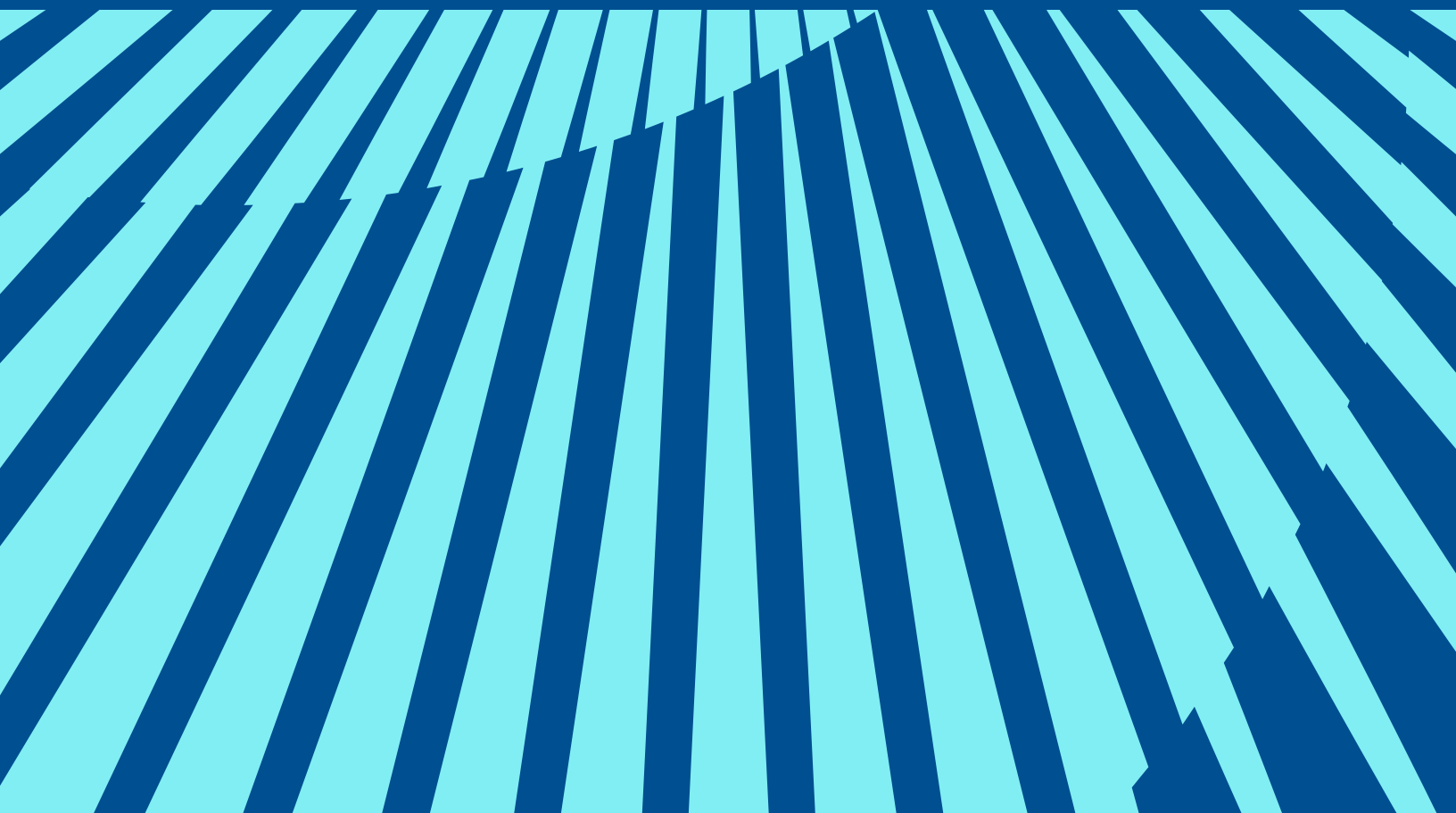
U.S. Chamber of Commerce

The NLRB's Attack on Free Speech



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Introduction

The National Labor Relations Act (the "Act"), originally passed in 1935, was amended by Congress in 1947 through the passage of the Taft-Hartley Act, to, among other things, protect employer speech. Employer speech protections were added in Section 8(c) of the Act and promote open discussions about unionization and other labor-management issues. The importance of open communication is also reflected in Section 7 of the Act, which protects employees' right to engage in (or refrain from engaging in) union and other concerted activities. Thus, the Act as amended has a direct a recognition of the importance of open discussion and free speech in the labor relations context.

Yet the Current General Counsel of the National Labor Relations Board (the "Board") has levied an assault on the very kinds of open discussion and free speech the Act explicitly protects.

In other words, rather than seeking to empower employees to make informed decisions, the General Counsel wishes for workers to only hear one side of the story.

The General Counsel seeks to stifle the open discussion of unionization and other labor relations issues by employing a creative—but, for the last 76 years, a consistently rejected—interpretation of the Act that seeks to effectively limit employer free speech rights while protecting the ability of unions to communicate.

The General Counsel does this by obstructing employers' ability to communicate with employees about Section 7 rights, to express certain viewpoints pertaining to Section 7 rights, and then by compelling employer speech. Moreover, the General Counsel has weaponized the Act against high profile employers in a transparent effort to chill yet more employer speech. And she does not stand alone—multiple states have passed arguably unconstitutional and preempted laws that clamp down on employers' ability to communicate with employees about Section 7 rights and their views or opinions about those rights.

The General Counsel's efforts to stifle free speech and circumvent the union election process creates an environment where workers are privy only to one side of the debate—the union side—and are susceptible to inadvertently and unknowingly opting into union representation. It is hard to imagine an environment more at odds with the goals of the Act.

Background

A. Purpose of the Board

The Board is an independent federal agency established by the Act in 1935.[1] The Board plays a crucial role in ensuring the protection of workers' rights, fostering harmonious labor-management relations, and encouraging collective bargaining in the United States.[2] With its mission to safeguard employees' interests, the Board is meant to act as an impartial arbiter in resolving labor disputes and advancing fair labor practices.[3]

Central to the Board's role is its commitment to protecting workers' rights with respect to unionization.[4] The agency is tasked with operating independently from any union or employer influence to ensure fair and equitable treatment of all parties involved in labor disputes.[5] One of the most integral parts of protecting workers' rights under the Act is the protection of their rights to access accurate information from both sides of a labor dispute in order to make informed decisions regarding their representation by a union and other issues related to unionization.[6]

B. Historical Treatment of Employer Speech

i. Employer Speech Prior to the Taft-Hartley Act

The Act, initially the Wagner Act of 1935, failed to provide any affirmative protections for employer free speech.[7] The Wagner Act instead focused on establishing protections for workers and causes of action against employers who violated the Act. The original Section 7 provided that workers had the right "to organize, to collectively bargain, and to engage in concerted activity for mutual aid and protection."[8] Employers who interfered, coerced, or restrained workers in the exercise of their Section 7 rights were liable for unfair labor practices under Section 8(1) of the Act.[9]

Since the Act did not address the issue of employer speech directly, the Board initially took the stance that employers should remain impartial and neutral regarding unions and organizing efforts.[10] This principle of employer neutrality led to the Board's

[1] See National Labor Relations Board, Who We Are, https://www.nlrb.gov/about-nlrb/who-we-are (last visited, June 9, 2023).
[2] See NLRB, FY 22 Justification of Performance Budget for the Common Appropriations, at 3-4 (May 28, 2021)
[3] Id.
[4] Id.
[5] Id.
[6] Chamber of Commerce v. Brown, 554 U.S. 60, 68 (2008).
[7] This explicit protection is not necessary, in any event, as the First Amendment's free speech protections govern. A reading of the Wagner Act as prohibitive of employer speech would be in violation of the First Amendment. Cf. McCullen v. Coakley, 573 U.S. 464 (2014). However, the subsequent passing of the Taft-Hartley Act, discussed below, was Congress's way of incorporating into the Act employer free speech protections.
[8] 29 U.S.C. § 157.
[9] 29 U.S.C. § 158(1).
[10] See Clark Bros. Co., Inc., 70 NLRB 802 (1946).

Clark Bros. decision in 1946, in which the Board outlawed what are commonly known as "captive audience" meetings. These meetings are used by employers to convey facts, information, and opinions regarding unionization to employees.[11] These meetings are typically held at the workplace, during the workday, and workers are paid for the time. Like any other meeting in the workplace, attendance at these meetings can be mandatory. Such meetings were found to be per se violations of employees' Section 7 rights in Clark Bros.[12]

Specifically, in Clark Bros, upon learning of a run-off election between the Congress of Industrial Organizations (CIO) union and Employee Association, Inc. of Clark Bros. Co. (EAI) the employer sought to ensure the selection of EAI by engaging in an anti-CIO campaign.[13] As a part of their campaign, the employer directed two mandatory meetings for all plant employees.[14] For the second meeting, all employees were directed by an announcement over the public address system, and others were instructed by their foremen, to convene on the shipping floor with the specific purpose of listening to a speech by the vice president of the company.[15] While the vice president gave this speech, all manufacturing operations were shut down, and the speeches were broadcast over the public address system throughout the entire plant.[16]

The Board found that the speech interfered with, restrained, and coerced employees in violation of Section 8(1), particularly because the employer played on its employees' fear of job insecurity by making it clear that support of the CIO was not in the company's interests.[17] Although the Board instituted a rule that such meetings were per se violations of employees' Section 7 rights, this rule was short-lived, as the Taft-Hartley Act promptly dispensed with it in 1947.

[11] Id. at 803.
[12] Id.
[13] Id.
[14] Id. at 803-04.
[15] Id. at 804.
[16] Id.
[17] Id.

ii. Congress Passed the Taft-Hartley Act to Protect Employer Free Speech

Roughly one year after the Board's Clark Bros. decision, Congress passed the Taft-Hartley Act of 1947.[18] One of the stated legislative purposes of the Taft-Hartley Act, particularly the addition of Section 8(c), was to overturn Clark Bros. and other Board precedents restricting employer speech and outlawing employee meetings.[19] The legislative history of the Act shows that members of Congress believed Section 8(c) was needed because the Board had "placed a limited construction" of employers' First Amendment free speech rights "by holding such speeches by employers to be coercive . . . if the speech was made in the plant on working time (Clark Brothers, 70 N.L.R.B. 60)."[20]

Correspondingly, the language that was added to Section 8(c) of the Act goes to great lengths to protect employers' ability to communicate with employees and participate in free speech. Section 8(c) provides that:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter if such expression contains no threat of reprisal or force or promise of benefit.[22]

Even opponents of the Taft-Hartley Act recognized the importance of including Section 8(c) to safeguard the free speech rights of employers. For example, then-Representative John F. Kennedy authored a "Supplemental Minority Report" in which he stated that labor had insisted on "special privilege and unfair advantage," and he agreed that the collective bargaining processes needed a "readjustment" which meant "employers must be guaranteed the same rights of freedom of expression now given to unions."[21]

The Board has noted in subsequent decisions, and on its own website, that Section 8(c) of the Act is rooted in the protection of employer's rights to free speech under the First Amendment.[23] This is consistent with the Supreme Court's holdings from as early as 1941, that the First Amendment broadly applies to employer speech regarding union issues.[24] More recently, in Chamber of Commerce v. Brown, the Supreme Court further reasoned that Section 8(c)'s protection of free speech was so integral to the Act that Congress felt the need to amend the Act itself instead of leaving the courts the task to correct the Board on a case-by-case basis.[25]

At the same time, the Taft-Hartley Act amended Section 7 rights to guarantee employees the right to refrain from engaging in the activity enumerated in Section 7.[26] As amended, Section 7 provides, in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities...[27]

[18] 29 U.S.C. §§ 141-144, 167, 172-187 (2023).
[19] Sen. Rep. No. 105, 80th Cong. 1st Sess. 23-24 (1947).
[20] Id.
[21] H.R. Rep. 80-245, 80th Cong., 1st Sess. at 113-114 (1947), reprinted in 1 Legis. Hist. 404-405 (1947).
[22] 29 U.S.C.§ 158(c) (2023).
[23] "This First Amendment right is embodied in Section 8(c), which allows the employer to express 'any views, argument, or opinion' in any media form without committing an unfair labor practice provided that 'such expression contains no threat of reprisal or force or promise of benefit.'" NLRB v. Pratt & Whitney Air Craft Division, United Technologies Corp., 789 F.2d 121, 134 (2d Cir. 1986). The Board's own website also acknowledges this purpose, stating: "The new law contained a 'free speech clause,' providing that the expression of views, arguments, or opinions shall not be evidence of an unfair labor practice absent the threat of reprisal or promise of benefit." See NLRB, 1947 Taft-Hartley Substantive Provisions, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1947-taft-hartley-substantive-provisions (last visited June 20, 2023).
[24] NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 477-79 (1941).
[25] Chamber v. Brown, 554 U.S. at 67.
[26] See 29 U.S.C.§ 157 (2023).
[27] Id. (emphasis added).

iii. Legality of Employee Meetings After the Taft-Hartley Act

Setting aside the clear legislative history, the language of the Act makes no specific mention of employee meetings. The Board has interpreted Section 8(c) of the Act to "specifically prohibit [it] from finding that an uncoercive speech, whenever delivered by the employer, constitutes an unfair labor practice."[28] This is especially true when such speech occurs on "an employer's premises" as such are "the natural forum" for employer speech, "just as the union hall is the inviable forum for" union-speech.[29]

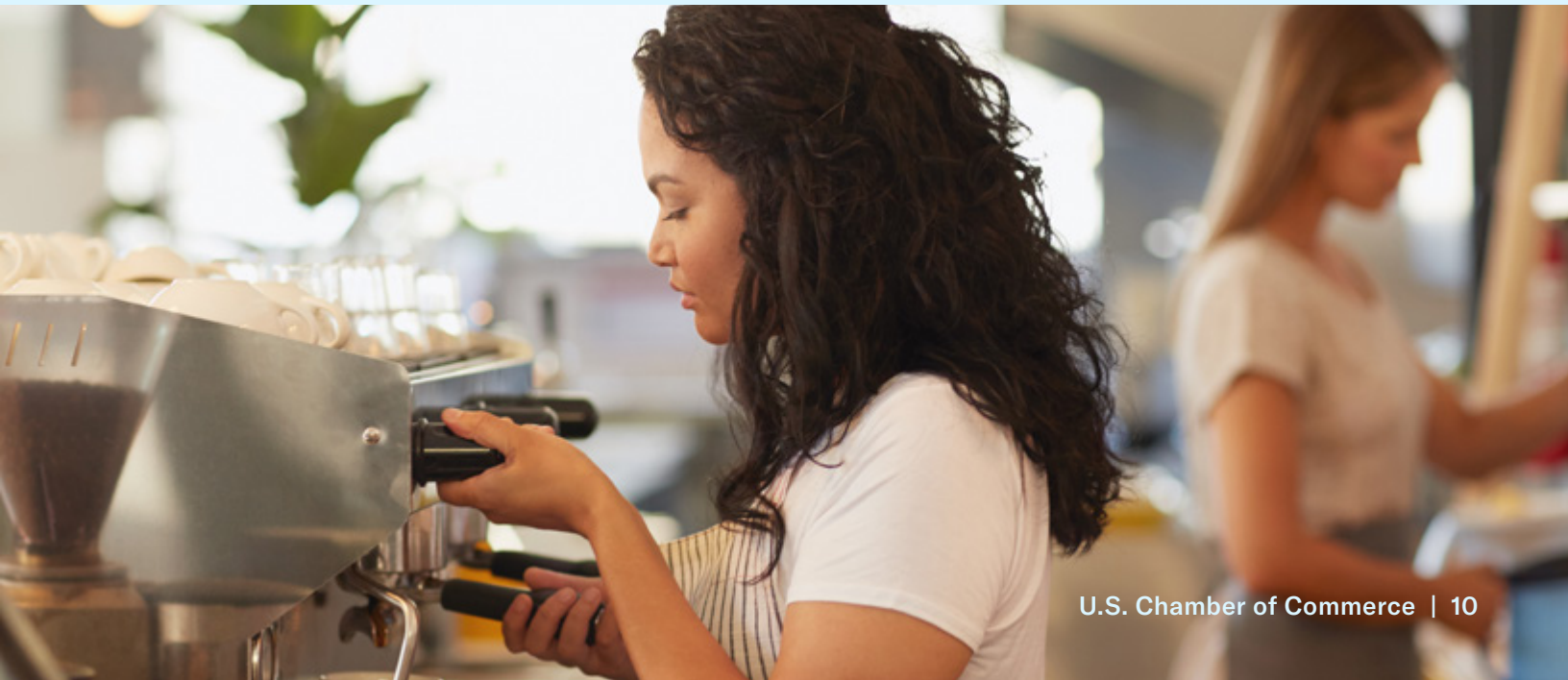
Indeed, the Board addressed this question shortly after the enactment of the Taft-Hartley Act. One year after Section 8(c) was added to the Act, the Board expressly abandoned the per se rule against employee meetings with its 1948 decision in Babcock & Wilcox Co.[30] The Board confirmed that an employer may lawfully hold meetings (1) for the purpose of expressing its anti-union position and (2) on the employer's time and premises.[31] In doing so, the Board further acknowledged that the Clark Bros. doctrine was "short-lived" and that "Congress specifically repudiated it . . . when it enacted Section 8(c) of the Act", which "was intended to overrule the 'compulsory audience' doctrine [] set forth in . . . Clark Bros[.]").[32]

The Board has subsequently, and repeatedly, recognized that the addition of Section 8(c) represented an inflection point in the Board's "captive audience" meeting doctrine, and through this recognition has developed 75 years of Board law affirming and defining the legality of such meetings.

Since that time, the Board has found in cases such as Electrolux Home Products, Inc. that employers are afforded broad latitude to hold meetings and express their views, argument, and opinions, and "persuade employees not to unionize."[33] In cases such as Addressograph-Multigraph Corp., where meetings are held on an employer's premises during normal working time, the employer "[is] at liberty to determine the use to which it wished to put the time for which it was paying the employees, and the employees were not free to make a choice in favor of working."[34]

Accordingly, since the passage of the Taft-Hartley Act, a fundamental component of the Act is the free speech protections guaranteed to employers.

[28] Livingston Shirt Corp., 107 NLRB 400, 405 (1953).
[29] Id. at 406.
[30] Babcock & Wilcox Co., 77 NLRB 577, 578 (1948) ("the language of Section 8 (c) of the amended Act, and its legislative history, make it clear that the doctrine of the Clark [27] Bros. case no longer exists as a basis for finding unfair labor practices") (emphasis added).
[31] Livingston Shirt Corp., 107 NLRB at 405.
[32] Id. at 414 (emphasis added).
[33] Electrolux Home Products, Inc, 368 NLRB No. 34, slip op. at 5 (2019).
[34] 228 NLRB 6, 8-9 (1977).



iv. The First Amendment Protects Employer Speech

Superior to the protections offered by Section 8(c) of the Act, employer speech is protected by the First Amendment of the United States Constitution. The Supreme Court has recognized that "employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guarantee."[35] Therefore, a restriction on an employer's speech concerning unionization and Section 7 rights must first comport with protections embodied in the First Amendment to the United States Constitution.

The First Amendment operates to impede government actors from "restrict[ing] expression because of its message, its ideas, its subject matter, or its content."[36] Moreover, "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."[37] In other words, speech restrictions aimed at content (for example, speech concerning Section 7 rights) are particularly intolerable, but speech restrictions aimed at particular views (for example, speech in opposition to unionization) are even worse. This is not to say there are no limits to the First Amendment's protections. For example, government actors may be permitted under the First Amendment to regulate the "time, place, and manner" of speech; yet "[t]ime, place, and manner" restrictions on speech are never permissible if they seek to regulate "the content of…speech", specific viewpoints, or specific speakers.[38]

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[35] Thomas v. Collins, 323 U.S. 516, 537 (1945) (emphasis added)

[36] Reed v. Town of Gilbert, Az., 576 U.S. 155, 163 (2015); see also Trinity Services Group v. NLRB, 998 F.3d 978, 980 (D.C. Cir. 2021) ("[A]bsent threats…Section 8(c) unambiguously protects any views, argument or opinion – even those that the [Board] finds misguided, flimsy, or daft.") (internal quotation marks omitted).

[37] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

[38] See Ward v. Rock Against Racism, 491 U.S. 781, 791, (1989); see also Hudgens v. NLRB, 424 U.S. 507, 520 (1976) ("[T]ime, place, and manner regulations [are impermissible if] the regulation [is aimed at] the content of…expression."); Rosenberger, 515 U.S. at 829 ("[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."); United States v. Playboy Ent. Grp., 529 U.S. 803, 812 (2000) ("Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles.").

As is discussed in more detail below, the General Counsel appears to conceal her content and viewpoint-based restrictions by taking specific aim at the mandatory nature of employee meetings held to discuss unionization. In so doing, she effectively requires employers to give employees disclaimers before discussing topics touching on Section 7 rights. But this runs afoul of the First Amendment, which prevents government actors from compelling speech. Compelled speech is inconsistent with principles of free speech because a "speaker has the right to tailor [its] speech, [and such right] applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 573 (1995).

Indeed, the First Amendment constrains the government from compelling private persons to convey government-preferred messaging. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 208 (2015).

Accordingly, the General Counsel's position not only is in opposition to the will of Congress when it enacted Section 8(c) of the Act, as well as 75 years of Board and Supreme Court precedent, but it also contravenes the First Amendment to the United States Constitution.

The General Counsel's Efforts to Restrict Employer Speech

From the beginning of her tenure as General Counsel of the Board in 2021, Jennifer Abruzzo has sought to utilize the Board as a tool to advance her own objective of increasing union density, irrespective of other considerations, including genuine worker support. Specifically, the General Counsel has been actively engaged in a campaign to reverse decades of Board precedent and severely restrict employer speech protections afforded by both the Constitution and the Act. Her actions to restrict speech range from pushing to outlaw employee meetings held to discuss unionization, targeting high-profile employers for engaging in lawful speech, outlawing certain types of employer speech, and seeking to compel employer speech in certain circumstances.

A. The General Counsel's Push to Outlaw "Captive Audience" Meetings

On April 7, 2022, the General Counsel issued a memorandum stating that she will ask the Board to overrule long-standing precedents and hold that compelling employees to attend meetings to listen to employer speech concerning their rights under the Act or the employers' views on unionization is unlawful.[39] In conjunction with her issuance of the memorandum, the General Counsel followed through on her promise: she targeted high-profile employers for utilizing employee meetings to communicate with their workers regarding unionization and their rights under the Act.[40]

[39] NLRB GC Memo 22-04.

[40] See e.g. 19-CA-290905, General Counsel's Brief in Support of Limited Exceptions to the Decision of the ALJ, at 10 (targeting of Starbucks); 10-CA-295915, General Counsel's Complaint and Notice of Hearing at 3 (targeting of Apple).

In a recent action brought against Amazon, the General Counsel laid out the specifics of her position:

[T]he Board should hold that, as a matter of law, reasonable employees will perceive an implicit, if not explicit, threat of reprisal for exercising their right to refrain from listening to their employer's communications concerning their exercise of Section 7 rights in two circumstances: when they are (1) convened on paid time or (2) cornered while performing their job duties.[41]

Per the General Counsel, "convened" is defined as any instance when an employer "asks employees to attend a meeting on paid time."[42] And "cornered" means any instance when an employer "approaches [an employee] while the [employee is] performing job duties."[43]

Thus, "convened" and "cornered" encompass virtually every interaction in which an employer engages with an employee on working time, whether or not the engagement is in a group or individual setting or is formal or informal.[44] Further, the General Counsel specifies that the only instance when "convened" or "cornered" employees are not subject to an implicit and unlawful threat of reprisal is when the employer provides assurances to the employee "that participation is voluntary."[45]

The General Counsel grounds her position on two flawed premises:

(1) Employee meetings infringe on employees' right to refrain from listening to employer speech concerning their Section 7 rights[46]; and

(2) Employee meetings are inherently coercive to employees, as they almost always urge employees to reject the union.[47]

[41] 29-CA-280153, General Counsel's Brief in Support of Exceptions at 33.
[42] See id. at 2 and 33.
[43] Id. at 33.
[44] See id. at 33, n.69 (confirming that, in the few instances when an employer engages an employee not covered by the broad definitions of "convened" and "cornered", such as during an "after-work meeting or approached on break time," a "totality of the circumstances" test should be employed).
[45] Id. at 36-37; see also id. at 33-34 (confirming that express assurance is required even if an employer does not communicate to employees that a meeting is mandatory).
[46] Id. at 2.
[47] Id.

