietly and secretly formed an organizing committee of workers who want to build a union in their workplace together. We were able to do that at three separate facilities without getting ‘made.’ In union organizing lingo, that just means that the boss doesn’t yet know what you’re up to. ...

We built the list and organizing committees quietly, and then kicked off the campaign on one weekend when we tried to do five hundred house calls in forty-eight hours. It was a massive operation, and it was really successful at two of the facilities. But at one of them, we actually were made in the week before the blitz campaign. That’s still the largest nonunion laundry in Phoenix today. It’s never been organized because the company found out before we were able to talk to a majority of the workers. At the other two facilities, the blitz went very well.

Usually a blitz happens over the course of the weekend, because the main managers of the company are away from the plant, even though industrial laundries tend to run seven days a week. It gives you a little bit of time to try to talk to the majority of workers at their homes. In both of the successful facilities, vast majorities signed cards indicating they wanted a union. We held organizing committee

meetings on Sunday night before workers had to go back into the factory on Monday morning to confront the hell that was going to be brought down on them.⁸¹

Sometimes, unions announce their intention to organize one or more companies. For example, at the end of 2023, the United Auto Workers announced that it would target nearly 150,000 workers at 13 car manufacturers: BMW, Honda, Hyundai, Lucid, Mazda, Mercedes, Nissan, Rivian, Subaru, Tesla, Toyota, Volkswagen, and Volvo.⁸² More often, however, unions use the element of surprise to galvanize support for the organizing drive.

The bottom line is this: union recognition and election rules put a thumb on the scale in favor of unions by allowing them to operate in secret and persuade employees for potentially months before they are “made.”

FORMAL ELECTION PROCESS GIVES EMPLOYERS LITTLE TIME AND IS LITTERED WITH LEGAL PITFALLS

Overview of Election Process

A representation petition marks the formal start of the union election process.⁸³ Typically, a labor union files this petition (an RC petition) with the NLRB after demonstrating sufficient employee support for organizing. However, as discussed below, employers are increasingly filing petitions for election. (A petition filed

81 An Interview With Daisy Pitkin, *“Anatomy of a Union Organizing Drive,”* Jacobin, Oct. 30, 2022.

82 Nathan Bomey, “UAW launches organizing campaign at 13 nonunionized automakers,” Axios, Nov. 29, 2023.

83 For a detailed listing of the process see, Form NLRB-4812 (4-15), “Description of Representation Case Procedures in Certification and Decertification Cases.”

by an employer is an RM petition.) The NLRB reviews filed petitions to determine whether the proposed bargaining unit is appropriate and then sets an election schedule.

After the NLRB accepts the petition, a formal campaign period begins. During this time, the union and the employer may communicate with employees about whether representation is in their best interest. Employees then vote in an NLRB-supervised election (timing discussed below), and the NLRB certifies the union as the official bargaining representative if it wins a majority of the votes cast — even if only a small fraction of eligible employees vote. For example, in 2023, the SEIU was certified to represent all 339 employees at Jetstream Ground Services after receiving just 87 votes — only 26% of the workforce — because most employees did not participate. Similarly, at a California Starbucks in 2022, only three of 28 eligible employees voted for the union, and with just one employee voting against the proposal, the union was still certified by a margin of 3-1.⁸⁴

Recent Regulatory Changes and Board Decisions Accelerate Election Process

Recent regulatory changes have significantly altered how quickly union elections take place, reshaping the balance between unions and employers — especially smaller ones. Historically, there was a several-week window between the filing of a petition and the election itself, allowing both sides to present their arguments to workers and to resolve any disputes about which employees should be eligible to vote.

In 2023, however, the NLRB reinstated its 2014 “ambush election” rule, which shortened election timeframes considerably.⁸⁵ Among other things, the rule condenses pre-election procedures, limits the issues that can

be litigated before the election is held, and requires employers to furnish voter eligibility lists within two business days after the election is directed.⁸⁶ As a result, it is estimated that most elections will occur 24 days after a petition is filed, as opposed to the 42-to-49-day timeframe under the previous rule.⁸⁷

For many employers, the first time they may hear of a union organizing campaign is when a petition is filed. By accelerating the election timeframe, the NLRB rule disproportionately hurts small employers. First, it means they have less time to understand and react to union campaigns by, among other things, providing employees with their perspective on unions. Second, a shorter election period is likely to be more disruptive at a smaller business and negatively impact employee productivity and business operations. Third, shortening the timeframe means that small businesses, which often do not employ human resource officers, labor relations specialists, or have access to in-house counsel, will likely increase the risk of inadvertent violations of the NLRA or procedural errors.⁸⁸ The abbreviated timeframe also means that non-unionized workers, unfamiliar with union policies, will lack critical information to make an informed decision.

A recent Board decision fundamentally changed how the NLRB resolves union recognition disputes, exacerbating many of these concerns.

