

The Biden board

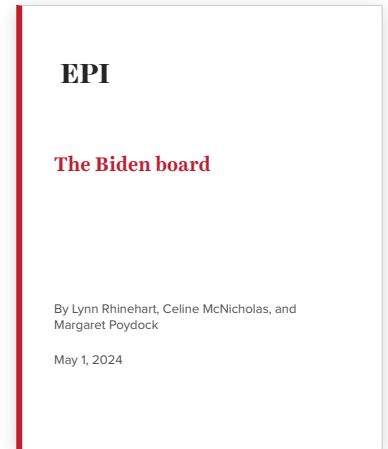
How President Biden's NLRB appointees are restoring and supporting workers' rights

Report • By Lynn Rhinehart, Celine McNicholas, and Margaret Poydock • May 1, 2024

The Biden board

How President Biden’s NLRB appointees are restoring and supporting workers’ rights

Summary: The National Labor Relations Board (NLRB) during the Biden administration has supported workers’ rights to form unions and engage in collective bargaining, standing in stark contrast to the Trump administration’s anti-worker record.



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Key findings

- President Biden has nominated experienced worker advocates and increased funding to the NLRB—the independent agency responsible for protecting private-sector workers’ organizing and bargaining rights. The Trump administration, however, appointed corporate lawyers to leadership positions and hollowed out the agency by not filling vacancies.
- President Biden’s appointees have advanced the NLRB’s mission by addressing issues such as employee status under the law, the scope of concerted activity protected by the law, the representation process, and remedies for violations of the law.
- The Biden NLRB has made significant progress in undoing the damage inflicted by the Trump administration’s appointees and in restoring workers’ rights, but more remains to be done.
- Structural weaknesses in the law continue to be an obstacle to workers seeking to organize unions and engage in collective bargaining.

Why this matters

Worker support for organizing unions has hit record levels. Petitions for union representation elections are up, as is the number of workers represented by unions.



Courtesy of the UAW

“President Biden’s NLRB appointees are restoring and supporting workers’ rights and have succeeded in undoing much of the damage of the Trump NLRB.”

Background

The National Labor Relations Board, an independent federal agency, enforces the nation’s fundamental labor law—the National Labor Relations Act (NLRA). This act guarantees most private-sector workers the right to organize and the right to collective bargaining. The agency has been the focus of increased political fights over recent decades as corporate opposition to unions has intensified. Given the vast difference between the Trump and Biden administrations’ records on workers’ rights, it should come as no surprise that the NLRB under the two presidents has been a study in stark contrasts.

The Trump administration used the NLRB to advance an agenda that can only be characterized as anti-worker, appointing corporate lawyers as general counsel and to the board (McNicholas, Poydock, Rhinehart 2019). EPI reviewed the Trump NLRB actions on issues identified as top priorities by the U.S. Chamber of Commerce, a major business trade association. The EPI report found that the Trump board had taken action on all 10 of the chamber’s top priorities, all of which gave more power and rights to employers at the expense of workers.

The Biden administration, on the other hand, has provided support for the important work of the agency, prioritizing nominations to and funding for the NLRB. President Biden’s appointees have strengthened workers’ rights to a union and collective bargaining—the core rights guaranteed by the NLRA. Through a series of decisions, the Biden board has made progress in rolling back the anti-worker agenda advanced by the Trump administration and has expanded worker protections in key areas. Further, through the work of General Counsel Jennifer Abruzzo, the agency has reinvigorated its enforcement of the NLRA and expanded its outreach efforts to ensure that more workers can access their right to a union and collective action with their co-workers.

Still, the board’s authority to protect workers’ organizing rights is limited by fundamental weaknesses in the NLRA. These include a lack of monetary penalties for violations by employers, a lack of restrictions on employer interference in organizing campaigns, and a lack of a process for

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reaching first agreements (McNicholas et al. 2019; McNicholas, Poydock, Rhinehart 2021). The current broken system of labor law and corporate opposition to unions make it difficult for workers who want a union to win representation. At the same time, workers have continued to overcome these obstacles and form unions at their workplaces, and the number of workers represented by a union has increased for the past two years (Shierholz et al. 2024).

Nominations

President Biden has prioritized the work of the NLRB in his nominations to the agency. On his first day in office, President Biden fired Trump appointee Peter Robb who was serving as general counsel. According to critics, including the nonpartisan Congressional Accountability Office, Robb had been hollowing out the agency by failing to fill vacancies and proposing reorganizations that lowered worker morale (Scheiber 2018; GAO 2021). President Biden then nominated, and the Senate confirmed, Jennifer Abruzzo to be NLRB General Counsel (NLRB 2024b). Abruzzo spent most of her career as an NLRB attorney. She served as Deputy General Counsel during the Obama administration and as Acting General Counsel following the expiration of Richard Griffin’s term. She also worked as special counsel to the Communications Workers of America.

