CLIENT ALERTS & INSIGHTS

NLRB General Counsel Issues Memorandum Asking Board to Overturn Biden-Era Precedent

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Authors: W. Eric Baisden, Adam Primm, Rachel Veneman

Featured Practices: Labor & Employment

Key Takeaways:

- Following the confirmation of a third Republican NLRB member, General Counsel Crystal Stowe Carey released a memorandum urging the Board to reconsider and overturn numerous Biden-era labor decisions.
- The memorandum outlines a significant shift in NLRB priorities and signals that several recent rulings expanding employee and union protections could be narrowed or reversed.
- Employers should closely monitor upcoming NLRB decisions and prepare for possible changes to severance agreements, workplace rules, union organizing campaigns, and bargaining obligations.

With the confirmation of a third Republican member to the National Labor Relations Board ("NLRB"), the NLRB's General Counsel Crystal Stowe Carey issued a memorandum on August 26, 2026, asking the now-Republican majority Board to revisit and overturn Biden-era precedent. Carey laid out her agenda, including the following:

- **Severance Agreements:** Arguing to overrule *McLaren Macomb*, 372 NLRB No. 58 (2023) in an answering brief in *Valley Radiology, P.A.* (10-CA-324512). The Board held in *McLaren* that employers may not offer employees severance agreements containing confidentiality and/or non-disparagement provisions that require employees to broadly waive their rights under Section 7 of the National Labor Relations Act ("NLRA").
- **Captive Audience Meetings:** Encouraging the Board to reverse *Amazon.com Services LLC*, 373 NLRB No. 136 (2024), and return to the longstanding "captive audience" standard set in *Babcock & Wilcox*, 77 NLRB No. 577 (1948), in a motion to withdraw exceptions in *UPS Supply Chain Solutions, Inc.* (32-CA-295913, 32-CA-297314). The Board ruled in *Amazon* that an employer violates the NLRA by requiring employees under threat of discipline or discharge to attend "captive audience meetings," or meetings in which the employer expresses its views on unionization. The Board permitted such meetings in *Babcock* and through the "free speech proviso" in section 8(c) of the Taft-Hartley Act of 1947.
- **Work Rules:** Arguing to overturn *Stericycle*, 372 NLRB No. 113 (2023) in *Honeywell International Inc.* (09-CA-327389). In *Stericycle*

, the Board adopted a new legal standard for evaluating employer work rules challenged as facially unlawful under Section 8(a)(1) of the NLRA. Under the *Stericycle* standard, the General Counsel must prove that a challenged rule has a reasonable tendency to chill employees from exercising their rights, and if the General Counsel does so, the rule is presumptively unlawful. The employer may rebut the presumption by showing that the rule advances a legitimate and substantial business interest and the employer is unable to advance the interest with a more narrowly tailored rule. Carey presumably seeks to return to the standards set forth in *Boeing Co.*, 365 NLRB No. 154 (2017) and *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019). Under the *Boeing* test, when evaluating facially neutral rules that potentially interfered with the exercise of NLRA rights, the Board evaluated two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule. The Board in *Boeing* simply weighed the factors and did not make a presumption, while also setting forth three distinct categories of rules.

- **Consent Orders:** Requesting to overturn *Metro Health Inc. d/b/a Hospital Metropolitano Rio Piedras*, 373 NLRB No. 89 (2024) in *Amazon* (31-CA-317349, 31-CA-319781, 31-CA-320596). The Board held in *Metro Health* that the Board will no longer accept "consent orders," where an Administrative Law Judge resolves an unfair labor practice case based on terms offered by the Respondent but objected to by both the Charging Party and the General Counsel.
- **Predictions on Impact of Unionization:** Arguing to reinstate *Tri-Cast, Inc.*, 274 NLRB No. 377 (1985) and stating that Carey does not share her predecessor's views on *Siren Retail Corp. d/b/a Starbucks*, 373 NLRB No. 135 (2024) in a motion to withdraw exceptions in *UPS Supply Chain Solutions, Inc.* (32-CA-295913, 32-CA-297314). The Board in *Siren* overruled *Tri-Cast* and clarified that the Board will analyze statements according to the Supreme Court's decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), which mandates that, to be lawful, employer predictions of negative impacts from unionization "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond its control." Carey argues to reinstate *Tri-Cast*, under which the Board held that statements generally predicting the negative impact unionization will have on employees' ability to directly address issues with their employer are categorically lawful.
- **Dress Codes:** Arguing against the application of *Tesla Inc.*, 371 NLRB No. 131 (2022) and requesting the Board to reinstate *Wal-Mart Stores, Inc.*, 368 NLRB No. 146 (2019) in exceptions and supporting brief in *Starbucks Corporation* (13-CA-322871, 13-CA-327142). The Board in *Tesla* overruled *Wal-Mart* and held that employer attempts to impose any restriction on the display of union insignia, including by wearing union apparel, are presumptively unlawful, absent special circumstances that justify such a restriction. Carey argues to reinstate *Wal-Mart*, under which the Board held that the special circumstances test applies only when an employer completely prohibits insignia, and that lesser size-and-appearance restrictions on union insignia could be lawful based on less compelling employer interests. Notably, on September 2, 2026, the Second Circuit Court of Appeals joined the Fifth Circuit in rejecting the *Tesla* standard in *Siren Retail Corp. d/b/a Starbucks Reserve Roastery v. NLRB*, No. 24-3168 (2d Cir. Sept. 2, 2026). The Second Circuit denied enforcement and remanded the case to the NLRB for it to consider the following factors as part of its analysis in line with *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945): (1) the extent of intrusion on employee Section 7 rights (i.e., whether the employer enforced a full or partial ban