In *Cemex Construction Materials Pacific, LLC*, the NLRB expanded the use of union authorization cards and linked employer commission of ULPs directly to union formation.⁸⁹ Under *Cemex*, once a union declares that a majority of any group of employees support union representation, and such a proposed bargaining unit makes sense, the employer must either: (1) voluntarily

84 Vernuccio & Chougule, *supra* note 79.

85 National Labor Relations Board, “Representation-Case Procedures,” 88 Fed. Reg. 58076, codified at 29 CFR Part 102.

86 *Id.*

87 Barnes & Thornburg, LLC, “[NLRB Dramatically Resets The Union Election Process With Traps For The Unwary](#),” (Aug. 25, 2023).

88 “Testimony of Elizabeth Milito before the Senate Committee on Health, Education, Labor, and Pensions, [“Ambushed: How the NLRB’s New Election Rule Harms Employers and Employees.”](#) (Feb. 11, 2015).

89 *Cemex Construction Materials Pacific, LLC*, 372 NLRB 130 (Aug. 2023); on appeal to the U.S. Court of Appeals for the Ninth Circuit, Docket No. 23-2302 (Pending as of February 22, 2025).

“EVEN THE NLRB HAS ACKNOWLEDGED THAT THE USE OF UNION AUTHORIZATION CARDS IS “SUSCEPTIBLE TO GROUP PRESSURE EXERTED AT THE MOMENT OF CHOICE.”

recognize the union and begin collective bargaining with it or (2) file an RM petition⁹⁰ asking the Board for an election within two weeks of the recognition request. If an employer takes no action, it risks being found to have committed a ULP and then will be required to bargain with the union.

The *Cemex* decision stacks the deck in favor of unions in two key respects. First, it undermines the secret ballot election process. Under *Cemex*, a union can claim that a majority of any group of employees wants a union, which likely will be done by using union authorization cards. It is well-documented that relying on union authorization cards is not a credible method for determining whether employees want a union.⁹¹ At a minimum, they often are secured before an employer (and even many workers) know a unionization effort is underway, so the only viewpoint the recruited employees hear is that of the union organizers. Even the NLRB has acknowledged that the use of union authorization cards is “susceptible to group pressure exerted at the moment of choice.”⁹² Moreover, union organizers use a wide range of tactics, many deceptive or coercive, to pressure workers to sign union authorization cards, which they use to claim majority support for the union.⁹³ There are very few rules governing what a union can say to persuade workers to sign union authorization cards, including claims that signing the card simply indicates the worker

wants an election held, even though in reality they are legally binding contracts in which the worker designates the union as their sole representative in employment matters, giving up their right to represent themselves.

Second, employers who file an RM petition are not guaranteed an election. If the Board finds an employer guilty of committing a ULP, the petition can be blocked or dismissed, forcing the business to begin the collective bargaining process immediately. This is a significant departure from previous interpretations of the law. Before *Cemex*, when the NLRB found an employer had committed a ULP, the Board required the employer to hold a second election. Now, any ULP (intentional or inadvertent) on the employer’s part allows unions to bypass a secret election altogether.

This becomes an especially serious concern given the Board’s recent decision in *Stericycle, Inc.* In that case, the Board made it easier for employees to challenge workplace policies — only requiring employees to show that the workplace rule or policy has a “reasonable tendency to chill employees from exercising their Section 7 rights.”⁹⁴ To rebut the presumption that a workplace rule or policy interferes with an employee’s rights, the employer has to show that the rule advances a legitimate and substantial business interest and that such interest cannot be advanced with a more narrowly tailored one. As former NLRB Member Kaplan noted

90 An RM petition is a request filed by an employer with the NLRB to hold a secret-ballot election when a union claims to represent a majority of employees or when the employer reasonably believes the union has lost majority support, allowing employees to decide on union representation through an election.

91 Testimony of Stephen Delie, Mackinac Center for Public Policy, before the House Committee on Education and the Workforce Subcommittee on Health, Employment, Labor, and Pensions, [“Big Labor Lies: Exposing Union Tactics to Undermine Free and Fair Elections.”](#) (May 22, 2024), Citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 603 (1963) and *Sunbeam Corp.*, 99 NLRB 546, 550-51 (1952).

92 *Dana Corp.; Metaldyne*, 351 NLRB 28, at 438 (2007).

93 Testimony of Stephen Delie, *supra* note 90, at 4-5.

94 *Stericycle, Inc.*, *supra* note 4, at 2.

in his dissent, a simple rule to promote civility in the workplace could lead to a ULP charge.⁹⁵ Practitioners caution employers that the Board may find rules concerning everything from prohibitions on the use of obscene language and harassment of fellow employees to attendance policies illegal under this decision.⁹⁶

These concerns are borne out by the data. Since the *Cemex* decision, the number of RM petitions filed by employers has exponentially increased. Post-*Cemex*, employer-filed RM petitions experienced a sharp uptick from FY 2023 (when employers filed 62 RM petitions nationwide) to FY 2024 (with 489 petitions filed nationwide), before moderating to 237 in FY 2025 — still nearly four times the pre-*Cemex* high.⁹⁷ ULP charges filed with the NLRB increased 7% from FY 2023 (19,869 cases) to FY 2024 (21,300 cases), before declining to 19,754 cases in FY 2025 — a level that, while lower than the prior year, remains historically elevated compared to pre-pandemic filing rates.⁹⁸

Worker Impact

These secretive and undemocratic tactics harm American workers, but the law allows union interests to supersede those of the employees they claim to represent. They shield unions from employer involvement and, more concerning, early resistance from skeptical workers. As a result, many workers are caught off guard when union campaigns suddenly go public and an election is announced. The accelerated timelines mean employees have less time to research and understand the pros and cons of unionization. Moreover, expanded use of union authorization cards deprives workers of secret ballot elections, leaving

them vulnerable to intimidation and harassment — both inside and outside the workplace — and uncertain about their rights, since there is no assurance that union organizers are providing accurate information.

