

WEBINAR



# NLRB: The Swinging Pendulum

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# 2023 VIRTUAL EMPLOYMENT & LABOR LAW SUMMIT

November 7, 2023



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## NLRB: THE SWINGING PENDULUM



## What is the NLRB?

The National Labor Relations Board (NLRB) is a federal agency created in 1935 to enforce the National Labor Relations Act (NLRA).

- Protect right to collectively bargain-freedom of association
- Protect right to seek better working conditions
- Allow designation of representation without retaliation
- Prevent and remedy unfair labor practices

3

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## Section 7 Rights

- Sets forth that employees have the right to self-organize, join a union, bargain collectively through an authorized representative and engage in other concerted activities for the purpose of collective bargaining, as well as the right to decide not to engage in labor organization activities.

4

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## Section 8 Rights

- Describes the right of workers (employees) to file unfair labor practices claims against their employer for interference with section 7 rights related to labor organizing and for discrimination or retaliation against an employee or employees for exercising their rights under the NLRA, not only related to labor organizing but also to complaining about working conditions such as wages, benefits, hours and so forth.

5

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## Jurisdiction-Both Union and Nonunion

- Retailers-Gross Volume of \$500,000 or more
- Non-retailers-Good sold or services provided out of state of at least \$50,000
- Channels of Interstate Commerce-\$50,000 gross annual sales
- Health Care and Law Organizations-\$250,000 gross annual sales
- All Companies with contracts with federal government
- Education and Cultural Centers-\$1 million gross

6

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## Jurisdiction-Excluded

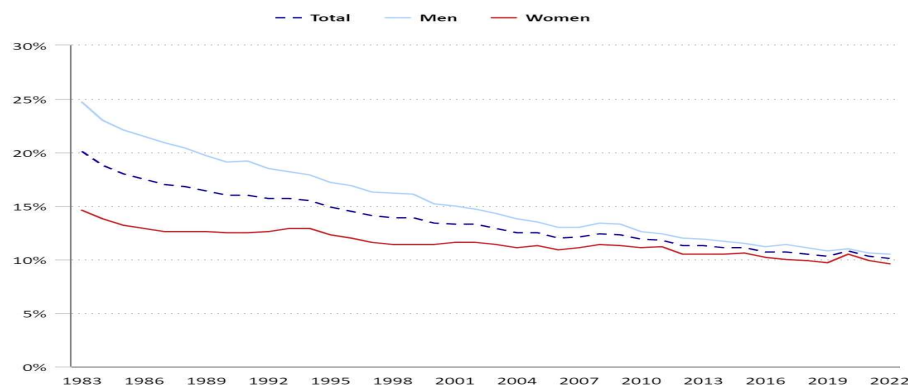
- Religious Organizations-so long as effectuating purpose of organization but some jurisdiction if secular characteristics
- Federal, state and local governments
- Employers who employ only agricultural laborers, engaged in farming operations that cultivate agricultural commodities for delivery
- Employers subject to Railway Labor Act, interstate railroads and airlines

7

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## Union Membership Lowest Ever

Union membership rates by sex, 1983–2022



Click legend items to change data display. Hover over chart to view data.  
Source: U.S. Bureau of Labor Statistics.

8

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## Return of “Quickie” Election Rules

- Overturns 2019 rule and return to 2014 standard of aggressive timeline toward union election
- Eliminate procedures for pre-election appeals-proposed single, discretionary appeal or pre and post-election issues
- Pre-election hearing only limited to representation question as to whether representation exists
- No longer have to observe 20-business day waiting period for an election
- **Effective December 26, 2023**

9

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## New Union Recognition Standard

*Cemex Construction Materials Pacific, LLC (Cemex)* (August 25, 2023)

- Overturns decades old precedents from 1971
- Employer can elect to recognize union but may still file a petition to test Union’s majority support or challenge unit.
- **HOWEVER**, if employer commits an unfair labor practice that requires setting aside the election, the election petition is dismissed
- **AND** employer can be forced to collectively bargain
- **RETROACTIVE APPLICATION**

10

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## Statutory Duty to Bargain With Unions