on union insignia during working time); (2) whether the employer's policy is facially neutral, nondiscriminatory, and consistently enforced; and (3) the context or circumstances underlying the intrusion.

- **Waiver of Right to Bargain:** Arguing to overturn the standard set in *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141 (2024) and urging the Board to return to the standard set in *MV Transportation, Inc.*, 368 NLRB No. 66 (2019) in a supplemental brief filed with the Administrative Law Judge in *HPC Industrial Group, LLC* (07-CA-308650). The Board in *Endurance* restored the "clear and unmistakable" waiver standard for evaluating employers' contractual defenses to allegations that they have unlawfully changed the working conditions of union-represented employees without first giving the union notice and an opportunity to bargain. Carey argues to return to the "contract coverage" standard of *MV Transportation*, which made it easier for employers to avoid engaging in collective bargaining over workplace changes.

Additionally, Carey set forth the positions she intends to present to the Board for consideration, including the following:

- **Bargaining Orders:** Carey intends to challenge the Board's decision in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023), *enforced* 2026 WL 1079297 (9th Cir. 2026) and request that the Board return to and reaffirm the binding applicability of *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) and reinstate *Linden Lumber Div., Summer & Co.*, 190 NLRB 718 (1971), *rev'd. sub nom. Truck Drivers Union Local No. 413 v. NLRB*, 487 F.2d 1099 (D.C. Cir. 1973), *aff'd.* 419 U.S. 301 (1974). The Board in *Cemex* held that when a union requests recognition on the basis that a majority of employees in a bargaining unit have designated the union as their representative, an employer must recognize and bargain with the union or promptly file a petition for an election. Under the *Cemex* framework, if an employer seeking election commits *any* unfair labor practice that would require setting aside the election, the petition will be dismissed, and the Board will order the employer to recognize and bargain with the union. Conversely, Carey intends to seek reinstatement of *Gissel Packing*, under which the Board held that issuance of a bargaining order is appropriate where an employer who has rejected a card majority has committed unfair labor practices *which have made the holding of a fair election unlikely*, or which have undermined a union's majority, caused an election to be set aside, and made the holding of a fair rerun election unlikely. Additionally, Carey argues to reinstate *Linden Lumber*, under which the Board held that an employer does not commit an unfair labor practice for refusing to accept evidence of the union's majority status other than the results of a Board election, such as authorization cards.
- **Protected Concerted Activity:** Carey intends to urge the Board to revisit *Miller Plastic Products, Inc.*, 372 NLRB No. 134 (2023), *vacated in part*, 141 F.4th 492 (3d Cir. 2025) and *Lion Elastomers, LLC II*, 372 NLRB No. 83, (2023), *vacated and remanded*, 108 F.4th 252 (5th Cir. 2024). The Board in *Miller Plastic* held that the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence, and the Board in *Lion Elastomers* returned to three setting-specific standards focusing on the severity of the employee's misconduct and the context in which it took place. The three setting-specific standards are (1) the *Atlantic Steel* test, which governs employees' conduct towards management in the workplace; (2) the totality-of-the-circumstances test, which governs social media posts and most cases involving conversations among employees in the workplace; and (3) the *Clear Pine Mouldings*

standard, which governs picket-line conduct.

Carey also plans to address employers' duty to bargain prior to changing terms and conditions of employment, union dues and objector representation fees, employers' obligation to discuss dues under security agreements after the contract expires, and novel and unprecedented enhanced remedies.

Before issuing the memorandum and while waiting for confirmation of a third Republican to the NLRB, Carey focused her attention on "prioritizing processing of agreed cases to reduce the historic backlog burdening the agency" and "implementing sustainable, prudent case handling practices to prevent a repetitive backlog of this scale." Since Carey took office, there has been a 50% reduction in cases awaiting determination in regional offices.