To protect worker privacy, prevent coercion, and ensure a fair and transparent process where both unions and employers can share their perspectives, reforms like the Employee Rights Act (discussed below) would guarantee workers the right to a secret ballot vote in unionization efforts.

CORPORATE CAMPAIGNS AND NEUTRALITY AGREEMENTS

Elections conducted under the more union-friendly rules of today are not the only tool unions have for organizing. Another is the “neutrality agreement.” Although not expressly defined in the NLRA, neutrality agreements are understandings between an employer and a union whereby the employer agrees to remain neutral and not oppose unionization efforts among its employees.⁹⁹ These agreements commonly tie the hands of employers and employees alike to the benefit of unions. As Stephen Delie, formerly Director of Labor Policy at the Mackinac Center for Public Policy, testified before the House of Representatives Committee on Education and the Workforce:

In truth, neutrality agreements are anything but neutral. These agreements leave employees with no information other than what the union provides. And while employees remain free to support or oppose unionization, employees have no say as to whether their employer enters into a neutrality agreement. Commonly, this means that employees also have no

95 Id.

96 David Phippin, “*News & Insights Legal Analysis: In light of recent NLRB decision, employer workplace rules face more aggressive scrutiny.*” Constangy, Brooks, Smith & Prophete, LLP (August 16, 2023).

97 National Labor Relations Board, “Representation Petitions (RM),” NLRB Case Activity Reports, <https://www.nlr.gov/reports/nlr-case-activity-reports/representation-cases/intake/employer-filed-petitions-rm> (last visited Feb. 20, 2026); Jesse R. Dill and Zachary V. Zagger, “Three Takeaways From the NLRB’s FY 2025 Petition Statistics,” Ogletree Deakins (Jan. 30, 2026), <https://ogletree.com/insights-resources/blog-posts/three-takeaways-from-the-nlrbs-fy-2025-petition-statistics/>.

98 National Labor Relations Board, “Unfair Labor Practice and Representation Case Intake,” NLRB Case Activity Reports, <https://www.nlr.gov/reports/nlr-case-activity-reports/annual-case-intake/unfair-labor-practice-and-representation> (last visited Feb. 20, 2026).

99 National Right to Work Foundation Legal Defense Foundation, “*What is a ‘Neutrality Agreement’ and how does it affect workers?*”

*say in whether they get to select a union through a secret ballot election — an employer who agrees to a neutrality agreement requiring card check deprives employees of that opportunity in favor of recognition exclusively through card check.*¹⁰⁰

The following provisions are often found in such agreements:

- **Gag rule:** Prevents employers, including a company's managers and supervisors, from making negative statements about the union.
- **Card Check Agreement:** Prevents employees from having a secret ballot election. Instead, the employer agrees to recognize the union once a certain number of signed union authorization cards are collected from employees and submitted to the employer.
- **Increased Union Access to Company Property:** Provides unions access to company property during work hours for the purpose of collecting signed union authorization cards and/or distributing literature.
- **Access to Employee Personal Information:** Provides unions with access to employees' personal information, including home addresses, which allows unions to conduct home visitations to pressure employees to sign union authorization cards.
- **Company-Paid Union Organizing Meetings:** Requires employers to pay for employee meetings in which the employer and union jointly present on the benefits of joining a union.¹⁰¹

Employers often agree to neutrality agreements following pressure they feel from picketing, threats,

or comprehensive “corporate campaigns.” During a “corporate campaign,” a union targets a company's shareholders, clients, consumers, and even political representatives to help pressure the employer to enter into a neutrality agreement. In its report, “How Neutrality and Card Check Agreements Harm the American Worker,” the Coalition for a Democratic Workplace documents unions and union officials describing pressure tactics that can be unleashed on an employer they seek to organize.¹⁰²

Moreover, while unions can focus one hundred percent of their time on organizing, companies still have businesses to run and are overmatched by the unions in time and personnel.

Employers, therefore, often feel that their only defense against these corporate campaigns is to accept a neutrality agreement. They agree to remain silent in order to avoid the negative publicity or drain on resources that often comes with opposing a union organizing drive. This is particularly true for smaller businesses that have no in-house counsel or other support to help them navigate the process.

Worker Impact

Workers bear the brunt of neutrality agreements, which are based on the flawed assumption that employee and union interests are inherently aligned.¹⁰³ In practice, these agreements significantly restrict workers' ability to make fully informed, independent decisions about union representation. By requiring employers to remain silent during organizing campaigns, neutrality agreements deny employees access to balanced information, effectively subjecting them to one-sided messaging from union organizers. This lack of countervailing perspectives hinders

100 Testimony of Stephen Delie, at 6.

101 National Right to Work Foundation Legal Defense Foundation, “*What is a ‘Neutrality Agreement’ and how does it affect workers?*”; Coalition for a Democratic Workplace, “How Neutrality and Card Check Agreements Harm the American Worker,” (2023); Jon O. Shimabukuro, Congressional Research Service, “The National Labor Relations Act (NLRA): Union Representation Procedures and Dispute Resolution” (Dec. 11, 2013).