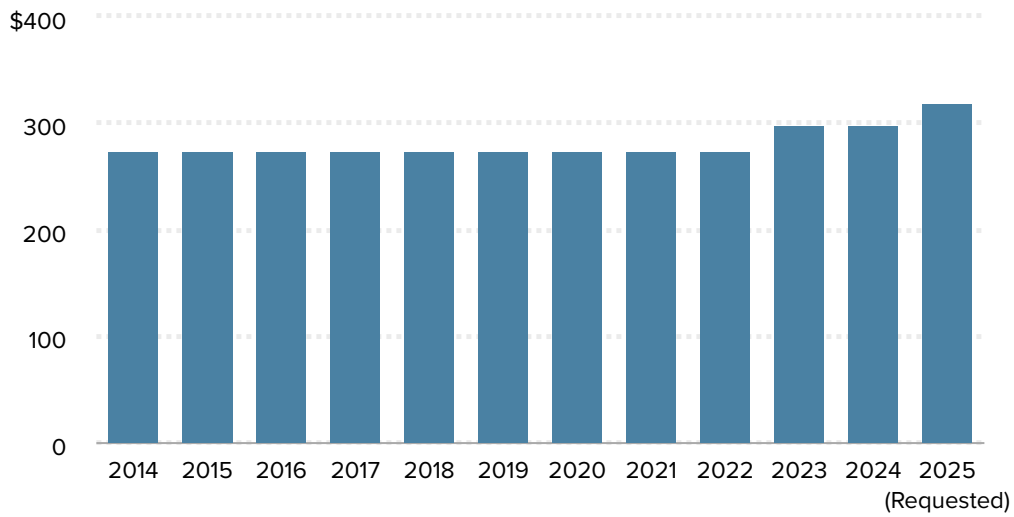
President Biden also addressed vacancies on the board by nominating strong workers’ rights advocates. He nominated, and the Senate confirmed, two union-side labor lawyers to serve as members of the NLRB: Gwynne Wilcox, a prominent union-side labor lawyer who is the first Black woman to serve on the NLRB, and David Prouty, the general counsel of SEIU Local 32BJ (NLRBb 2024a; NLRB 2024d). The nominees joined Lauren McFerran, whom President Biden named as NLRB Chair on his first day in office and who served as chief labor counsel to the late Senator Edward M. Kennedy and to Senator Tom Harkin. As a result of President Biden’s nominations, strong workers’ rights advocates became the majority on the NLRB in September 2021 (NLRB 2024e).

Funding

The Biden administration has pushed for increased NLRB funding to ensure support for the agency’s critical work (The White House 2024). Despite the NLRB’s central role in protecting the organizing and bargaining rights of 109 million working people, the agency has suffered from chronic underfunding relative to its mission and workload.¹ The agency has been essentially flat funded for years, meaning that the funding level hasn’t changed over time, which represents a real-dollar decrease given increases in inflation (**Figure A**).

Figure A

Funding for the National Labor Relations Board, fiscal years 2014–2025 (in millions), non-inflation adjusted

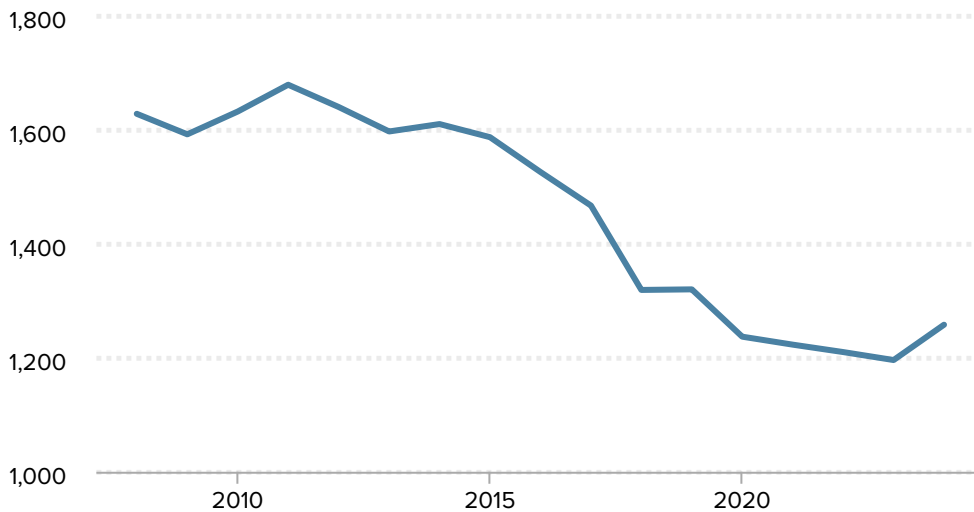


Source: National Labor Relations Board, *Performance Budget Justification* reports, fiscal years 2008–2025, downloadable from <https://www.nlr.gov/resources/performance-budget-justification>, accessed March 25, 2024.

