

**HOW THE NEW NATIONAL LABOR RELATIONS BOARD  
WILL IMPACT YOUR BUSINESS**

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**EXPAND YOUR EXPECTATIONS™**

**Clinton  
NLRB**

Democrat

Chairman  
Democrat

Democrat

Republican

Republican

## **Bush NLRB**

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Republican

Republican

Republican

Democrat

Democrat  
Wilma Liebman

## **Obama NLRB**

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Craig Becker  
Democrat

Chairman-  
Wilma Liebman  
Democrat

Mark Pearce  
Democrat

Brian Hayes  
Republican

Peter Schaumburg  
Republican

## Obama Today NLRB

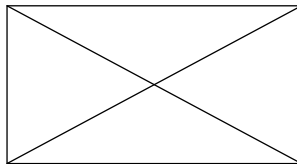
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Craig Becker  
Democrat

Chairman-  
Wilma Liebman  
Democrat

Mark Pearce  
Democrat

Brian Hayes  
Republican



## Status of NLRB

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- Appointments of Becker and Pearce
  - Becker was AGC for SEIU and AFL-CIO.
  - Pearce is union side attorney from NY.
- *New Process Steel* (U.S. Supreme Court Case)
  - Decisions of Two Member Board Invalid.
  - 600 cases remanded.
  - Will be decided by NLRB with Obama's appointments.

## Craig Becker

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- Employers should have no role in union organizing campaigns and union representation elections.
- Employers should be barred from placing observers at the polls to challenge ballots.
- Employers should have no right to raise questions concerning voter eligibility or campaign conduct.
- No more captive audience speeches.
- Employers must observe their own restrictions on solicitation and distribution during election campaign.
- Mandatory bargaining orders.
- Would allow partial strikes.
- Would allow unionization of temp employees.
- Minority collective bargaining.

## RIGHTS OF EMPLOYEES

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- Sec. 7. [§ 157.] 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 such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

## Use of Employer's E-mail for Union Organizing

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### Current Law:

- *Register Guard*, 351 NLRB No. 70 (2007)
  - Employer can legally prohibit use of e-mail for non work related purposes.
  - Employer can allow personal use of e-mail while prohibiting solicitation on behalf of groups.

### Potential Change:

- Chairman Liebman opined in *Register Guard* dissent that e-mail is a form of solicitation; just like verbal solicitation.
- She suggested that employers should only be able to ban e-mail solicitation if the employer can prove interference with productivity of employees.

## Right to Witnesses at Meetings that Could Lead to Discipline of Nonunion Employees

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### Current Law:

- *IBM Corp.*, 341 NLRB No. 148 (2004)
  - Nonunion employees **do not** have a right to a witness at investigatory interview that leads to discipline.

### Potential Change:

- NLRB's stance has shifted on this topic over time.
  - *Epilepsy Foundation* case in 2000.
- NLRB is likely to over-rule *IBM* and return to *Epilepsy Foundation*.
- Just applies to investigatory meetings. Does not apply to pre-determined discipline. Does not apply to managers or supervisors.

## Salting

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### Current Law:

- *Toering Electric Co.*, 351 NLRB No. 18 (2007)
  - Individuals who are not “genuinely seeking employment” are not protected by the NLRA.
  - General Counsel must prove that applicant was genuinely interested in employment.

### Potential Change:

- Chairman Liebman’s dissent in *Toering* suggests that employers must prove that applicant was not genuinely interested in employment.
- She also suggested that salts should be protected by the NLRA.

## Definition of Supervisor

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### Current Law:

- *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006)
  - Employee is a supervisor if they assign employees to work in specific places and times.
  - Employee is a supervisor if they are held accountable for other employees’ performance.

### Potential Change:

- Obama Board will likely contract the definition of supervisor to limit what is meant by “assign” and “responsibly direct.”
- RESPECT ACT would remove assign and responsibly direct from statutory definition of supervisor.

## **Retaliatory Legal Action by Employer**

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### Current Law:

- BE&K Construction Co., 351 NLRB No. 29 (2007)
  - Employer can bring suit against individual employee or union, even if the suit complains of protected activity, and even if suit is ultimately dismissed, so long as employer is subjectively acting in good faith.

### Potential Change:

- Previous Board law said that if case was not objectively reasonable, then it was a retaliatory unfair labor practice.
- Previous Board law said that dismissal of case was evidence that it was not brought in good faith.

## **Harassment Policy**

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### Current Law:

- *Palms Hotel & Casino*, 344 NLRB 351 (2005)
  - Employer's policy prohibited "conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with other employees or patrons."
  - Policy was legal because NLRB will not presume that policy interferes with employee's rights under the NLRA.

### Potential Change:

- Chairman Liebman in dissent would find the policy illegal because union activity may be offensive to other employees, and therefore, policy banned union activity.

## Lowering Standards for Election Objections

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### Current Law:

- *Delta Brands*, 344 NLRB 252 (2005)
  - Employer's policy, by itself, is not enough to overturn an election, without some proof that the policy affected the election.

### Potential Change:

- Chairman Liebman would overturn any election where the employer's policies were overbroad, even without proof that the policy affected the election.

## Stringent Surveillance Standards

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### Current Law:

- *Alladin Gaming*, 345 NLRB 585 (2005)
  - Supervisors overheard employees discussing union in cafeteria and interjected into the discussion to provide employer's point of view.
  - NLRB said that this was not surveillance because it was not out of the ordinary and it was routine casual conversation.

### Potential Change:

- Chairman Liebman said that this was an intrusion on private conversation so it was unlawful surveillance.

## Use of Project Labor Agreements for Federal Construction Projects

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- Sec. 7. The Director of OMB, in consultation with the Secretary of Labor and with other officials as appropriate, shall provide the President within 180 days of this order, recommendations about whether broader use of project labor agreements, with respect to both construction projects undertaken under Federal contracts and construction projects receiving Federal financial assistance, would help to promote the economical, efficient, and timely completion of such projects.

## What is Protected Activity?

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### Current Law:

- *Holling Press, Inc.*, 343 NLRB 301 (2004)
  - Employee soliciting co-worker to give statement in support of sexual harassment EEOC charge.
  - NLRB held that this was not protected activity because it was motivated by personal, as opposed to collective, goals.
  - Personal gripes are not considered protected concerted activity.

### Potential Change:

- Chairman Liebman said that protected activity can have personal motives, as long as one employee is seeking help from another employee.

### ***Waters of Orchard Park – Scope of Protected Activity***

- **FACTS:** Two nursing home employees called a state hotline to report excessive heat in the Employer's nursing home, expressing concern about the effect of the heat on patients.
- **ISSUE:** Whether the employees were engaged in protected, concerted activity under the Act?

### ***Waters of Orchard Park - cont'd***

- **HELD, no.** Although concerted, the employees' action did not relate to a term or condition of employment and therefore was not protected. The call was made not for mutual aid or protection of employees, but rather out of concern for elderly patients.
- **IF REVERSED...**disgruntled employees would be emboldened to report any potential workplace issues to State or Federal agencies, regardless of their motivation, safe in the knowledge that their activities are protected by the NLRA.

### ***W San Diego – Union Paraphernalia***

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- **FACTS:** Pursuant to a hotel policy prohibiting all non-business uniform adornments, employees were prohibited from wearing union buttons in public areas.
- **ISSUE:** Whether Employer's policy violated the Act?

### ***W San Diego - cont'd***

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- **HELD, no.** Although employees have a right to wear union insignia, Employers may lawfully restrict the right in certain circumstances. Here, Employer's interest in providing its guests with a "unique atmosphere and ambience" warranted such a restriction.
- **IF REVERSED...**the Board is unlikely to accept a business image rationale for Employer rules that prohibit employees from wearing union insignia in public areas.

### ***Leiser Construction, Inc. – Union Paraphernalia***

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- **FACTS:** Construction worker employee displayed on his hardhat a variety of union-related stickers. One sticker depicted someone urinating on a rat that was designated as “non-union.”
- **ISSUE:** Whether Employer violated the Act by prohibiting its employee from wearing the vulgar, though union-related, sticker?

### ***Leiser Construction, Inc. – cont'd***

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- **HELD, no.** Employers have the right to restrict the display of insignia that is vulgar and obscene.
- **DISSENT:** Both management and employees commonly used vulgar language in the workplace, and the employee had no contact with the public such that displaying the sticker would harm Employer’s public image. Therefore, the employee should not be prohibited from wearing the sticker.
- **IF REVERSED...**if the dissent’s position is adopted, it would restrict an employer’s ability to prohibit employees from adorning themselves or their equipment with obscene paraphernalia so long as that paraphernalia has some relation to unions.

### ***Tradesmen International – Work Rules***

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- **FACTS:** Several of Employer's work rules were challenged, including: 1) prohibition of disloyal, disruptive, competitive or damaging conduct; 2) prohibition of slanderous or detrimental statements; and, 3) requirement that employees represent Employer in a positive manner.
- **ISSUE:** Whether the challenged rules would reasonably tend to chill employees in the exercise of their rights under the Act?

### ***Tradesmen International – cont'd***

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- **HELD, no.** The rules serve a legitimate business interest and reasonable employees would not construe them as intended to proscribe their rights under the Act.
- **IF REVERSED...**rules such as those at issue will likely be construed as intended to restrain employees' rights under the Act unless they specifically define prohibited conduct and adequately inform employees that the terms do not encompass Section 7 activity.

## Question Time

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