102 Coalition for a Democratic Workplace, “How Neutrality and Card Check Agreements Harm the American Worker,” (2023).

103 Id. at 4.

THE OPPORTUNITIES FOR UNIONS TO BLOCK DECERTIFICATION ELECTIONS ARE SEEMINGLY ENDLESS.

workers' ability to evaluate the implications of unionization thoroughly.

Moreover, many neutrality agreements include “card check” provisions, which replace private, secret ballot elections with public card-signing processes. This exposes workers to potential coercion, peer pressure, and misinformation, undermining the confidentiality and integrity of their decisions.

As I4AW President F. Vincent Vernuccio noted in testimony before Congress, “Corporate campaigns and neutrality agreements show little respect for workers’ wishes, and in many cases, unions target workers themselves.”¹⁰⁴ These agreements erode core principles of employee free choice and self-determination.

DECERTIFICATION OF A UNION

While there are several pathways for union formation, there is only one way to remove a labor union, a complex process known as decertification.

Employees wanting to decertify a union cannot rely on negotiated agreements like the neutrality agreements employers sign. They can only call for an election to remove the union or replace it with another one by demonstrating that they have signed union

authorization cards from at least 30% of employees in the bargaining unit.¹⁰⁵

A union will be fully entrenched in the workplace before employees can even consider decertifying it as their exclusive representative. The “certification bar” under the NLRA prevents employees from filing a decertification election petition during the first twelve months after a union has been certified,¹⁰⁶ while the “contract bar” prevents a decertification election petition from being filed during the term of an existing collective bargaining agreement, up to three years.¹⁰⁷ For a union that an employer voluntarily recognizes through a “neutrality agreement,” employees are barred for six months (up from 45 days in pre-*Cemex* times) from filing a decertification petition.¹⁰⁸ In practice, this means employees wishing to decertify a union generally must wait four or more years to file a petition to remove the union. After the four years have elapsed, employees must act within a 30-day window (between 60 and 90 days before the end of the collective bargaining agreement) to file their decertification petition with the NLRB.¹⁰⁹ However, unions can subvert this 30-day window by agreeing to a new contract before it opens.¹¹⁰

Unions can further delay decertification elections by taking advantage of a recent NLRB rule that reinstated “blocking charges.”¹¹¹ A “blocking charge” occurs

104 Vernuccio Testimony, *supra* note 46 at 6.

105 NLRB, [Decertification election](#).

106 *Id.*

107 *Mountaire Farms, Inc.*, 370 NLRB 110 (2021).

108 “Representation-Case Procedures, *supra* note 85.

109 NLRB, [Decertification election](#).

110 National Right to Work Legal Defense Foundation, [Decertification Election](#).

111 National Labor Relations Board, “Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships,” 89 Fed. Reg. 62952, codified at 29 C.F.R. §103.20 (Aug. 1, 2024).

when a party to an election alleges the other party committed a ULP and requests that the Board block the election until the ULP charge is litigated. It is well-documented that unions use blocking charges as a delay tactic. They file serial ULPs against employers, preventing a decertification election from taking place.¹¹² In a post-*Cemex* world, the opportunities for unions to block decertification elections are seemingly endless.

Assuming employees can overcome the tight statutory timeframes and legal hurdles accompanying decertification, they need significant resources to organize and win a decertification election. While unions have sophisticated, experienced organizers to form a union, workers are on their own when it comes to removing one. Employees work alone to organize meetings, create and distribute materials, and meet with co-workers. The bigger the bargaining unit, the harder this is to accomplish, since workers who seek decertification do not have the administrative resources available to union organizers. Moreover, because many employers have non-solicitation policies or policies preventing the use of work equipment for personal matters, even something as simple as using a copying machine at work to print out flyers about the next employee meeting on decertification can be impossible.

NLRB's own data demonstrates the headwinds workers face when trying to decertify a union. From fiscal year 2016 through fiscal year 2025, less than half of all decertification petitions filed (49%) resulted in an election.¹¹³

If and when an election is finally scheduled, the union and those in favor of decertification can present their arguments to the workforce, and a secret ballot election follows. The union is decertified unless a majority of the votes cast favor keeping it.¹¹⁴ For example, if a bargaining unit has 100 employees but only 60 participate in the election, the union will be decertified unless at least 31 employees vote to retain it. But if the union retains majority support, it remains the employees' exclusive representative.

The recent experience of employees at a Trader Joe's store in Hadley, Massachusetts, shows the real-world impact of the burdensome decertification process on workers.