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Figure B

Total number of full-time employees at the National Labor Relations Board, fiscal years 2008–2024



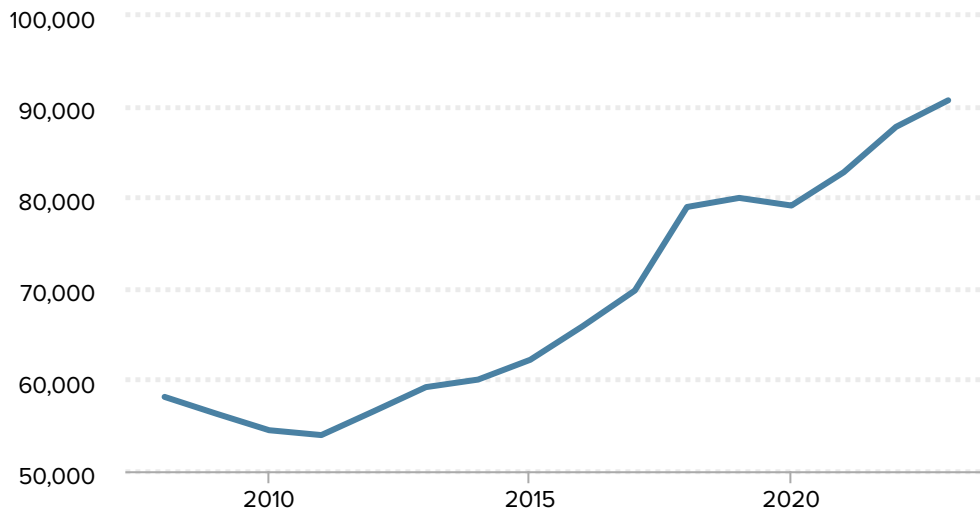
Source: National Labor Relations Board, *Performance Budget Justification* reports, fiscal years 2008–2025, downloadable from <https://www.nlr.gov/resources/performance-budget-justification>, accessed March 25, 2024.

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Figure C

The National Labor Relations Board (NLRB) is now responsible for far more workers than it was a decade ago

Number of private-sector workers per NLRB full-time employee, 2008-2023



Source: EPI calculations from National Labor Relations Board budget data on full-time employees from 2008–2023 and Current Employment Statistics survey data of production and nonsupervisory private-sector employees from 2008–2023.

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In December 2022, the Biden administration sought, and Congress approved, the largest increase in funding for the NLRB in nearly a decade—a \$25 million increase. This increase allowed the agency to avoid furloughs and other cutbacks in personnel and services, and to backfill some positions (**Figure B**).

Funding for the NLRB remains insufficient, a growing challenge in light of the agency’s heavier caseload due to increases in union representation petitions and unfair labor practice filings (NLRB 2024i). NLRB staff are responsible for serving more workers than ever before, as shown in **Figure C**. The Biden administration recently proposed a \$20 million increase in NLRB funding for fiscal year 2025 (The White House 2024).

Undoing damage wrought by the Trump NLRB

In 2019, EPI released “[Unprecedented—How the Trump NLRB is Rolling Back Workers’ Rights](#)” (McNicholas, Poydock, Rhinehart 2019). The report reviewed decisions and actions by former President Trump’s NLRB appointees and found that they had systematically and dramatically eroded workers’ organizing and bargaining rights through decisions, rulemakings, and other actions.

Tables 1 and 2 summarize the Biden board’s progress in undoing the damage to workers’ rights that the Trump board inflicted. It is important to note that in order to reverse a prior board’s decision, the NLRB must be presented with a case that involves the issue. Table 1 shows the U.S. Chamber of Commerce’s 10-item wish list and the Trump and Biden boards’ actions in regard to them, if any.

Table 1

U.S. Chamber of Commerce asks

Chamber ask	Trump board	Biden board
Overrule <i>Specialty Healthcare</i> and allow employers to gerrymander bargaining units	Done	Reversed and returned to pre-Trump standard
Repeal rules to streamline representation election process	Done	Reversed and returned to pre-Trump standard
Overrule <i>Browning-Ferris Industries</i> to enable employers to avoid joint-employer status	Done	Reversed and new rule issued to define joint employer. Rules were vacated by Trump judge on March 9, 2024.
Allow employers to require arbitration agreements and give greater deference to arbitration	Supreme Court disposed of the mandatory arbitration question in <i>Epic Systems</i> . Trump board reversed Obama board to give greater deference to arbitration proceedings.	Amicus briefs requested on scope of confidentiality clauses in arbitration agreements
Expand management rights to give employers more power to make unilateral changes during the term of a collective bargaining agreement and upon its expiration	Done	Partially reversed. <i>MV Transportation</i> "contract coverage" test for unilateral changes still has not been addressed.
Allow employers to impose discipline without bargaining with a newly organized union	Done	No action taken
Allow employers to prohibit use of employer email system for communications about union organizing and other workplace issues	Done	No action taken
Give employers greater leeway to fire employees engaged in collective action for using profane or offensive language	Done	Reversed and returned to pre-Trump standard
Allow employers to require confidentiality in their investigations and withhold witness statements from the union	Done	Reversed
Allow employers to restrict picketing on their property and broaden definition of unprotected intermittent strikes	Done	Partially reversed. Board returned to prior standard allowing access to employer property by contractor employees. Board has not yet issued a ruling on intermittent strikes.