- Two NLRB Decisions – *Wendy Corp* and *Tenocap, LLC* (August 26, 2023)
- *Wendt*-overturn 2017 decision-now no discretion to make unilateral changes to unionized workforce during a contract hiatus or during negotiations on first contract
- *Tenocap*-Employer’s past practice of unilateral changes under management-rights clause in a CBA cannot authorize changes made after agreement expires
- **NO LONGER CAN MAKE DISCRETIONARY CHANGES WITHOUT BARGAINING FIRST**

11

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## Expansion of Advocacy Rights

### *American Federation for Children* (August 31, 2023)

- Overturns Board precedent that employee advocacy on behalf of individuals who are not “employees” is excluded from Section 7 protections.
- Section 7 of the NLRA gives employees the right “to engage in . . . concerted activities for the purpose of . . . mutual aid and protection.” 29 U.S.C. § 157
- “Solidarity principle”-employee who comes to aid of another is integral to this concept.

12

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## New Standard as to Work Rules

### *Stericycle Inc. (August 2, 2023)*

- Overturns prior balance of interests of employer and employee
- New rule-whether a work rule *could* be reasonably interpreted to “chill” employees Section 7 rights-presumptively unlawful even if facially neutral
- Employer can rebut by showing “legitimate and substantial business interest”
- **RESULT: LIKELY ANY RULE THAT SEEKS TO CONTROL BEHAVIOR OR SPEECH-NOW INCREASED SCRUTINY**

13

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## Severance Agreements

### *McLaren Macomb (February 21, 2023)*

- Confidentiality and non-disparagement agreements in severance agreements that are overly broad violate Section 7 rights
- Confidentiality and non-disparagement provisions okay as to supervisors
- Narrowly tailored provisions are not prohibited, trade secret or propriety information
- Cannot restrict employees from communicating with other employees to prevent unlawful workplace issues
- Savings clause may work to save agreement.

14

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## Independent Contractor v. Employee

### Return to a Factor Test v. Entrepreneurial Opportunity:

- The extent of control the employer exercises over the details of the work.
- Whether the work is usually done under the direction of the employer or without supervision.
- Whether the worker is engaged in a distinct occupation or business.
- How much skill is required in the particular occupation.
- Whether the employer supplies the tools and the place of work.
- The length of time for which the worker is employed.
- The method of payment, whether by the hour or by the job.
- Whether the work is a part of the regular business of the employer.

15

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## Joint Employer-December 26, 2023

- Prior Rule-only if “exercises actual and direct control”
- **New Standard:** a company is a joint-employer if it exercises “indirect control” over working conditions or if it has “reserved authority” to do so.
- In other words, the mere right to control (even if not exercised) can lead to joint employment.
- If met, joint employer must collectively bargain about all terms and conditions over which it has authority or exercises power to control even if they are not “essential”

16

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## Joint Employer-What Does It Mean?

- Exposes employers to collective bargaining obligations for employees supplied by staffing agencies and companies
- May potentially be held responsible for labor violations committed by labor contractors
- Increased likelihood of joint-employer of workers at franchised operations
- **NEW RULE CHALLENGE IN CONGRESS AND IN COURTS**

17

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## Increased Remedies Under NLRA

*Thryv, Inc.* (December 13, 2022)

- Traditional Remedies: back pay, reinstatement and cessation order
- New remedies authorized: all direct and foreseeable damages from a violation
- Could include out of pocket medical expenses, lost credit rating, missed mortgage and rental payments, and all forms of consequential damages
- Issue is foreseeability of damage to violation

18

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## Employee Discipline

*Lion Elastomers, LLC, II* (May 1, 2023)

- Significantly curtail employers' ability to discipline for misconduct
- "Setting-specific" standard adopted-shift from employer's motive to the context and severity of employee misconduct
- Factors: (1) where specifically the discussion occurred; (2) the discussion's subject matter; (3) the nature of the outburst; and (4) whether an unfair labor practice provoked the outburst
- **Result: NLRA may protect misconduct that otherwise warrants discipline and termination if it occurs during concerted activity**

19

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## Potential Future Areas of Expansion

- Change in Captive Audience Meetings
- Use of Company Email for Non-business purposes
- Prohibition as to non-compete agreements
- Expansion of Union's access rights

20

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## Take-Aways/Tips

- Regular Review/Audits of Policies
- Written notices and communication to employees as to policies and expectations
- Neutral written with savings clauses
- Communicate the truth-daily
- Encourage employees to report
- Train all employees especially managers
- Clear communications both written and oral



21

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## Thank you for attending!



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22

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