On July 31, 2024, employees at that store submitted a decertification petition seeking to remove Trader Joe's United as the bargaining representative for the workers at the store.¹¹⁵ Trader Joe's United had been "voted in" by the workers in July 2022. According to testimony of Michael Alcorn, a Trader Joe's employee who formerly worked at the Hadley store and is currently an I4AW visiting fellow, union officials used misleading and coercive tactics to initiate a union election at his store.¹¹⁶ He stated that union organizers misrepresented the legal significance of union authorization cards, telling employees that signing only supported an election rather than support for union representation itself.¹¹⁷ According to Alcorn, organizers petitioned for an election and sought voluntary recognition without first holding open discussions with all employees, depriving many workers of meaningful participation before the filing.¹¹⁸ He testified that

112 United States Senate Committee on Health, Education, Labor, and Pensions, Bill Cassidy, M.D., Ranking Member, *"The Biden Administration: Politicizing National Labor Law to Help Their Union Bosses,"* Minority Staff Report at 10 (Jan. 8, 2024). ("Unions have historically utilized these "blocking charges" as a weapon to delay or prevent a decertification election from ever coming to fruition by filing repeated unsubstantiated ULP charges. In fact, several federal appellate courts have observed the potential for union abuse, dating back decades.")

113 NLRB, *Decertification Petitions-RD*.

114 *Id.*

115 NLRB, *Trader Joe's East*, Case No. 01-RD-347289 (Jul. 31, 2024).

116 Testimony of Michael Alcorn before the House Committee on Education and the Workforce Subcommittee on Health, Employment, Labor, and Pensions, *"Big Labor Lies: Exposing Union Tactics to Undermine Free and Fair Elections,"* (May 22, 2024).

117 *Id.*

118 *Id.*

dissenting employees were labeled “anti-union,” intimidated, and excluded from information, creating pressure to conform and discouraging open debate prior to the vote.¹¹⁹



APPLICATION OF ANTITRUST LAWS TO EMPLOYERS AND UNIONS

Alcorn also described the deceptive and coercive tactics the union organizers employed throughout the campaign. These included making false statements and representations about their workplace and portraying it in a negative light, which embarrassed him in front of his customers.¹²⁰ When he asked the organizer why he did not receive input from all of the employees before putting out a one-sided pro-union video, he was told that unions had to “surprise the boss” when organizing.¹²¹ According to Alcorn, “It wasn’t just ‘surprise the boss’, it was ‘organize in secret and then surprise your co-workers and then make them feel like if they don’t vote for the union then they must not care about their co-workers.’”¹²²

In light of these abuses, on July 31, 2024, employees at the Hadley store submitted a decertification petition seeking to remove Trader Joe’s United as their bargaining representative.¹²³ But the NLRB regional director dismissed the workers’ decertification petition on October 8, 2024 based on alleged ULPs committed by Trader Joes.¹²⁴ The regional director found that, if proven, the alleged ULPs would have caused employee disaffection from the union and tainted the petition.¹²⁵ As a result, Alcorn and his coworkers never had a chance to vote on decertifying the union.

This report has thus far focused on the NLRA and various interpretations of it, but the NLRA is not the only law that favors unions. Antitrust law, specifically the Sherman Antitrust Act (the “Sherman Act”), does as well. Enacted in 1890, the Sherman Act is a cornerstone of U.S. antitrust law designed to maintain competition in the marketplace.¹²⁶

APPLICATION OF US ANTITRUST LAWS TO EMPLOYERS

In addition to protecting consumers from monopolistic business practices that drive up the cost of goods and services, the Sherman Act also prohibits employers from hindering competition and mobility in the U.S. labor market. Specifically, employers are prohibited from: (1) agreeing to set or limit employee wages; (2) sharing sensitive information about wages, benefits, and other employment terms with each other, either directly or indirectly through third parties; and (3) agreeing not to hire or solicit each other’s employees.¹²⁷

The Sherman Act imposes criminal penalties of up to \$100 million for a corporation and \$1 million for an individual, along with up to 10 years in prison.¹²⁸

On January 16, 2025, the Department of Justice (DOJ) and Federal Trade Commission (FTC) issued joint guidance to

119 Id.

120 Id.

121 Id.

122 Id.

123 NLRB, *Trader Joe’s East*, Case No. 01-RD-347289 (Jul. 31, 2024).

124 *Trader Joe’s East and Leslie Stratford and Trader Joe’s United, “Decision and Order Dismissing Petition,”* Case 01-RD-347289, National Labor Relations Board, Region 1, (Oct. 8, 2024).

125 Id.

126 15 U.S.C. §§ 1-7.

127 15 U.S.C. § 1; See also, U.S. Department of Justice and the Federal Trade Commission, “Antitrust Guidelines for Business Activities Affecting Workers” (Jan. 2025) (hereinafter, (2025 Antitrust Guidelines)).

128 15 U.S.C. § 1.

businesses about how the agencies will assess whether certain business practices violate federal antitrust laws.¹²⁹ It replaced 2016 guidance directed to human resource professionals.¹³⁰

The new guidelines highlight several employment agreements and practices that may violate federal antitrust laws, leading to civil or criminal penalties:

1. **Wage-Fixing & No-Poach Agreements** — Agreements between businesses to set wages, limit hiring, or require permission before recruiting workers may be illegal, even if they only establish pay ranges or restrict cold-calling rather than create outright hiring bans. (Despite the DOJ experiencing several significant losses in criminal no-poach trials,¹³¹ the replacement guidance continues to consider no-poach and non-solicit agreements as potential per se criminal violations of antitrust law.)
2. **Franchise No-Poach Agreements** — Franchisors and franchisees agreeing not to compete for workers can be unlawful, regardless of harm to employees. Even informal or unwritten agreements among franchisees may violate antitrust laws.
3. **Sharing Sensitive Employment Information** — Exchanging employment terms like wages and benefits with competitors may constitute a violation if it leads to anticompetitive effects. Algorithms recommending wages may also be illegal, even if businesses do not strictly follow them.

