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Insights
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## The NLRB Will Soon Have Its Third Republican Vote: Here Are the 8 Cases Most Likely to Change the Face of Labor Law

President Trump just nominated James Macy on April 13 to fill a vacancy on the National Labor Relations Board, and if confirmed, the Board will have something it hasn't had since Trump took office: **a functioning three-member Republican majority with the votes to actually change the law**. Longstanding NLRB tradition requires at least three affirmative votes to overturn precedent, and that bottleneck is about to clear. Now that the third GOP vote is within reach, here are the eight Biden-era decisions we believe are most likely to be overturned, and what employers can expect when the law changes.

**Who is James Macy?**

Macy currently serves as the director of the Department of Labor's Office of Workers' Compensation Programs and previously served as acting administrator for the Wage and Hour Division pending Andrew Rogers's confirmation. Before joining the DOL, he worked as a management-side labor attorney in private practice, and has a 40+ year career in labor and employment law. If confirmed as expected, his term would run through August 2030.

**The Stage Is Set for Change**


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Before diving in, a word on timing and mechanics. Overturning NLRB precedent requires the right case to reach the Board in the right procedural posture, and that takes time. The Board doesn't simply issue rulings on its own. It can only reverse decisions through new cases that present the same legal question. The General Counsel's office, now aligned with the Board's majority, will play a critical role in selecting and litigating those cases strategically. But none of these changes will happen overnight. It will take months, if not years, for some of these cases to work their way up the chain.

You may also wonder why we haven't seen any of these changes take place yet, despite the fact that Trump took control of the NLRB early in 2025 and the Board obtained a voting quorum to act in December. That's because, even though GOP members outnumbered Democratic members by a 2-1 margin, the full Board should have five members, and the NLRB has historically refrained from overturning precedent unless it has three votes to do so. In fact, the Board's two-member Republican majority declined to revisit a Biden-era severance policy case last week for exactly that reason – they were one vote short.

As for Macy, he still needs to win Senate confirmation in order to be seated on the Board. The GOP holds a slim majority in the Senate, but we don't expect that to make a difference, any more than it did for the successful confirmations of Chairman Murphy, Member Mayer, and General Counsel Carey last year. We expect the regular order of a committee hearing and ultimately a floor vote in the next two months or so, and we see no roadblocks to that result – particularly because Macy is being paired with Member David Prouty's renomination to a Democratic seat.

## Expect Changes in Union Organizing and Elections

### 1. *Cemex Construction Materials Pacific, LLC (Union Recognition)*

No Biden-era decision unsettled employers more than *Cemex*. It revived elements of the nearly forgotten *Joy Silk* doctrine, creating a framework where an employer who declines to voluntarily recognize a union – and then commits even a single unfair labor practice during the ensuing campaign – faces the prospect of a bargaining order, bypassing the secret-ballot election entirely.

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That represented a sharp departure from decades of election-centric precedent. The secret ballot has long been considered the cornerstone of labor law's approach to organizing, precisely because it gives employees a private, coercion-free opportunity to express their true preferences. *Cemex* put that protection at serious risk.

> **What to expect:** The Board is widely expected to narrow or overrule *Cemex* and restore the traditional framework, under which a bargaining order requires a clear showing that an election would be irreparably compromised.

### 2. *American Steel Construction, Inc. (Micro-Units)*

This decision reinstated the *Specialty Healthcare* "overwhelming community of interest" standard, making it significantly easier for unions to carve out small, fragmented bargaining units (sometimes called "micro-units"). The practical effect has been to give unions more leverage by targeting the most organizable pockets of a workforce rather than having to demonstrate broader support.

> **What to expect:** A return to a more traditional "community of interest" standard that takes the full workplace into account. Employers managing multi-location or multi-classification workforces stand to benefit most when this standard is revisited.

## Expect Changes in Employer Speech and Campaign Conduct

### 3. *Amazon.com Services, LLC (Captive Audience Meetings)*

In a decision that overturned more than 75 years of established practice, the Biden Board held that mandatory captive audience meetings (where employers require employees to attend sessions discussing unionization) violate the NLRA if attendance is compelled under threat of discipline. The ruling significantly constrained one of employers' most traditional tools for communicating their perspective during an organizing campaign.