Source: EPI analysis of the National Labor Relations Board's rulemaking and board decisions; McNicholas, Poydock, Rhinehart 2019.

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Other issues concerning workers' organizing and bargaining rights

Table 2 highlights several key areas where the Trump board undermined workers' organizing and bargaining rights. The Biden board's response has been to not only undo this damage, but establish additional protections for workers' rights in some cases. The appendix contains more information and background about the actions and issues highlighted in Tables 1 and 2.

Table 2

Other issues concerning workers’ organizing and bargaining rights

Issue	Trump board	Biden board
Scope of protected activity	Narrowed the scope of protected activity (meaning that workers can face discipline, including being fired, for the activity)	Restored a broader definition of protected concerted activity
Organizing/ bargaining rights for student workers	Proposed a rule to strip student workers of their organizing and bargaining rights	After President Biden made Lauren McFerran Chair of the NLRB, the board withdrew the proposed rule and left legal precedent in place that says student workers have organizing and bargaining rights. Almost 44,000 student workers have won unions in NLRB elections since 2022. None of these elections would have been allowed under the Trump NLRB’s proposed rule
Misclassification of workers as independent contractors	Changed the legal test to allow more workers to be (mis)classified as independent contractors	Restored the prior, more protective test for determining independent contractor status
Unfair labor practices that undermine the representation process		Issued <i>Cemex</i> decision to prevent employer unfair labor practices that undermine the representation process
Voluntary recognition by employers	Issued a rule undermining voluntary recognition; issued complaints alleging voluntary recognition agreements were illegal.	Issued a proposal to withdraw Trump board rules undermining voluntary recognition, but the rules have not yet been finalized, meaning that the Trump rules remain in effect
Dues checkoff during bargaining	Allowed employers to cease dues checkoff at the expiration of collective bargaining agreement	Restored pre-Trump NLRB rule that dues checkoff continues during bargaining for a successor contract (unless employer can prove that there is an impasse in bargaining)
Relief for workers harmed by employer violations		Issued decision that made clear that board will consider awarding monetary relief for direct or foreseeable harms such as medical bills and rent payments, if proven by the general counsel.
Employer-issued rules and handbooks that chill collective action	Allowed employers to adopt rules and policies that potentially chill worker organizing and collective action	Employer-issued rules that potentially chill collective action are presumptively unlawful, and employers must justify their need and scope.

Source: EPI analysis of the National Labor Relations Board’s rulemakings and board decisions.

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General counsel initiatives to protect workers' organizing and bargaining rights

Under the leadership of General Counsel (GC) Abruzzo, the NLRB's Office of the General Counsel has undertaken vigorous enforcement of the NLRA. One of the significant wins has been a landmark settlement with Amazon under which the company agreed to provide access to its facilities to off-duty employees and an expedited process to address violations of the settlement. GC Abruzzo has also sought to expand and deepen the agency's reach by establishing new partnerships with other agencies, including those that scrutinize corporate mergers and other practices for anti-competitive impacts that harm workers. The general counsel has issued memoranda on several important issues, such as employer surveillance, the use of noncompete agreements, and the employee status of student athletes. She has also urged the NLRB to strengthen workers' rights in several areas, including remedies for bad faith bargaining and restrictions on employer use of captive audience meetings (NLRB 2024g). While a comprehensive review of all GC initiatives is beyond the scope of this report, what follows is a description of several key initiatives.

Ensuring that workers know their rights

The NLRB's Office of the General Counsel has implemented several initiatives to better ensure that workers are aware of their organizing and bargaining rights (NLRB 2021a; NLRB 2023c). These outreach efforts are important, given the gap between the high percentage of workers who want a union and the low percentage who have information on how to form one. The general counsel's office has developed information cards on workers' organizing rights and promoted this information through social media. The NLRB contributed information to the Department of Labor's [Worker Organizing Resource and Knowledge \(WORK\) Center](#), one of DOL's initiatives in connection with the White House Task Force on Worker Organizing and Empowerment. The general counsel's office has partnered with several embassies—including Mexico, Guatemala, El Salvador, and most recently, the Dominican Republic—to get know-your-rights information into the hands of immigrant workers (NLRB 2024f).

Winning preliminary relief for workers during organizing campaigns

One of the GC's priority initiatives has been to seek and obtain interim relief for workers who are illegally fired by their employer during an organizing campaign. The GC has sought and won preliminary injunctions to win reinstatement for Starbucks baristas, cannabis workers, and others. The general counsel has issued several memoranda to the

field offices emphasizing the priority these cases should be given (NLRB 2022b).