4. **Non-Compete Clauses** — Restricting employees from switching jobs or starting competing businesses may be unlawful. The FTC’s broad non-compete ban was vacated by federal courts, and in September 2025 the FTC formally dismissed its appeals, abandoning the nationwide rule. However, the agency retains authority to — and has indicated it will — pursue non-compete violations on a case-by-case basis.¹³²
5. **Other Restrictive Employment Practices** — Agreements that hinder worker mobility, such as overbroad non-disclosure agreements, training repayment clauses, non-solicitation agreements, exit fees, and false earnings claims, may face antitrust scrutiny.
6. **Independent Contractors** — Antitrust laws protect independent contractors as well as employees.

The future of these guidelines under the Trump administration remains uncertain. While some Republican FTC Commissioners, including current FTC Chair Andrew Ferguson, opposed the changes, criticizing the timing as a “lame-duck” action by the outgoing Biden administration,¹³³ similar policies from the Obama administration survived under Trump’s first term, and past DOJ leadership pursued criminal no-poach cases.

LABOR EXEMPTION FROM ANTITRUST LAWS

Labor unions are expressly protected from antitrust liability when they pursue legitimate objectives,

129 U.S. Department of Justice and the Federal Trade Commission, “Antitrust Guidelines for Business Activities Affecting Workers” (Jan. 2025). This guidance replaces U.S. Department of Justice and the Federal Trade Commission, “Antitrust Guidance for Human Resource Professionals” (Oct. 2016).

130 U.S. Department of Justice and the Federal Trade Commission, “Antitrust Guidance for Human Resource Professionals” (Oct. 2016).

131 Ann M. O’Brien, Leo Caseria, et al., “DOJ Loses Third Consecutive Antitrust Labor Trial,” Antitrust Law Blog reposted on The National Law Review (Mar. 24, 2023).

132 Federal Trade Commission, “Federal Trade Commission Files to Accede to Vacatur of Non-Compete Clause Rule” (Sept. 5, 2025), <https://www.ftc.gov/news-events/news/press-releases/2025/09/federal-trade-commission-files-accede-vacatur-non-compete-clause-rule>; *Ryan, LLC v. FTC*, No. 24-10951 (5th Cir. 2025); *Properties of the Villages, Inc. v. FTC*, No. 24-13102 (11th Cir. 2025); Federal Trade Commission, “FTC Takes Action to Protect Workers from Noncompete Agreements” (Sept. 4, 2025), <https://www.ftc.gov/news-events/news/press-releases/2025/09/ftc-takes-action-protect-workers-noncompete-agreements>; *In re Gateway Services, Inc. & Gateway US Holdings, Inc.*, Matter No. 2210170 (FTC Complaint, Sept. 4, 2025).

133 Dissenting Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak Regarding the Antitrust Guidelines for Business Activities Affecting Workers Matter Number P251202 (Jan. 16, 2025).

THE MONOPOLISTIC PRACTICES OF UNIONS RAISE WAGES FOR MEMBERS BUT SLOW OVERALL EMPLOYMENT GROWTH.

such as organizing workers, negotiating collective bargaining agreements, or striking.¹³⁴ In *Apex Hosiery Co. v. Leader*, the Supreme Court clarified that labor activities do not violate the Sherman Act unless they are intended to restrain or monopolize trade in a way that directly affects interstate commerce.¹³⁵ Soon after, in *U.S. v. Hutcheson*, the Court reaffirmed that unions acting in their self-interest and using lawful labor means are exempt from antitrust liability, provided they do not combine with non-labor groups to pursue anti-competitive objectives.¹³⁶ *Apex* and *Hutcheson* established that the Clayton Act and Norris-LaGuardia Act protect labor unions from Sherman Act liability when they act alone in pursuit of legitimate labor objectives. However, the Court emphasized that the labor exemption does not apply where a union's conduct imposes a direct and substantial restraint on commercial competition.¹³⁷

Unions have lost their exemption when they conspired with non-labor entities to restrain trade or create monopolies;¹³⁸ engaged in agreements that imposed direct restraints on competition in product or service markets, rather than focused on labor objectives;¹³⁹ conspired with management to restrain trade,¹⁴⁰

or violated other federal labor laws, like the Taft-Hartley Act, which prohibits secondary boycotts or jurisdictional strikes.¹⁴¹

Just as the FTC has expanded the types of business activities that can result in employer antitrust liability, it also has interpreted the labor exemption broadly to include certain independent contractor activities.