> **What to expect:** Reinstatement of the longstanding rule that mandatory attendance at employer meetings is

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lawful. This would restore an important channel for employer speech during organizing campaigns, though best practices around meeting content and tone will still matter.

**4. *Siren Retail Corp. (Starbucks) (Employer Speech)***

Prior to this decision, a longstanding categorical rule allowed employers to warn employees that they would lose individualized grievance-handling rights upon unionization – a factually accurate statement that the Biden Board concluded was improperly coercive in isolation.

**What to expect:** A restoration of clear safe harbors for factual employer speech about how union representation affects workplace dynamics, as long as the communication doesn't cross the line into threats or promises.

## Expect Changes in Workplace Rules, Remedies, and Severance

**5. *Stericycle, Inc. (Workplace Rules)***

*Stericycle* replaced the relatively predictable *Boeing* framework with a far more employee-centric standard: workplace rules and handbook policies are now presumptively unlawful if a "reasonable employee" could interpret them as chilling protected activity under Section 7. The burden shifted entirely to employers to justify even facially neutral policies. The result has been years of uncertainty around basic workplace rules covering conduct, confidentiality, and communications.

The Board's General Counsel has already signaled a shift in enforcement posture through a February guidance memo directing regional offices to be more selective in pursuing work-rules cases. But that memo didn't change the law. Only the Board can do that.

**What to expect:** A return to something resembling the *Boeing* framework, with its category-based approach and greater deference to legitimate employer interests. Employers should continue reviewing handbooks now in anticipation of that shift, even before the Board acts.

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### 6. *McLaren Macomb (Severance Agreements)*

Few decisions created more immediate operational headaches than *McLaren Macomb*, which called into question confidentiality and non-disparagement provisions that employers had been including in severance agreements for decades. The Board held that offering employees a severance agreement containing such provisions – even without any explicit threat – was itself an unfair labor practice, because the clauses could be read to chill employees' Section 7 rights. Overnight, standard severance language that had been considered unremarkable became legally suspect.

> **What to expect:** A restoration of employers' ability to include reasonable confidentiality and non-disparagement provisions in severance agreements, subject to appropriate carve-outs for core Section 7 activity. Employers should hold off on locking in post-*McLaren* severance templates as permanent policy, as the law here is likely to shift sooner rather than later.

### 7. *Lion Elastomers LLC (Employee Misconduct)*

This decision abandoned the uniform *Wright Line* analytical framework for employee misconduct during protected activity, reinstating setting-specific standards that effectively make it harder for employers to discipline employees who engage in threatening, racist, or misogynistic conduct while participating in labor-related activity. The result has been a frustrating double standard: conduct that would result in termination in any other context may be protected when it occurs on a picket line or during a labor dispute.

> **What to expect:** A return to consistent, objective standards for evaluating employee misconduct that recognize an employer's legitimate interest in maintaining a safe and respectful workplace, regardless of whether a labor dispute is underway.

### 8. *Thryv, Inc. (NLRA Remedies)*

Perhaps no decision expanded employer financial exposure more aggressively than *Thryv*. It extended NLRA remedies

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to cover "all direct and foreseeable" economic harm caused by an unfair labor practice – a consequential damages theory that is entirely foreign to the traditional make-whole framework historically associated with labor law. Some circuit courts have already pushed back, but the doctrine remains operative before the Board.

> **What to expect:** A rollback to traditional make-whole remedies (back pay and reinstatement) without the speculative damages exposure that *Thryv* introduced. Employers currently facing ULP charges should factor this likely shift into their litigation strategy.

### What Employers Should Do Right Now

*Cemex*, *Stericycle*, and the rest of these decisions remain binding law today. But the Macy nomination is a strong signal that changes will be coming, and you may want to start preparing now.

- Specifically, now is the time to review handbook policies that were revised in response to *Stericycle* and flag provisions that may warrant restoration once the legal standard shifts.
- Assess your organizing-response protocols to account for the likely end of the *Cemex* risk.
- Evaluate severance agreement templates for provisions that were narrowed in response to *McLaren Macomb*.
- And if your organization has pending ULP charges involving *Thryv*-style damages claims, this is the time to reassess your litigation strategy with labor counsel.

### Conclusion

We will continue to monitor developments and provide updates as the Board acts. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information direct to your inbox. If you have questions, contact your Fisher Phillips attorney or any member of our Labor Relations Practice Group.

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