Building agency partnerships to strengthen enforcement

The NLRB operates with limited resources and struggles to fulfill its mission under severe budgetary constraints. To maximize the impact of the agency's enforcement resources, the Office of the General Counsel has entered into partnership agreements with numerous federal agencies to have better coordination, information exchange, and enforcement (NLRB 2022d). These partnerships are with the Department of Labor and its subcomponents—the Occupational Safety and Health Administration, the Wage and Hour Division, and the Office of Labor Management Standards. The General Counsel also has entered into partnerships with the Department of Justice (DOJ), the Federal Trade Commission, and the Consumer Financial Protection Bureau to foster greater coordination on antitrust and other anti-competitive practices that harm workers (NLRB 2023b). As one example of the impact of these partnerships, after the NLRB and DOJ signed a partnership agreement, the Department of Justice filed an amicus brief before the NLRB in the *Atlanta Opera* case, urging a narrow definition of independent contractor to maximize employee protections under the NLRA.²

The NLRB has partnered with the Department of Labor and the Equal Employment Opportunity Commission to increase coordination and awareness of anti-retaliation protections (NLRB 2021d). And the NLRB has partnered with the Federal Mediation and Conciliation Service (FMCS) on a first-contract initiative to encourage parties to utilize FMCS's services to facilitate reaching first contracts in newly organized workplaces (NLRB 2022c).

Protecting immigrant workers

The NLRB General Counsel's office has actively participated in interagency work led by the Department of Homeland Security to ensure that immigrant workers, including undocumented immigrant workers, are protected when they exercise their NLRA rights. The NLRB has developed educational materials on the availability of protections for undocumented workers when they face interference with or violations of their workplace rights and have made these materials available on the NLRB's website, through its embassy partnerships, and through social media (NLRB 2022a). General Counsel Abruzzo has issued several memoranda to field offices emphasizing the importance of protecting the NLRA rights of immigrant workers.

Conclusion

President Biden's NLRB appointees have succeeded in undoing much of the damage inflicted by the Trump NLRB. More remains to be done, however, to reverse the Trump board's damage. To ensure that workers' organizing and bargaining rights are protected to

the maximum extent possible under existing law, the Biden administration must ensure that the board retains a strong, pro-worker majority and must win greater funding for the agency. Given the fundamental and structural weaknesses in the law, the Biden administration must also continue to push for the Protecting the Right to Organize Act and other legislative reforms to strengthen and protect workers' ability to form and join unions and engage in collective bargaining with their employers.

Appendix

What follows is more context about the board actions in Tables 1 and 2.

Table 1: U.S. Chamber of Commerce asks

Overrule *Specialty Healthcare* and allow employers to gerrymander bargaining units

The NLRA states that workers may organize into “an” appropriate bargaining unit, i.e., group of workers. Historically, the NLRB has interpreted this language to mean a group of workers who share a “community of interest,” meaning that their jobs or working conditions are similar enough that it makes sense for them to join together in a unit for purposes of collective bargaining.

In 2010, the Obama board—in its *Specialty Healthcare* decision, *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 934 (2011)—applied this long-standing “community of interest” standard to a group of certified nursing assistants who had petitioned for a union election. The board ruled that the unit proposed by workers would presumptively be deemed an appropriate unit unless the employer could demonstrate that other employees should be added because they shared an “overwhelming” community of interest with the presumptively appropriate unit. Employer groups and Republicans attacked the decision, claiming that it was designed to help unions get their foot in the door of nonunion facilities by organizing “micro-units” of workers.

Overturing *Specialty Healthcare* was the number one item on the U.S. Chamber of Commerce’s wish list for the Trump board, which wasted no time in doing so in December 2017 with *PCC Structurals, Inc.*, 365 NLRB No.160 (2017). The Biden board reversed that decision in December 2022, restoring the *Specialty Healthcare* community of interest standard in *American Steel Construction, Inc.*, 372 NLRB No. 23 (2022). This issue is significant because it gives workers more ability to choose the group they wish to organize and bargain with and reduces the ability of employers to gerrymander the bargaining unit or use the bargaining unit issue to delay elections and certification of new unions.

Repeal rules to streamline representation election process

Delay in the representation election process is a long-standing problem that undermines workers' ability to successfully form unions at their workplaces. Employers often exploit the NLRB's procedures to delay elections and use the time to campaign against the union. The Obama board adopted rules to modernize and streamline the representation process and reduce unnecessary litigation and delay. Repeal of these rules was the second item on the U.S. Chamber of Commerce's wish list for the Trump board, which in 2019 issued rules repealing the Obama board rules. See Representation-Case Procedures, 84 Fed. Reg. 69524–69599 (December 18, 2019).

The Trump rules were challenged in court, and several provisions were ruled invalid. In August 2023, the Biden board essentially reissued the Obama board's representation rules to once again reduce unnecessary delay in the process and give workers a timely vote. See Representation-Case Procedures, 88 Fed. Reg. 58076–58102 (December 26, 2023). The new rules have cut the time between election petition and election to 59 days, from 105 last year.