On January 14, 2025, the FTC released a policy statement stating that independent contractors, including gig workers, are not subject to antitrust liability when engaging in protected activities like bargaining for better pay and working conditions.¹⁴² The Commission announced that it will not challenge collective actions taken by gig workers — such as rideshare and food delivery drivers — who are seeking improved compensation and job conditions, as these efforts are exempt from antitrust laws.¹⁴³

The FTC asserted that workers engaged in protected bargaining or organizing activities are not automatically excluded from the antitrust exemption solely because they lack a formal employer-employee relationship with the company they are negotiating with over

134 The Clayton Act of 1914 codified at 15 U.S.C. §17 (1914); Norris-LaGuardia Act codified at 29 U.S.C. §§101-14 (1932).

135 *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

136 *U.S. v. Hutcheson*, 312 U.S. 219 (1941).

137 *Apex Hosiery*, supra note 133 at, 512–13 (1940); see also *Allen Bradley Co. v. Local Union No. 3, IBEW*, 325 U.S. 797 (1945).

138 *Allen Bradley Co.*

139 *Connell Co. v. Plumbers Steamfitters*, 421 U.S. 616 (1975).

140 *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

141 *Labor Board v. Denver Bldg. Council*, 341 U.S. 675 (1951); *National Woodwork Manufacturers Ass'n v. Nat'l Labor Relations Bd.*, 386 U.S. 612 (1967).

142 Federal Trade Commission, Press Release: "FTC Issues Policy Statement Clarifying that Independent Contractors, Gig Workers' Organizing Activities Are Shielded from Antitrust Liability," (Jan. 14, 2025).

143 Federal Trade Commission, "Federal Trade Commission Enforcement Policy Statement on Exemption of Protected Labor Activity by Workers from Antitrust Liability," Matter No. P251201 (Jan. 14, 2025).

compensation or working conditions.¹⁴⁴ The FTC emphasized that protecting all workers from antitrust liability when engaged in lawful labor activities is firmly rooted in statutory text, aligned with existing case law, and consistent with the original intent of the labor exemption.¹⁴⁵

The Commission believes that excluding independent contractors from these protections entirely would create incentives and opportunities for employers to exploit differences in antitrust liability.¹⁴⁶ For instance, businesses could classify — or misclassify — workers as independent contractors to suppress wages and gain an unfair advantage over competitors that offer better pay and working conditions.¹⁴⁷

As with the FTC’s January 14 guidance covering business activities relating to workers, it is unclear whether the Trump administration will revoke this policy statement.

WORKER IMPACT

Workers do not always benefit from the labor antitrust exemption. By reducing competition, the exemption can suppress wages for nonunion workers, limit job opportunities, and create barriers to entry for new or marginalized workers. Economist Liya Palagashvili of the Mercatus Center argues that the monopolistic practices of unions raise wages for members but slow overall employment growth.¹⁴⁸ She points to evidence from the Rust Belt, where strong unions and labor disputes accounted for roughly 55% of manufacturing job losses in the 1970s and 1980s, as firms responded by cutting hiring, increasing automation, or offshoring to escape rising labor costs.¹⁴⁹



REFORMS THAT COULD RESTORE PARITY TO THE NLRA

To achieve a true level playing field, reforms to the NLRA are urgently needed to ensure that employers and workers who choose not to unionize are afforded the same legal protections enjoyed by unions.

POTENTIAL NLRB REFORMS

As previously noted, on February 14, 2025, then Acting General Counsel Cowen issued his first General Counsel Memorandum rescinding many of Former General Counsel Abruzzo’s memoranda.¹⁵⁰ This is a positive first step to restore balance in enforcing the NLRA. This change will increase the flow of information to workers, enabling them to make more informed decisions about whether they should vote for unionization.

The Board should pursue additional reforms to restore parity between employers and unions under the Act and ensure balanced communications that serve workers’ best interests. The Board should:

- Rely on the secret ballot in union organizing and limit relying on union authorization cards as the final determination of union formation;
- allow employers to implement workplace policies prohibiting the use of harassing or defamatory language;
- go back to the previous standard of allowing employers to hold EMUs to explain how having a union at the company would impact operations; and

144 Id.

145 Id. at 5-11.

146 Id. at 12.

147 Id.

148 Liya Palagashvili and Revana Sharfuddin, “Do More Powerful Unions Generate Better Pro-Worker Outcomes?” Mercatus Working Paper, Mercatus Center, George Mason University (May 7, 2025).

149 Id.

150 Cowen, *supra* note 11.

- allow employers to make statements about how the direct employer-employee relationship could change with unionization.

CURRENT LEGISLATION THAT WOULD LEVEL THE PLAYING FIELD FOR AMERICAN WORKERS

Each new president and administration brings shifts at the NLRB. In many instances, these changes are not just shifts in policy but complete reversals of prior policies and enforcement priorities. Pro-worker leaders could consider more lasting reforms to protect workers from intimidation and pressure tactics and provide them with the information they need to make informed decisions relating to the unionization of their workplace.