As an initial matter, the General Counsel's push to outlaw such meetings requires an untenable lapse in logic. As discussed above, Section 7 rights were supplemented by the Taft-Hartley Act to grant employees the right to refrain from exercising the other enumerated Section 7 rights. At the same time, Section 8(c) was added to the Act—as discussed above, Section 8(c) was included for the specific purpose of repudiating Board decisions that were hostile toward employer-hosted meetings. The General Counsel's position requires the simultaneous adoption of two contradictory propositions:

- Congress added the "right to refrain" language to Section 7 to permit employees to "refrain" from attending "captive audience" meetings; and
- Section 8(c) granted employers the right to require attendance at meetings held to discuss unionization.

These propositions cannot both be true: if the right to refrain language gave employees a right not to attend "captive audience" meetings, employers would not be able to require attendance at such meetings.

Setting this contradiction aside, employees have no right to "refrain" from listening to employer speech under the Act.

Finally, the General Counsel's decision to implement a directive that, unless employers say what the General Counsel wants them to say, they cannot exercise their free speech rights under the First Amendment, is a direct violation of the First Amendment's compelled speech doctrine.

i. The Act Does Not Include a Right to Refrain from Listening to Employer Speech

The General Counsel's effort to outlaw mandatory employee meetings imports the novel contention that Section 7 of the Act grants employees the right to refrain from listening to employer speech on company time. However, this argument hinges on the General Counsel's misinterpretation of the Act. Listening to employer speech, or refraining therefrom, is not a "protected" activity under Section 7 of the Act, which is set out in the relevant part above.[48]

The language of Section 7 is unambiguous in that it grants employees the right to "refrain" only from certain activities. The text establishes a panoply of specific employee rights: "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to

Further, the position that mandatory meetings are inherently coercive because of the views espoused during such meetings is clear content and viewpoint discrimination and is among the worst First Amendment infringements in which a government actor can engage.

engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.[49] Section 7 then explicitly limits employees' right to refrain "from any or all of such activities . . ."[50] This limiting reference establishes that an employee's right to "refrain" necessarily corresponds only to those rights expressed in Section 7. None of the rights expressed in Section 7 relate to employer speeches or other employer communications.[51]

Indeed, the employment relationship is one that inherently involves, subject to very narrow exceptions not present here, an employee's obligation to listen to their employer's communications, and employees may face lawful, disciplinary action for refusing to do so.[52] "An employee has no statutorily protected right to leave a meeting that the employees were required by management to attend on company time and property to listen to management's noncoercive antiunion speech designed to influence the outcome of a union election."[53]

Accordingly, the premise employed by the General Counsel that employees have a Section 7 right to refrain from listening to employer speech is, at best, misguided.

ii. The First Amendment Protects Employers' Right to Hold Mandatory Employee Meetings

In addition to its inconsistency with the express language of the Act, the General Counsel's near-limitless regulation of employer speech discriminates on the basis of content and viewpoint, is under-inclusive, and seeks to compel employer speech in violation of the First Amendment of the United States Constitution. As discussed above, the General Counsel's position is so overbroad that her proposed regulation of employer speech would encompass virtually every interaction in which an employer engages with an employee on working time.[54] Thus, in virtually every interaction where an employer engages an employee, should matters arise that merely "concern" Section 7 rights, the employer would be compelled to provide a disclaimer in order to prevent an unwarranted assumption that the employer is unlawfully threatening its employees with reprisal or coercing them.

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[48] See Section II(B)(ii)

[49] Id.

[50] Id.

[51] Given the clear statutory language and the absence in Section 7 of any indication that such rights extend to, touch on, or in any way concern employer speech, the General Counsel's attempt to shoehorn such a right into Section 7 stands in contravention of basic principles of statutory construction. See Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit, 507 U.S. 163, 168 (1993) (canon of expressio unius est exclusio alterius governs statutory interpretation and operates to bar interpretation that would include in a statute a right not expressed where the statute expresses other rights); see also Keene Corp. v. United States, 500 U.S. 200, 200-01 (1993) (recognizing the Court's duty to refrain from reading into the statute a phrase that Congress has left out); Hosp. Workers' Union, Local 250, 255 NLRB 502, 504 (1981) ("It is axiomatic, of course, that statutory construction must begin with the language of the statute itself" and "[a]s a general rule of statutory construction, the language of a statute controls when sufficiently clear in its context") (internal quotation marks omitted). The General Counsel "is not free to disregard [Congressionally-imposed requirements] simply because [she] considers them…unsuited to achieving" her goals. C.I.R. v. Gordon, 391 U.S. 83, 93 (1968).

[52] See, e.g., Detroit Hosp., 249 NLRB 449, 450 (1980) (employee lawfully disciplined for "refusal to listen and by his leaving the meeting" which constituted "grounds for regarding him as insubordinate, and the reason for his discharge was not protected by the Act"); Gen. Elec. Co., 240 NLRB 479 (1979) (employee lawfully disciplined for insubordination after "walking away" from foreman and stating he "was not going to listen"); SouthwestCustom Trim Products, 255 NLRB 787, 793 (1981) (ALJ opinion) (no violation where an employee received discipline after an employee's "refusal to listen" to supervisor); Sys-T-Mation, Inc., 198 NLRB 863, 864 (1972) (employee lawfully discharged for insubordination after "refusal to listen" and "abruptly" leaving during discussion with company executive). See generally NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937) ("the Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them").

[53] Litton Systems, Inc., 173 NLRB at 1024.

[54] See 29-CA-280153 Brief in Support of Exceptions at 33, n.69 (confirming that, in the few instances when an employer engages an employee not covered by the broad definitions of "convened" and "cornered", such as during an "after-work meeting or approached on break time," a "totality of the circumstances" test should be employed).

a. Content and Viewpoint Restrictions

The General Counsel's restriction is transparently content-based as it only operates when matters concerning Section 7 activity arise.[55] Additionally, the restriction is clearly viewpoint based, as the General Counsel does not take the position that unlawfulness is determined simply by the "mandatory" nature of interactions where employees are "convened" or "cornered," but that unlawfulness is determined when an employer tries to "dissuade employees from unionizing or engaging in concerted activity to improve job training or safety."[56] Given the broad definitions of "convened" and "cornered" employed by the General Counsel, she advances a position that places a restriction on employers (1) in virtually every type of interaction in which an employer could engage with its employees in the workplace, (2) when matters "concerning" Section 7 "rights" are discussed, and (3) when the employer expresses "hostility"—in whatever capacity, be it fact, opinion, or experiences—toward such rights, or otherwise seeks to "dissuade" employees from, unionizing or engaging in concerted activity. It is hard to conceive of a more blatant content- and viewpoint-based restriction—and it is one that is a direct infringement on employers' First Amendment speech rights.[57]

b. Underinclusive Restriction

Under-inclusive viewpoint-based speech restrictions undermine a government actor's justification for the restriction and expose the underlying "disfavor [of] a particular speaker or viewpoint."[58] The General Counsel's viewpoint-based restriction is under-inclusive because it seeks to restrict employers' anti-union speech but leaves unimpeded unions' right to engage in pro-union speech, even pro-union speech that is misleading.