Overrule *Browning-Ferris Industries* to enable employers to avoid joint-employer status

Employers who hire temporary or contract employees from staffing agencies or other employers often have considerable influence over the wages, hours, and working conditions of these employees. Unless these employers are brought to the bargaining table as joint employers, the affected workers are unable to fully bargain over their wages and working conditions, undermining the purposes of the NLRA. While the particular relationship between two employers is fact-specific, the NLRB has long had a test for evaluating whether two employers jointly employ particular employees.

In *Browning-Ferris Industries*, 362 NLRB No. 186 (2015), the Obama board reiterated and clarified the test for determining joint-employer status, including that indirect control or reserved control could be an indicator of employer status. The workers in *Browning-Ferris* worked on a recycling line at a Browning-Ferris facility and were supplied by a staffing agency. In order to meaningfully bargain over their working conditions, the workers needed Browning-Ferris at the bargaining table, so they named Browning-Ferris as a joint employer in their petition for a representation election. The NLRB agreed. The business community immediately sounded the alarm, saying that the *Browning-Ferris* decision would result in franchisees being joint employers with their franchisors—despite the fact that *Browning-Ferris* involved a staffing agency, not a franchise situation. Nevertheless, because of this opposition, and in light of organizing efforts at McDonald's by the Service Employees International Union (SEIU), overturning *Browning-Ferris* was identified as a top priority—number three—on the U.S. Chamber of Commerce's wish list for the Trump board.

The Trump board initially attempted to overturn *Browning-Ferris* in *Hy-Brand Industrial Contractors*, 365 NLRB No. 156 (2017), but the decision had to be vacated because of

then-NLRB member William Emanuel’s conflict of interest in the case (NLRB 2018). The Trump board then engaged in rulemaking and issued a rule in 2020 that made it more difficult to demonstrate that an employer was a joint employer. See *Joint-Employer Status Under the National Labor Relations Act*, 85 Fed. Reg. 11184–11236 (February 26, 2020).

The Biden board engaged in rulemaking to establish a more protective standard, and a final rule was issued in October 2023. See *Standard for Determining Joint-Employer Status*, 88 Fed. Reg. 73946–74018 (October 27, 2023). However, the rules were enjoined by a Trump-appointed federal district judge in Texas before they took effect and were vacated on March 9, 2024 (NLRB 2024g).

Allow employers to require arbitration agreements and give greater deference to arbitration

Employers and their trade associations have worked for years to impose mandatory arbitration clauses on workers and consumers in order to force claims into an employer-controlled system and keep them out of federal court. The Obama board ruled that employers could not force employees bringing group workplace claims into arbitration because this conflicts with the NLRA’s protection of concerted activity by employees on workplace issues. See *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012).

However, in *Epic Systems*, a closely divided Supreme Court ruled that the Federal Arbitration Act allows employers to require arbitration of group claims and that the NLRA’s protection of concerted action did not override that law. The Biden board has asked for amicus briefs on the legality and permissible scope of confidentiality clauses in mandatory arbitration agreements but has not yet ruled in this case (NLRB 2022e).

On the issue of deferral to arbitration, the Trump board reversed the Obama board and provided greater deference to arbitration proceedings. See *United Parcel Service, Inc.*, 369 NLRB 1 (2019). The Biden board has not yet ruled on this issue.

Expand management rights to give employers more power to make unilateral changes during the term of a collective bargaining agreement and upon its expiration

The Trump board issued a series of decisions that gave employers more leeway to institute changes without bargaining with their workers’ union. The Trump board’s decisions allowed employers to impose unilateral changes upon the expiration of a collective bargaining agreement if the employer could show a past practice of doing so, and the Trump board adopted a very broad interpretation of “management rights” that gave employers more leeway to make unilateral changes even while a collective bargaining agreement is in effect. These decisions undermined the collective bargaining process and the union’s role in it by giving more unilateral power to employers. The Biden board has reversed one of these decisions and no longer allows employers to make unilateral changes at the conclusion of a collective bargaining agreement’s terms (NLRB 2023e). The Biden board has not yet acted on *the MV Transportation* “contract coverage”

test for allowing management to make unilateral changes.

Allow employers to impose discipline without bargaining with a newly organized union

In *Care One*, the Trump board ruled that employers involved in initial bargaining with a new union may impose discipline on employees without bargaining with the union—a decision that undermines the new union’s authority. See *Care One at New Milford*, 369 NLRB No. 109 (2020). The Biden board has not yet addressed the issue.

Allow employers to prohibit use of employer email system for communications about union organizing and other workplace issues

Prior to the Trump board, the NLRB’s rule was that employers could not bar employees from using the company email system for union-related communications unless the employer could demonstrate a compelling need for such a policy. See *Purple Communications, Inc.*, 361 NLRB No. 126 (2014).

The Trump board reversed this precedent and ruled that employers could bar employees from using the company email system for union-related communications. See *Caesars Entertainment*, 368 NLRB No. 143 (2019). The decision exacerbates an existing imbalance in workers’ ability to discuss unionization at work, given that employers can and do freely express their views on unionization to employees, including in mandatory anti-union meetings. The Biden board has yet to address this issue.

