CLIENT ALERTS & INSIGHTS

Contradicting the Language of the NLRA, NLRB Upends Decades-Old Precedent and Statutory Text, Instead Finding Captive Audience Meetings Unlawful under the NLRA

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Authors: W. Eric Baisden, Adam Primm

In an apparent effort to publish as many worker-friendly opinions as possible before the transition of power from President Joe Biden to President-elect Donald Trump, the National Labor Relations Board (the "Board") issued its Decision and Order in Amazon.com Services, LLC, finding that captive audience meetings are unlawful under the National Labor Relations Act ("NLRA") and overturning precedent established in 1948. Captive audience meetings are mandatory meetings held by an employer, which are held during working hours and for which employees are paid, and at which the employer voices its perspective on unionization.

The protection of employer free speech rights begins in 1947 when Congress passed the Taft-Hartley Act. That Act amended the NLRA by adding section 8(c), which became known as the free speech proviso. Section 8(c) states that "The expressing of any views, agreement, or opinion, or the dissemination thereof … 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." This amendment was in direct response to a Board decision in 1946, *Matter of Clark Bros.*, which (prior to a revision before the court of appeals) stated that captive audience meetings were an unfair labor practice. The United States Senate specifically addressed this case when debating the language of section 8(c), finding that the decision in *Clark Bros.* was much too restrictive of the right of employer free speech. Soon after passage of the Taft-Hartley Act, codifying an employer's right to free speech in a captive audience meeting, the Board upheld captive audience meetings in its seminal *Babcock & Wilcox Co.* decision. *Babcock* was followed soon after by *Matter of S. & S. Corrugated Paper Machinery Co. Inc.* in 1950, which further ruled that captive audience meetings were protected by section 8(c) and could not form the basis for finding the employer committed an unfair labor practice or interfered with employees' free choice, even if it denied the union an equal opportunity to use its facilities.

Despite this explicit Congressional approval of an employer's use of captive audience meetings to express its opinion regarding unionization and more than 75 years of consistent precedent upholding such meetings, Board General Counsel Jennifer Abruzzo issued a non-binding memorandum in April 2022 stating her belief that captive audience meetings constitute unlawful threats. In that memo, she announced her intention to direct the Board to overrule *Babcock*.

Now, on the verge of an administration change that will assuredly result in a new Board GC and a shift away from promoting union rights at the Board, the Board finally met Abruzzo's challenge

dismantled one of the few tenants of employer rights codified in federal labor law when the Board determined that its holding in *Babcock* was "largely unexplained[,] … not compelled by the text or the legislative history of the Act", and "flawed as a matter of statutory policy." Those claims that the legality of captive audience meetings and the holding in *Babcock* are unsupported by the text or legislative history of the NLRA are entirely false. As described above, Taft-Hartley amended the NLRA to add section 8(c) in direct response to this exact decision in 1946 in an effort to codify and protect that employer right, which is reflected in the text of Taft-Hartley and the legislative history, which immediately resulted in seminal decisions protecting that right. Nonetheless, in *Amazon.com Services, LLC*, the Board completely disregarded such overt intentions of Congress and held that captive audience meetings were unlawful, claiming they reflect an extraordinary exercise and demonstration of employer power over an employee because at such meetings an employer can silence or banish employees who express their own views or ask questions while simultaneously providing the employer with an opportunity to observe its employees, who they associate with, and how they react to what they hear. The Board found that captive audience meetings are inconsistent with Section 7 of the Act, which provides, in relevant part, that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and shall have the right to refrain from any or all of such activities."

The Board also stated that its decision did not impact employer free speech by distinguishing noncoercive employer expression with speech that the employee is compelled to listen to, the latter of which the Board deemed unlawful.

While captive audience meetings are now unlawful, the Board provided a "safe harbor" from liability for employers who wish to express their views concerning unionization in a workplace, work-hours meeting with employees. Under the safe harbor, an employer will be found to not have violated Section 8(a)(1) if, reasonably in advance of the meeting, the employer informs the employee that:

- The employer intends to express its views on unionization at a meeting at which attendance is voluntary;
- Employees will not be subject to discipline, discharge, or other adverse consequences for failing to attend the meeting or for leaving the meeting; and
- The employer will not keep records of which employees attend, fail to attend, or leave the meeting.

Provided the employer gives employees these assurances and abides by them, the Board claims employers may lawfully hold voluntary meetings with employees on company time to express views on unionization.

Going forward, employers that choose to hold meetings with employees during working time to express its views on unionization should take the necessary steps outlined above to ensure that their meetings fall within the safe harbor to avoid allegations of unfair labor practice charges.

In addition, nothing in the *Amazon*

holding specifically addresses an employer's right to hold one-on-one meetings with employees. While the Board in *Amazon* justified its decision, in part, on the fact that captive audience meetings permit employers to observe how employees interact with one another at the meeting, that consideration plays no role in a one-on-one meeting. However, employers should still proceed with caution when discussing unionization with employees, regardless of the environment.

While *Amazon* is the law of the land as far as compliance with the NLRA is concerned for now, employers can expect that the administration change in January will result in a conservative Board that is likely to do away with many of the current Board's edicts-potentially including the *Amazon* decision.

For more information, please contact a member of Benesch's Labor & Employment Practice Group.

Eric Baisden at ebaisden@beneschlaw.com or 216.363.4676.

Adam Primm at aprimm@beneschlaw.com or 216.363.4451.