WORKER RESULTS ACT

Sponsored by Senate Health, Education, Labor, and Pensions Committee Chairman Bill Cassidy (R-LA), this proposal would modernize the NLRA to make union elections more transparent, efficient, and employee-driven.¹⁵¹ The bill would require unions to win a secret ballot election overseen by the NLRB to achieve exclusive representation of a workforce, eliminating the use of union authorization cards and voluntary recognition by employers. It would require at least two-thirds of eligible workers participate in a union representation election for the results to be certified. The bill would also define clear recertification windows tied to collective bargaining agreements and eliminate procedural hurdles like the settlement bar and successor bar that have delayed or blocked past elections. And it would limit the NLRB's discretion to dismiss or restrict election petitions, tighten standards for blocking charges by requiring evidence and witness lists, and ensure secret ballots are counted, regardless of pending disputes.

In addition, the following reforms could help ensure accountability and transparency in the unionization process, to the ultimate benefit of workers.

FREEDOM FROM UNION VIOLENCE ACT

This proposed solution would close the loophole in the Hobbs Act that allows unions to commit acts of violence, extortion, or obstruction of commerce during labor disputes. The bill would eliminate unions' exemption from prosecution for activities that otherwise would be considered extortion, including violence, so long as the activities are used to achieve "legitimate labor ends."¹⁵²

EMPLOYEE RIGHTS ACT

As discussed in a recent I4AW report, "How to Empower Workers: Embracing a Pro-Worker Agenda Built on Choice," the ERA is the "crown jewel of legislative reforms in the labor space." Among other things, it promotes important reforms that would:

- give workers the right to a secret ballot election in every unionization campaign, allowing them to make their choice from intimidation and harassment; and
- allow workers to choose what personal information unions receive during an organizing campaign and penalize unions when they use workers' personal information for non-representation purposes.¹⁵³

START APPLYING LABOR TRANSPARENCY (SALT) ACT

The SALT Act would provide workers with the transparency they deserve in union organizing by requiring unions to fully disclose their organizers' identities and activities, whether they work officially or undercover, in the same manner that federal law requires employers to report their persuader activities.¹⁵⁴

151 S. 3117, "Worker RESULTS Act," introduced by Senator Bill Cassidy (Nov. 6, 2025).

152 H.R. 5054, "Freedom From Union Violence Act of 2025," introduced by Rep. Scott Perry (Aug. 26, 2025).

153 H.R. 4154, "Employee Rights Act, introduced by Rep. Rick W. Allen (June 26, 2025).

154 H.R. 2952, supra note 78.

SMALL BUSINESSES BEFORE BUREAUCRATS ACT

Just as penalty and other monetary thresholds are periodically updated, it is past time for the monetary thresholds establishing NLRB jurisdiction over businesses to be updated. This reform proposes to raise the threshold from \$50,000 to \$500,000 for non-retail businesses and \$500,000 to \$5 million for retail businesses. Such changes are needed to protect America’s small businesses that lack human resource professionals or labor lawyers to help them navigate complex labor law.¹⁵⁵

TRUTH IN EMPLOYMENT ACT

The legislation would amend the NLRA to make clear that an employer does not have to hire an individual who seeks employment for union organizing purposes.¹⁵⁶

MODERN WORKER EMPOWERMENT ACT

This reform would standardize the definition of “employee” across the NLRA and Fair Labor Standards Act to allow businesses to offer benefits to independent contractors without jeopardizing or redefining their classification.¹⁵⁷ By aligning the definition of “employee” across federal statutes, workers would have the ability to negotiate for the benefits they need and want without altering their classification, safeguarding the flexibility and autonomy they value and enjoy. The bill would eliminate inconsistencies that can lead to confusion for workers and employers alike, modernize labor laws to fit the realities of today’s evolving workforce, and negate the need for the FTC to alter the labor exemption in the Sherman Act.

155 S. 3111, “Small Businesses before Bureaucrats Act,” introduced by Sen. Markwayne Mullin (Nov. 5, 2025).

156 H.R. 4320, “Truth in Employment Act of 2023,” introduced by Rep. Rick Allen (June 23, 2023).

157 S. 2228, “Modern Worker Empowerment Act,” introduced by Sen. Tim Scott (July 9, 2025).



CONCLUSION

After 90 years, the NLRA has drifted far from its original purpose of creating industrial peace and leveling the playing field between employers and employees. Instead, decades of litigation and regulatory expansion have turned the NLRA into a tool that often benefits unions at the expense of the very workers it was meant to protect.

Today, small businesses — most of America’s employers — face a legal minefield under the NLRA. Employers are prohibited from discussing with their employees how unionization could affect their operations and relationship, protecting employees from harassing speech and behavior, and promising improvements to wages or benefits. Meanwhile, unions operate under far fewer restrictions: they can access workers at home, make sweeping promises about pay and benefits, and even plant organizers within workplaces. Once a union is in place, removing it is extraordinarily difficult, with complex decertification procedures and opportunities for unions to block votes.

The imbalance extends beyond labor law. Federal antitrust enforcers continue to police anti-competitive conduct in labor markets, such as wage-fixing, no-poach agreements, and abusive non-compete clauses. At the same time, unions benefit from a long-standing legal exemption that protects activities like organizing, bargaining, and striking from antitrust liability — conduct that would often be illegal if undertaken by employers.

These double standards leave American workers caught in the middle — restricted from hearing both sides and misled by laws that no longer serve their interests. Pro-worker policies and reforms would rebalance the scales and restore the Act’s original promise: fairness, transparency, and true worker empowerment.

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