Give employers greater leeway to fire employees engaged in collective action for using profane or offensive language

Acting on another U.S. Chamber of Commerce priority, the Trump board reversed precedent and gave employers more leeway to discipline employees engaged in protected activities if the employee uses profanity or offensive language. See *General Motors LLC*, 369 NLRB No. 127 (2020). This decision gave employers the ability to use profane or offensive language as grounds to retaliate against workers exercising their labor law rights. The Biden board reversed the Trump board’s ruling and restored the long-standing “setting-specific” standard for evaluating profane or offensive speech in the context of workers exercising their labor law rights. The standard looks at the severity of the conduct and the context. See *Lion Elastomers LLC II*, 372 NLRB No. 83 (2023).

Allow employers to require confidentiality in their investigations and withhold witness statements from the union

The Trump board issued a decision that reversed precedent and allowed employers to have rules requiring employees to maintain confidentiality about workplace investigations for the duration of the investigation, even when the rules could be interpreted to interfere with workers' rights to engage in collective action under the NLRA. See *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019).

The Biden board has reversed this decision and instituted a new rule requiring employers to justify rules, such as confidentiality rules, as necessary and narrowly crafted. See *Stericycle, Inc. and Teamsters Local 628*, 372 NLRB No. 113 (2023).

Allow employers to restrict picketing on their property and broaden definition of unprotected intermittent strikes

Restriction on picketing

The Trump board ruled that employers could deny access to off-duty employees of contractors who work on their property. See *Bexar County I*, 368 NLRB No. 46 (2019). The Biden board reversed this decision and returned to the prior rule on access to property by off-duty contractor employees. See *Bexar County II*, 372 NLRB No. 28 (2022).

Unprotected intermittent strikes

The Trump board issued a ruling in *Wal-Mart Stores, Inc.*, 368 NLRB No. 24 (2019) finding that certain work stoppages were intermittent strikes and therefore not protected by labor law. The Biden board has not yet issued a ruling on this issue.

Table 2: Other issues concerning workers' organizing and bargaining rights

Scope of protected activity

Under the NLRA, employers are prohibited from retaliating against or interfering with workers engaged in "protected concerted activity," that is, activity aimed at addressing wages, hours and working conditions, regardless of whether workers are attempting to form a union. Protected concerted activity takes many forms and can address many issues—health and safety, racial justice at the workplace, policies on workplace harassment, protections for immigrant workers, and much more.

The Trump board took a narrow view of protected concerted activity, issuing a decision that found that an employee protesting their employer's tipping policy did not constitute

protected activity because only one employee was arguably involved in the particular action in question. See *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019). Then-NLRB member and now NLRB Chair Lauren McFerran dissented, saying that the decision took an overly narrow view of protected activity and that the employee was clearly raising a group concern and did so in front of other employees.

The Biden board formally reversed the decision in August 2023, restoring the board's long-standing "totality of the circumstances" approach to determining whether employees are engaged in protected concerted activity. See *Miller Plastic Products, Inc.*, 372 NLRB No. 134 (2023).

The Biden board issued another decision finding that an employer illegally interfered with a worker's NLRA rights by requiring him to remove Black Lives Matter insignia from his uniform. See *Home Depot USA, Inc.*, 373 NLRB No. 25 (2024).

The Biden board also reversed a decision by the Trump board finding that employees are not engaged in protected activity if they collectively raise issues about non-employees in cases that have potential impact on the bargaining unit. In this case, employees advocated that unpaid interns be paid for their work. See *American Federation for Children, Inc.*, 372 NLRB No. 137 (2023).

Organizing/bargaining rights for student workers

Students on campuses who work as teaching assistants, researchers, resident assistants, and other jobs have shown great interest in organizing unions to collectively improve their pay, benefits, and working conditions. In the last three years alone, almost 45,000 student workers have formed unions through NLRB elections with several more, large organizing drives currently underway. The Trump board, however, sought to strip student workers of their organizing rights. The Trump board proposed a rule to exclude student workers from the definition of "employee" under the NLRA. The rule would have deprived tens of thousands of student workers of their legal rights. Fortunately, the rulemaking was not completed during the Trump presidency, and it was withdrawn after Biden was elected president and named Lauren McFerran as Chair of the NLRB.(NLRB 2021c).

In addition, the general counsel has opined that student athletes are employees (NLRB 2021b).

An NLRB regional director so ruled in a case involving a group of basketball players at Dartmouth College who recently voted to unionize (Golen 2024).

Misclassification of workers as independent contractors

Misclassification of workers as independent contractors is a pervasive problem in many sectors of the economy, including low-wage sectors. Misclassification is problematic for many reasons, including that workers classified as independent contractors do not have organizing and bargaining rights under the NLRA. The Trump board issued a decision making it easier for employers to classify workers as independent contractors and deprive

them of organizing rights, *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019). The Biden board has restored the prior test for determining independent contractor status utilizing common law factors—an important ruling given the prominence of the misclassification issue. See *The Atlanta Opera, Inc.*, 372 NLRB No. 95 (2023).