For example, the General Counsel's proposal does not seek to quell a union's right to obtain private, personal information of employees and engage those employees in pro-union speech, even when those employees do not wish to listen to such speech.[59] Nor does it seek to reverse precedent allowing unions the ability to present inaccurate or misleading information to employees.[60] Indeed, the General Counsel seeks only to restrict employer speech that espouses certain views.

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[55] Id.
[56] Id. at 35.
[57] See Section II(B)(iv); see also Thomas v. Collins. 323 U.S. at 537 ("[E]mployers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty.").
[58] Williams-Yulee v. Florida Bar, 575 U.S. 433, 448 (2015).
[59] Rules and Regulations of the NLRB, Section 102.62(d), 102.67(l).
[60] See e.g., Midland National Life Insurance Co., 263 NLRB 127 (1982).
[61] See 575 U.S. at 448; see also Carey v. Brown, 447 U.S. 455, 461-62 (1980).
[62] 29-CA-280153 General Counsel's Brief in Support of Exceptions at 36-37; see also id. at 33-34 (confirming that express assurance is required even if an employer does not communicate to employees that a meeting is mandatory).
[63] See, e.g., Hurley, 515 U.S. at 573; Walker, 576 U.S. at 208.
[64] See, e.g., 03-CA-285671 at 203 (ALJ ordered Starbucks former CEO Howard Schultz to either "read the Notice to Employees and an Explanation of Rights to employees employed by Respondent at Respondent's Buffalo-area facilities" or "make a video recording of the reading of the Notice to Employees and the Explanation of Rights").
[65] Typically, the notice reading remedy is reserved for particularly egregious unfair labor practice, and the notices are read by Board agents, not company officials. See HTH Corp. v. NLRB, 823 F.3d 668, 674 (D.C. Cir. 2016).
[66] Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 49 (2006).
[67] Sysco Grand Rapids, LLC v. NLRB, 825 F. App'x 348, 359 (6th Cir. 2020).
[68] Id.
[69] Denton Cnty. Elec. Coop., Inc. v. NLRB, 962 F.3d 161, 174 (5th Cir. 2020) (quoting HTH Corp., 823 F.3d at 677).
[70] Rumsfeld, 547 U.S. at 49.

This type of under-inclusive, viewpoint-based restriction of employer speech is entirely inconsistent with the First Amendment and, in accordance with the Supreme Court's holding in Williams-Yulee, undermines any justification the General Counsel may have for seeking to quash employers' right to hold employee meetings and speak "in opposition to [a] [u]nion".[61]

c. Compelled Speech

The General Counsel's "compulsory disclaimer," wherein employers are only free to speak their opinions on the topic of Section 7 activity if they "provide assurances" that employees' participation in the conversation is "voluntary," is yet again at odds with the First Amendment.[62] In essence, the General Counsel seeks to compel employers to say magic words before they can avoid the all-encompassing application of the General Counsel's speech restriction. But this runs afoul of compelled speech jurisprudence; like the General Counsel's content and viewpoint-based restrictions, her endeavor to compel employer speech violates the First Amendment.[63]

In 2020, the Sixth Circuit struck down an attempt by the Board to compel management officials to publicly read notices of violation.[67] The Sixth Circuit's ruling highlighted that forcing named individuals to recite specific words for the purpose of rehabilitation or enlightening an audience runs counter to our established system of governance.[68] The court further expressed its position by citing a previous case from the Fifth Circuit, which held that "such orders mandate a 'confession of sins' and conjure up the system of 'self-criticism' devised by Stalin and adopted by Mao.'"[69] The court then emphasized that compelling individuals to engage in forced readings clashes directly with the Supreme Court's recognition that violations of compelled speech extend to situations where the speaker's own message is influenced by the speech they are coerced to accommodate.[70]

Additionally, the Board has sought with increasing frequency the enforcement of notice readings by company officials as a remedy in unfair labor practice cases.[64] That is, the Board has sought to compel speech from employers as a remedy for purported violations of the Act.[65] This remedy has been repeatedly struck down by courts as it runs contrary to the First Amendment.[66]

B. Extending Limitations on Speech Beyond Employee Meetings

The General Counsel's campaign to limit employers' rights to free speech is not isolated to her attempts to outlaw employee meetings. The General Counsel also advocates re-examining the current standard for what employers may lawfully say to employees regarding the impact of unionization on the employer-employee relationship—a standard set by the Board decades ago in Tri-Cast Inc.[71]

As discussed above, it is well established that employers have a protected right to express views, arguments, and opinions, so long as they do not contain unlawful threats of reprisal or force, promises of benefits, or solicitations of grievances.[72]

Pursuant to this right, the Board's longstanding Tri-Cast doctrine provides that employers may lawfully communicate with employees regarding the impact of unionization on employees' direct relationship with management so long as it is otherwise lawful.[73]

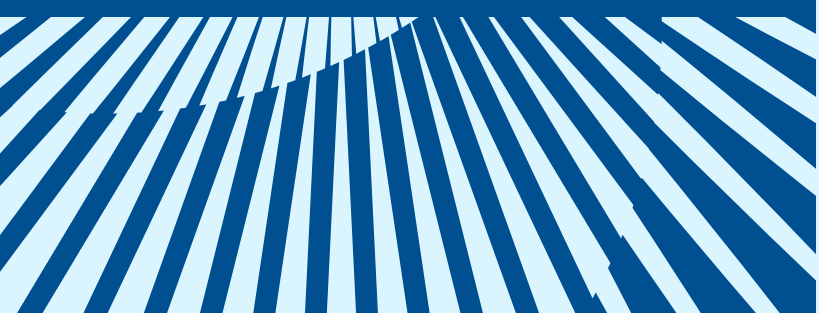
In Tri-Cast, Inc. the Board evaluated an employer's statements advising employees that it could no longer "work on an informal and person-to-person basis" with its employees if they unionized, noting that "[the employer would] have to run things by the book, with a stranger, and will not be able to handle personal requests" as it had done in the past.[74] Upon a legal challenge from the union, the Board deemed this language consistent with Section 9(a) of the Act, and thus lawful, reasoning that the employer appropriately described how the employer-employee relationship changes after employees vote to be represented by a union.[75]

