

# NLRB Update

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# Terms of Current Board Members

Board Member	Term Expiration
Lauren M. McFerran, Chairman (D)	December 16, 2024: Nominated for Third Term
Marvin E. Kaplan (R)	August 27, 2025
David M. Prouty (D)	August 27, 2026
Gwynne A. Wilcox (D)	August 27, 2028
Joshua L. Ditelberg (R) (Nominee – Open Seat)	Nominated for First Term



Representation/New Organizing

# Employer Statements on Effect of Unionization

*Siren Retail Corp d/b/a Starbucks,*

373 NLRB No. 135 (Nov. 8, 2024)

- Statements in Captive Audience Meeting
- Overrules *Tri-Cast, Inc.*, 274 NLRB 377 (1985)
  - Categorical rule immunizing nearly all statements re: employee/employer relationship
- Section 9(a)
  - “[A]ny individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative”
- Statements “could reasonably be understood to threaten employees with the loss of an established workplace benefit.”
  - Case specific approach
- Prospective only

# Captive Audience Meetings

*Amazon.com Services LLC,*

373 NLRB No. 136 (Nov. 13, 2024)

- Whether an employer violates Section 8(a)(1) “by compelling its employees, on pain of discipline or discharge, to attend a meeting during which it expresses its views concerning unionization.”
- Overturns *Babcock & Wilcox Co.*, 77 NLRB 577 (1948)
- Section 8(c)
  - The expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression ***contains no threat of reprisal*** or force or promise of benefit.
- Compulsion to attend meeting is a “threat of reprisal”
- Anti-union meetings OK if employer informs employees of the subject matter of the meeting and that they’re voluntary.
- Does not address unscheduled one-on-one meetings
- Prospective Basis Only

# Agency Rule Making

## Rules Requiring Notice and Public Comment (Substantive Rules)

- “imposes substantive burdens, encodes a substantive value judgment, trenches on substantial private rights or interests, or otherwise alters the rights or interests of parties.”

## Rules Not Requiring Notice and Public Comment (“Procedural Exception”)

- “internal house-keeping measures organizing agency activities”
- “primarily directed toward improving the efficient and effective operations of an agency”

*AFL-CIO v. NLRB, 57 F.4th 1023 (D.C. Cir. 2023)*

Step	Timeline
Advance Notice of Proposed Rulemaking	Optional procedure for outside input prior to issuance of proposed rule
Notice of Proposed Rule Making (NPRM)	As soon as there is a Republican majority
Public Comment	30 to 180+ days after NPRM
Extension of Public Comment	Optional procedure to solicit further input
Final Rule	After completion of public comment

Board	NPRM	Final Rule	Effective
Obama	2/6/14	12/15/14	4/15/15
Trump	n/a	12/18/19	5/31/20*
Trump, Again	8/12/19	4/1/20	7/31/20
Biden	n/a	8/25/23	12/26/23
Biden, Again	11/4/22	8/1/24	9/30/24

# Voluntary Recognition & Blocking Charges

August 1, 2024 Final Rule

Effective September 30, 2024

89 FR 62952-01

- Voluntary Recognition (Section 103.21)
  - No longer requires posting of *Dana* notice, 45-day period;
  - Recognition bar restored
    - Reasonable Period (6 mo-1 yr) based on factors relating to bargaining history
- Blocking Charges (Section 103.20)
  - Absent special circumstances, Regional Directors will hold petition in abeyance upon an offer of proof describing “evidence that, if proven, would interfere with employee free choice”
  - No longer required to hold elections and impound ballots in environment tainted by unfair labor practices



Unfair Labor Practices



# Cemex Update

*Cemex Constr. Materials Pac.*, 372  
NLRB No. 130 (2023)

- 10(j) injunction with Cemex remedy:
  - *Sacks v. I.N.S.A.*, 2024 WL 2187012, Civ. No. 23-12368 (D. Mass. May 14, 2024)
    - Numerous hallmark violations; grants the usual deference to the Board's legal theories, rejects argument that a court of appeals will reject Cemex
- Board decision with Cemex remedy:
  - *Red Rock Casino Resort Spa*, 373 NLRB No. 67 (2024)
    - Numerous hallmark violations; met *Gissel* standard
- Board decision declining to consider Cemex remedy:
  - *Spike Enters.*, 373 NLRB No. 41 (2024)
    - Numerous hallmark violations. GC did not make an 8(a)(5) allegation. Violation found and rerun ordered. Kaplan partial dissent invokes broad remedial authority, implying Cemex remedy would have been appropriate?
  - *Russell Reid Waste Hauling*, 373 NLRB No. 51 (2024)
    - Single 8(a)(1) violation: coercive memorandum re: eligibility for raises. GC did not make an 8(a)(5) allegation. Violation found and rerun ordered

# Cemex update (cont.)

*Cemex Constr. Materials Pac.*, 372  
NLRB No. 130 (2023)

- ALJ decisions with Cemex remedy:
  - *Starbucks*, JD(NY)-14-24, 29-CA-292741, et al. (Oct. 21, 2024) (exceptions due Dec. 23)
    - Multiple hallmark violations; met *Gissel* standard
  - *Woodford Reserve Distillery*, JD-21-24, 09-CA-307086, et al. (Apr. 8, 2024) (exceptions fully briefed June 21, 2024)
    - Multiple hallmark violations, including distribution of bourbon; met *Gissel* standard
  - *Big Green*, JD(SF)-40-23, 27-CA-276068, et al. (Dec. 20, 2023) (subsequently settled)
    - Multiple hallmark violations; met *Gissel* standard
- Cemex itself on appeal
  - Argued October 21
  - Panel: Clifton, Sung, Sanchez
  - Case un-submitted October 28 pending *Macy's v. NLRB*, No. 23-150, concerning *Jarkesy/Thryv* issues

# Consent orders

*Hospital Metropolitano Rio Piedras,*  
373 NLRB No. 89 (2024)

- Consent orders: proposed by Respondent, accepted by ALJ, over objection of General Counsel and Charging Party
  - Absence of agreement by *parties* means these aren't settlements
- Previously the Board had changed direction at times on whether the standard for acceptance of a consent order was "full remedy" or *Independent Stave* factors
  - *Postal Service*, 364 NLRB 1704 (2016): full remedy
  - *UPMC*, 365 NLRB 1418 (2017): reasonableness/Independent Stave
- Rather than flip-flop again, Board simply bans consent orders
  - Arguably contrary to the Rules & Regulations' obligation that ALJs not adjust cases
  - "Full remedy" standard is challenging and inefficient
  - Respect the GC's prosecutorial authority
  - Contrary to, or at least not consistent with, policies of the Act