Unfair labor practices that undermine the representation process

The Biden board issued an important decision in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023), seeking to address the problem of illegal employer interference in worker organizing drives. Under *Cemex*, when an employer is presented with a request from employees to recognize their union and proof of majority support, the employer is required to recognize the union or file its own petition for a representation election at the NLRB. However, if the employer chooses the election option and commits an unfair labor practice that would require rerunning the election, the employer is required to voluntarily recognize the union. In this manner, *Cemex* creates an incentive for employers to voluntarily recognize unions and spare workers the delay and problems associated with an NLRB election, and it creates incentives for employers to comply with the law and avoid committing unfair labor practices that interfere with worker organizing.

Voluntary recognition by employers

When workers want to form a union, they can present their employer with proof of majority support from employees, and the employer can voluntarily recognize the union and begin bargaining. If workers so choose, or the employer refuses to voluntarily recognize the union, workers can file a petition at the NLRB for a representation election. The election path can be problematic when employers use the election period to campaign against the union, and often employers commit unfair labor practices during this period that undermine the organizing drive.

The Trump board issued rules in 2020 that undermine the long-standing practice of employers voluntarily recognizing their workers' union upon a showing of majority support. The Trump board rules require employers to notify the NLRB and post notices in their workplace informing workers of the voluntary recognition and providing a period of time during which workers can file a petition for an election to challenge the voluntary recognition. See Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships, 85 Fed. Reg. 18366–18400 (April 1, 2020).

In addition, the Trump general counsel issued a memorandum critiquing voluntary recognition agreements (NLRB GC 2020).

The Biden board issued a notice of proposed rulemaking to repeal the Trump rules but has not yet taken final action, meaning that the problematic Trump rules still remain in place four years after their adoption. See Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships, 87

Fed. Reg. 66890–66933 (November 4, 2022).

The most recent regulatory agenda lists March 2024 for publication of a final rule (OIRA 2024).

Dues checkoff during bargaining

The Biden board reinstated a rule requiring employers to continue to honor dues checkoff clauses following the expiration of a collective bargaining agreement. This policy promotes stability in labor management relations—the key purpose of the NLRA—by not suddenly depriving unions of dues revenue from their members while a successor contract is being negotiated. This makes sense given that the union’s duty to represent its membership—and the attendant costs—continues regardless of the expiration of the collective bargaining agreement. See *Valley Hospital Medical Center, Inc.*, 371 NLRB No. 160 (2022).

Relief for workers harmed by employer violations

A fundamental weakness in the National Labor Relations Act is its lack of compensatory damages to workers harmed by employer violations of the law, or monetary penalties for violations of the law. The Protecting the Right to Organize Act would address this problem in part by establishing monetary penalties for violations of the law. In the interim, however, General Counsel Abruzzo has urged the NLRB to interpret “make whole” relief to include monetary relief for expenses workers incur as a result of employer violations. The NLRB adopted this approach in *Thryv, Inc.*, 372 NLRB No. 22 (2022), ruling that employers are liable for direct or foreseeable financial harms from their illegal conduct. This may include medical bills and other direct financial consequences. Still pending before the NLRB is the general counsel’s request that “make whole” relief includes the value of wages and benefits employees lose when their employers engage in bad faith bargaining and delay reaching a collective bargaining agreement.

Employer-issued rules and handbooks that chill collective action

In one of its first decisions, the Trump board overturned long-standing precedent to make it easier for employers to adopt rules, policies, and handbook provisions that workers may reasonably believe restrict them from exercising their NLRA rights. The Trump board discarded a long-standing test for evaluating these handbooks and rules and replaced it with a less protective standard that gave employers more power. See *Boeing Co.*, 365 NLRB No. 154 (2017).

In August 2023, the Biden board overturned the Trump board’s decision and adopted a test that outlaws rules that may chill employees from exercising their rights, unless the employer can show that it needs the rule to advance legitimate business interests and cannot do so with a narrower rule. The Biden board’s decision, therefore, places more of a burden on employers to justify their work rules and demonstrate both that they are

necessary and do not chill employees' exercise of their NLRA rights. See *Stericycle, Inc. and Teamsters Local 628*, 372 NLRB No. 113 (2023).

Notes

1. The National Labor Relations Act covers most private-sector employees but excludes federal government workers, agricultural workers, domestic workers, independent contractors, and supervisors. The NLRA does not cover airline and railroad workers who are covered by the Railway Labor Act. For this calculation we used the Current Employment Statistics data on production and nonsupervisory workers (BLS-CES 2024).
2. Brief for the Department of Justice as Amicus Curiae, *The Atlanta Opera, Inc., and Make-Up Artists and Hair Stylists Union, Local 798, IATSE*, Case 10-RC-276292 (2022)

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