[71] 28-CA-194262 NLRB GC Advice Response Memo Omni Hotels Management Corp. (May 5, 2017).
[72] See Section II.B.; see also 29 U.S.C.A. § 158 (c); Gissel Packing Co., 395 U.S. at 617; Amptech, Inc., 342 NLRB at 1137; Kinney Drugs, Inc., 74 F.3d at 1427-28.
[73] Tri-Cast, Inc., 274 NLRB 377 (1985); see also Holy Cross Health, 370 NLRB No. 16, slip op. at 1 n.3 (2020).
[74] Tri-Cast, Inc., 274 NLRB at 377.
[75] Id.
[76] 28-CA-194262 NLRB GC Advice Response Memo Omni Hotels Management Corp. (May 5, 2017).

The General Counsel disagrees with the Board's holding in Tri-Cast and argued in a released memoranda that any factual statement by an employer that employees will no longer be able to have a direct relationship with management after the election of a union representative, constitutes coercive threats of loss of benefits in violation of Section 8(a)(1) and is therefore unlawful.[76] According to the General Counsel, then, facts are coercive.

Moreover, unionization does result in the loss of the direct employer-employee relationship, and the General Counsel's decision to hide this "loss of benefit" from employees is highly suspect. Indeed, the General Counsel's crusade against Tri-Cast seems but another attempt to further erode employers' abilities to communicate with their employees—and far more concerning, an attempt to impede employees' ability to hear both sides of the issue to enable an informed exercise of their Section 7 rights.

In addition to advocating for and taking action to achieve limitations on employer speech as described above, the General Counsel has been initiating frivolous actions against highly visible companies seemingly for any speech that simply mentions unionization, regardless of whether it is conveyed in a mandatory, public, work-related, or journalistic venue. The sole purpose of such actions can only be to chill employer speech against unionization by miring high profile companies in litigation over conduct and speech that is lawful under current Board precedent and, more importantly, is protected by the Constitution.



C. Other Efforts to Chill Employer Speech

One notable example of such tactics is the General Counsel's issuing of a complaint against Starbucks and Starbucks's former CEO Howard Schultz for allegedly unlawful speech during the company's quarterly public earnings call in April 2022.[77] During the call, Schultz allegedly stated that "[w]e do not have the same freedom to make these improvements at locations that have a union or where union organizing is underway" when speaking about raises to U.S.-based employees.[78] The General Counsel argued that through Schultz's actions, Starbucks was unlawfully dissuading workers from joining the union and "interfering with, restraining, and coercing" their rights to organize.[79]

Similarly, on two separate occasions, on October 26, 2022, and on May 22, 2023, the General Counsel issued complaints against Amazon, alleging unfair labor practices by Amazon's CEO, Andy Jassy. On the first occasion, Jassy was targeted for stating in an interview that workers should have "direct connections with their managers," instead of through an intermediary like a union, and that workers might be better off "without a union."[80]

On the second occasion, Jassy was targeted for making "anti-union" comments during an interview at the New York Times DealBook Summit in November 2022.[81] That complaint alleges that Jassy's remarks at the summit implied that union representation could diminish worker empowerment and create obstacles in establishing direct relationships with managers.[81]

The General Counsel's decision to prosecute this type of employer speech, which neither occurred on-site during company time nor was shared in a meeting during which employee attendance was mandatory, is inapposite to all of her stated reasons for opposing mandatory employee meetings, and seemingly reveals her true goal of restricting any protected employer speech concerning unionization. This overzealous initiation of actions against large companies engaging in unambiguously constitutional, lawful, and protected conduct is meant to chill any lawful and protected anti-union speech by smaller employers who perhaps cannot afford to defend themselves legally against Board enforcement actions.

Counsel for Starbucks Workers United confirmed this tactic, stating in a quote given to Law360 that "[t]he fact that Starbucks will, and Howard Schultz specifically may have to issue an apology for this unlawful conduct, could have a deterrent effect on future employers[.]."[83] Moreover, these actions only lend credence to the notion that the General Counsel's positions with respect to the limitations of employer speech for the alleged protection of workers are merely pretext for imposing content and viewpoint related restrictions on employer speech that could be considered hostile to unions.[84]

[77] Complaint, Case No. 19-CA-294579, et al.
[78] Id.
[79] Id. at 13.
[80] Palmer, Annie Amazon CEO Andy Jassy violated labor laws with union remarks, federal agency alleges, CNBC (Oct. 27, 2022), https://www.cnbc.com/2022/10/27/nlrb-says-amazon-ceo-andy-jassy-violated-labor-laws.html.
[81] Complaint, Case No. 29-CA-296817 et al.
[82] Id.
[83] Banks, Beverly, NLRB Attys Say Schultz's Starbucks Union Talk Broke Law, Law360.com, https://www.law360.com/articles/1524371?scroll=1&related=1 (August 25, 2022).
[84] Indeed, it appears there are no instances in which the General Counsel sought an enforcement action against an employer for attempting to persuade worker to vote in favor of a union.

