# PUBLICATION

## NLRB Places Further Restrictions on Employers: Captive Audience Meetings Restricted

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**The National Labor Relations Board (the Board) voted 3-1 on November 13, 2024, (along party lines, with Member Kaplan dissenting) to prohibit so-called "captive audience" meetings.[1] In doing so, the Board overturned seventy-six (76) years of precedent that previously held such meetings lawful, beginning with the 1948 case of *Babcock & Wilcox Co.*, 77 NLRB 577 (1948).**

This decision comes as no surprise to many, as the Board's General Counsel, Jennifer Abruzzo, has previously voiced her opposition to captive audience meetings, stating that they "inherently involve an unlawful threat that employees will be disciplined or suffer other reprisals."[2] It seems that the General Counsel is making good on her promises in the waning days of the current Board's tenure.

### The Board's Reasoning

A "captive audience" meeting refers to a mandatory meeting of groups of employees called by the employer during an organizing campaign, in order to express the employer's views regarding (often against) unionization. Before last Wednesday's decision, such meetings were one of the few tools remaining in the employer's arsenal to defend against Union organizing. In prohibiting these meetings, the Board's majority reasoned that "[a] captive-audience meeting is an extraordinary exercise and demonstration of employer power over employees in a context where the act envisions that employees will be free from such domination . . . [w]e thus prohibit [them]."[3] The sole dissenting Board member stated in response that "the Board simply does not have the power to prohibit captive audience meetings . . . [n]or may the right guaranteed by the Constitution . . . be evaded in the service of some other goal."[4]

### Employers May Still Hold Group Meetings, With a Catch

It is important to note that, even in light of this new decision, it remains lawful for employers to hold voluntary "all-hands" type meetings during a union organizing campaign. That said, however, if the employer intends to discuss the organizing campaign or how the employees should vote, etc., the employer must take several precautions. The employer must tell employees, within a "reasonable" time before the meeting is held that (1) the employer is holding a meeting to discuss its views on unionization; (2) that their attendance is voluntary; (3) there will be no negative consequences if an employee does not attend, or if an employee chooses to leave during the meeting; and (4) that the employer is not taking attendance or noting which employees attend the meeting.

It should be noted that the new rule should be assumed to apply to any meetings with groups of employees. The rule applies at an "all employee" meeting but would also apply to a pre-shift meeting with a portion of the workforce in attendance, or a series of smaller "roundtable" meetings. It should also be noted that the Board stated that it will be unlawful for an employer to "tack on" union-related messaging during a work-related meeting that is on employees' calendar.

### What Now?

While this decision remains in effect and binding, it should be noted that President Trump has made significant changes to the labor law landscape, and more may be in the offing.

By design, the Board has five members, one of which is chairman. At the end of President Biden's term, only three of those seats were occupied and included two Democrats and one Republican. The Board must have three members seated in order to conduct business.[5] Board members are appointment by the President and must be confirmed by the Senate.

By order of the President, on January 20, 2025, the sole Republican voice on the Board, Marvin Kaplan, become the new chairman. As expected, on January 28, 2025, the President terminated the Board's General Counsel, Jennifer Abruzzo. The move is not without precedent.[6]

In a move that is without precedent, on January 28, the President fired Board Member Gwynne Wilcox, a Biden appointee whose term was not set to expire until 2028.[7] This move is likely to draw legal challenges[8] and leaves the Board with only two members. With only two members, the Board cannot achieve a quorum, and therefore cannot rule on cases until the Senate confirms one or both of President Trump's new Board appointees.

When that happens, the rule banning captive audience meetings, as well as many other pro-labor decisions the Board has issued in recent years, are highly likely to be overturned. Businesses faced with union organizing now will have to make a calculated risk: while captive audience meetings are currently unlawful, they might not be in the very near future. Whether a company should disregard the new rules regarding captive audience meetings and assumes the risk that comes along with doing so will depend on the particular facts and circumstances of each situation. This is a decision that is best made after consultation with experienced labor counsel, particularly as the landscape may change very soon.

We continue to monitor these and other developments at the Board. Despite the recent shift in the political power, it is important to take the possibility of union organizing seriously and to take proactive steps, if you wish for your business to remain union-free. If you would like to consult an attorney about how best to achieve that goal, or with any questions about these legal developments, please reach out to Gerald E. Bradner.

[1] *Amazon.com Services LLC*, Case No. 29-CA-280153, et. seq. [https://www.law360.com/articles/1710447/attachments/0]

[2] GC's April 7, 2022 Memorandum GC 22-04 [https://aboutblaw.com/2sF]

[3] *Amazon.com Services LLC*, at *12.

[4] *Id.* at *26.

[5] See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

[6] The Biden administration demanded the resignation of the former Board GC, Peter Robb, in 2021. Robb refused and was subsequently terminated.

[7] Traditionally, Board Members serve their entire term. Terms are staggered such that Board seats become open during each Administration.

[8] Advocates for Former-Member Wilcox are likely to argue that she cannot be removed in light of protections afforded by *Humphrey's Executor*, but because the NLRB has rulemaking power, the argument is unlikely to

avail her. See *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). A more persuasive argument would point directly to the National Labor Relations Act, which states that Board Members serve for five-year terms and "may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause."