The End of Mandatory Captive Audience Meetings? 5 Tips for Adapting to the NLRB's Latest Departure from Decades of Past Precedent

Insights
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The National Labor Relations Board just banned mandatory employee meetings for purposes of discussing the subject of union representation – so-called "captive audience" meetings – and placed new restrictions on an employer's ability to require attendance at such meetings. By abandoning more than 75 years of precedent, the Board significantly reshaped the legal landscape with yet another gift to unions in the waning days of the Biden administration. Fortunately for employers, this decision will only apply on a go-forward basis. Here's a breakdown of yesterday's ruling and what it means for employers, along with actionable steps to take moving forward.

Captive Audience Meetings: A Brief History

For more than 75 years, employers have been free to convey their views on unionization to employees. The Board's initial stance on these meetings emerged in the 1940s, where decisions emphasized that coercive tactics, even if indirect, violated the National Labor Relations Act (NLRA). The Board's seminal 1948 decision in *Babcock & Wilcox* interpreted Section 8(c) of the NLRA to protect an employer's free speech rights to require attendance at these meetings, so long as no direct threats or promises were made.

These so-called "captive audience" meetings are often conducted to educate employees – particularly in response to arguments advanced by organized labor outside the workplace – and have been a staple in the American workplace since Congress amended the labor laws to recognize employer free-speech rights in 1947. Over the decades, courts and the Board have debated what could and could not be said in captive audience meetings, but the principle that employers could compel attendance (provided they refrained from coercive tactics) remained largely intact.

In 2022, however, the Board's General Counsel issued a memo taking aim at captive audience meetings (along with one-on-one supervisory "cornering" sessions). She claimed they violate the NLRA because they "force" employees to listen to free speech about union representation when they have a statutory right to refrain from doing so. Yesterday's decision endorses the General Counsel's position and jettisons more than 75 years of legal precedent to the contrary – despite the fact that the results of the recent general election will likely give rise to a replacement of the current General Counsel as early as Inauguration Day.

How Did We Get Here?

In yesterday's decision, the Board reviewed Amazon's practice of holding mandatory meetings at its Staten Island facilities during an active unionization campaign. Consistent with existing Board precedent, Amazon managers exercised their free speech rights at numerous meetings and expressed their opinions on unionization, detailing why they believed unionization was not in the employees' best interest. The meetings became a focal point in the union's claims that Amazon's tactics amounted to unfair labor practices, citing coercion and interference with employees' Section 7 rights.

The Board concluded Amazon's mandatory meetings violated the NLRA, which prohibits employer actions that interfere with employees' rights to organize. Specifically, the Board found that compelling employees to attend captive audience meetings on threat of discipline constituted coercion. According to the Board, the employer's free speech rights under Section 8(c) (which allow an employer to express its views, arguments, and opinions) do not include the right to compel employees to listen.

In the Board's view, the compelled attendance is coercion in and of itself. Because it declined to apply its decision retroactively, however, the majority chose not to find fault with this particular aspect of Amazon's conduct in the case before it.

This decision nonetheless represents a radical shift, as the Board ruled that mandatory meetings discussing union matters inherently interfere with employees' right to decide freely on unionization without employer pressure, regardless of the content of the employer's speech.

Dissent Offers Preview of What's to Come

Member Kaplan's dissent took issue with the majority's decision to overturn longstanding precedent, arguing that Section 8(c) of the NLRA, which codifies employers' rights to express their views on union matters, should protect Amazon's actions. According to Member Kaplan, requiring employees to attend meetings where the employer shares non-coercive opinions on unionization aligns with free speech principles and does not necessarily equate to coercion. The dissent further warned that the decision could hinder employers' ability to communicate effectively with their workforce, potentially creating a less informed employee base when considering unionization.

The dissent is especially noteworthy given the incoming presidential administration and the Board's anticipated shift to a Republican majority. If past is prologue, many of Member Kaplan's dissents are likely to become majority opinions in the months to come.

5 Key Takeaways for Employers

Here are five strategies employers can adopt for purposes of achieving compliance with this latest decision regulating captive audience meetings.

1. **Avoid Compulsory Attendance at Union-Related Meetings**
   To avail themselves of the "safe harbor" specified within this decision, you should refrain from requiring attendance at any meetings in which the subject of third-party representation (regardless of their position) is on the agenda or otherwise discussed. Instead, the decision makes clear that meeting invitations must be extended on a voluntary basis, while underscoring the voluntary nature of participation well before the meeting is scheduled to begin.
2. **Identify Meeting Topics in Advance and Avoid Issuing Discipline for Failing to Attend a Meeting**
   To ensure employees understand the purpose of any upcoming meeting that may implicate it, the decision makes clear that you should furnish "reasonable advance notice" regarding the purpose of the meeting (for example, to review management's position on third party representation). You should also make clear that there will be no adverse action or repercussions for those who choose not to attend or to leave after the meeting begins.
3. **Make Clear that Attendance at Captive Audience Meetings will Not be Tracked**
   To ensure compliance with the decision, you should also underscore that you will not be recording the identities of those who voluntarily choose to attend.
4. **Carefully Tailor All Information to be Shared**
   You should ensure that any communication about third party representation otherwise comports with the NLRB's rules regulating employer free speech, avoiding statements that rise to the level of unlawful promises, threats, or could otherwise be reasonably construed as coercive.
5. **Train Managers on the New Standards**
   This is the second time in less than a week that the Board has dispensed with decades of precedent impacting employer free speech rights under the NLRA. It is essential to train all statutory supervisors on the updated standards surrounding meetings discussing third-party representation and permissible communications on union representation. Managers play a key role in day-to-day interactions with employees and should understand the boundaries for discussing these topics. Comprehensive training can help ensure that they legally (and effectively) communicate their employer's position against the backdrop of these new requirements.

What's Next?

We expect a flood of pro-labor decisions from the Board in the coming weeks that may impact all facets of your workplace, whether you are unionized or not. And this decision and others that may follow will not automatically be wiped clean when a new administration takes office. It may take time for power to shift at the Board level and for new decisions to be issued that reverse course and swing the pendulum back to the other side of the fulcrum, so make sure you comply with current standards until you hear otherwise.

Conclusion

We will continue to monitor these developments and provide updates as necessary. Make sure you are subscribed to Fisher Phillips' Insight System to receive the most up-to-date information. If you have questions on how these developments may impact your organization and workforce, please contact your Fisher Phillips attorney, the authors of this Insight, or any member of our Labor Relations Practice Group.

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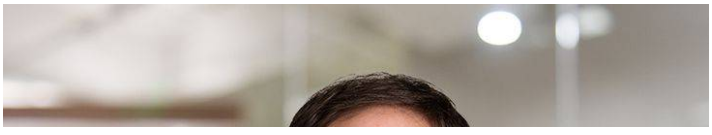

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