D. Anti-Employer Speech Trends Influencing the General Counsel's Strategy

The General Counsel is not engaged in her anti-free speech campaign in a vacuum. Instead, her efforts are complemented by state actors who are similarly endeavoring to restrict employers' free speech. In recent years, Minnesota, Oregon, Connecticut, New York, and Maine have each passed some version of a law banning employee meetings held to discuss certain topics, and California (for a second time) and Vermont have introduced similar laws in the 2023-2024 legislative session.[85] Although these laws are likely to be struck down in light of the Supreme Court's 2008 Chamber v. Brown ruling, which held that the Act preempted California's first attempt to pass such a law, these laws are emblematic of the general trend toward government actors disfavoring the employer perspective of the labor relations conversation.[86]

In Chamber v. Brown, the Supreme Court struck down California's Assembly Bill (AB) 1889, which restricted employers from using funds received from the state "to assist, promote, or deter union organizing."[87] The Supreme Court ultimately held that AB 1889 should be struck down because it was preempted by the Act. The Court reasoned that "California's policy judgment that partisan employer speech necessarily 'interfere[s] with an employee's choice about whether to join or to be represented by a labor union,' is the same policy judgment that the [Board] advanced under the Wagner Act, and that Congress renounced in the Taft-Hartley Act" and therefore "Congress ha[d] clearly denied [the Board] the authority to regulate the broader category of noncoercive speech encompassed by AB 1889."[88] This protection, the Court noted, extends to speech that goes beyond the "narrow zone of speech [the Board can police] to ensure free and fair elections under the aegis of §9 of the [Act]."[89] Ultimately, the Court found that California "plainly could not directly regulate noncoercive speech about unionization by means of an express prohibition [and] may not indirectly regulate such conduct by imposing spending restrictions on the use of state funds."[90]

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[85] See e.g. California Senate Bill SB 399 (prohibiting certain employers from requiring employees to attend an employer-sponsored meeting or participate in any communication regarding employer opinion); Vermont Senate Bill S 102 (proposing to make it illegal under state law for employers to discipline or fire employees who decline to attend employer-hosted meetings that are primarily about the employers' political or religious opinions — including unionization).

[86] Chamber v. Brown, 554 U.S. at 62.

[87] Id.

[88] Id.

[89] Id. at 74.

[90] Id. at 69.

Despite this clear ruling from the Supreme Court, states continue to enact similar laws banning captive audience meetings. This year, Maine, New York, and Minnesota passed laws banning mandatory employee meetings covering certain topics meetings in those states.[91] These laws were written to mirror similar bills that have already been passed in other states, such as Oregon's Bill S 519, which went into effect in January 1, 2010, and Connecticut's Bill SB318, which went into effect on July 1, 2022. While these laws broadly allow workers to agree to a meeting where their employer argues against unionization, Oregon's, Connecticut's, New York's, Maine's, and Minnesota's laws prohibit employers from disciplining or firing employees who choose not to attend such meetings.[92] Additionally, the laws restrict employers' ability to communicate with employees about "political matters" and broadly define "political matter" to include, among other things, legislative or regulatory proposals and the decision to join a labor organization.[93] In effect, the laws threaten employers with liability for speaking with their employees on a range of important workplace issues, such as whether pending laws or regulations, like those concerning energy, taxes, or public transportation, are good or bad for the company.[94] The laws are so broad, small business owners could now face potentially expensive and time-consuming complaints and litigation for simply exercising their First Amendment rights by communicating openly with their employees.

Although it is likely that these anti-employer speech laws will also be struck down by federal courts due to the Act's preemption, the recent and coordinated efforts by both local labor movements and the General Counsel suggest that these attempts to restrict employer speech are nowhere near done.[95]

[91] See, e.g., Maine SP 1756; New York S.4982; Minnesota H.F. 2442.
[92] ORS 659.785(1); Conn. Gen. Stat. § 31-51q(b); 2023 Minnesota House File No. 2442; 26 MRSA §600-B(2)(A) (2023),
[93] ORS 659.780(5); ORS 659.780(1); Conn. Gen. Stat. § 31-51q(a)(1); 2023 Minnesota House File No. 2442; New York S.4982; 26 MRSA §600-B(1)(A) (2023).
[94] Conn. Gen. Stat. § 31-51q; ORS 659.785(1).
[95] In Chamber of Commerce v. Brown, 554 U.S. at 68-9, the Supreme Court struck down California's anti-"captive audience" meeting law in a 7-2 opinion, concluding it was preempted by the Act.

The Significance of Allowing Employers to Communicate with Employees

As is discussed above, Section 8(c) was passed to unequivocally protect employers' First Amendment rights in expressing "'any views, argument, or opinion' in any media form without committing an unfair labor practice provided that 'such expression contains no threat of reprisal or force or promise of benefit.'"[96]

However, it is clear based on the General Counsel's campaign to hamper employer speech, that those tenets of free debate are being set aside in order to promote increased unionization.

The Supreme Court made clear in Chamber v. Brown that employers' First Amendment rights must be protected to allow for free debate in the context of union organizing.[97] That, the Supreme Court acknowledged, is the best mechanism for decision-making.[98]

Congress' addition of Section 8(c) explicitly acknowledges the importance of employers' right to express their opinions, concerns, or objections regarding union activities without facing legal consequences, as long as they adhere to the boundaries established by the Act. Without such open debate, employees cannot obtain all of the information necessary to make an informed decision regarding unionization.

Clearly, this is the world the General Counsel wants to create, but it is a world where First Amendment rights, the Act's protections, and the best interests of employees have no place.[99]

[96] See Section II(B)(ii): see also NLRB v. Pratt & Whitney Air Craft Division, United Technologies Corp., 789 F.2d 121, 134 (2d Cir. 1986).

[97] Chamber v. Brown, 554 U.S. at 68-9.

[98] Id.

[99] The importance of transparent, open debate was made all the more clear by a recent Board ruling in a case involving Starbucks. There, a union won an election at a Starbucks location, and Starbucks alleged that a union and agents of the Board improperly colluded and engaged in other misconduct in an effort to ensure a union victory; a Board hearing officer agreed the evidence supported Starbucks's allegations and recommended a new election. Hearing Officer's Report and Recommendations, Case No. 14-RC-289926 (February 24, 2023). However, the General Counsel filed a complaint effectively seeking to force Starbucks to bargain with the union despite the hearing officer's finding of union and Board agent misconduct. See Consolidated Complaint and Notice of Hearing, 14-CA-29968 (June 21, 2022). Accordingly, in a world where the governing institutions are so blatantly biased in favor of the union business instead of the best interests of employees, it is imperative that employers have an avenue to provide information from the other side of the debate, lest employees have no fair chance of adequately discerning whether a union is actually in their best interests.

Conclusion

The General Counsel's efforts to restrict employer speech is untenable under the First Amendment, established Board precedent, and the Act. Her disregard for these binding legal authorities undermines the fundamental principles of fairness and balance in labor relations. Given her determination, it will be up to Congress and the Courts to assert the primacy of the law.

U.S. Chamber of Commerce

1615 H St, NW
Washington, DC 20062
uschamber.com