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LEGISLATIVE ACTION ALERT

HOW YOU VOTE THIS NOVEMBER WILL DETERMINE WHETHER OR NOT WORKER'S RIGHTS WILL CONTINUE TO BE DISMANTLED

Under Trump the NLRB Has Gone Completely Rogue

THE
Nation.

An agency founded to defend workers' rights is dismantling them just when workers need them most.

By [Lynn Rhinehart](#) *The Nation* ©

According to an article posted online by The Nation®, while the country was riveted on the skyrocketing number of Covid-19 cases and trying to make sense of the incoherent response by the Trump administration, a little-known agency continued its steady dismantling of workers' rights.

The National Labor Relations Board (NLRB) is a New Deal agency established by Congress to implement and enforce the National Labor Relations Act (NLRA), the law giving most private-sector workers the right to join together and take action—whether through forming a formal union or not—to improve their pay, benefits, and working conditions. These rights are more relevant now than ever, as demonstrated by the recent wave of strikes and job actions by health care workers and workers at Amazon, Instacart, Whole Foods, Trader Joe's, and other companies. Workers have taken to the streets, started petition drives, and made bargaining demands in an effort to get their employers to provide safety equipment and institute other measures to protect them from workplace exposure to the Covid-19. Even before the Covid-19 crisis, worker interest in organizing unions was on the rise, with the percentage of nonunion workers saying they would vote for a union if given the chance up 50 percent from a similar poll 25 years ago.

The board is currently composed of three white male NLRB members and another white male general counsel

(prosecutor)—all Republicans, three with careers representing corporations and one as a Republican Capitol Hill staffer. Both Democratic seats are currently vacant. There is nobody currently on the NLRB with experience representing workers or unions. Through these appointees, an agency that is supposed to protect workers' right to organize has taken the law in exactly the opposite direction.

In decision after decision, the NLRB has stripped workers of their protections under the law, restricted their ability to organize at their workplace, slowed down the union election process to give employers more time to campaign against the union, repealed rules holding employers accountable for their actions, and undermined workers' bargaining rights. (Disclosure: I co-authored a report detailing these rollbacks with my colleagues at the Economic Policy Institute. See "[Unprecedented: The Trump NLRB's Attack on Workers' Rights.](#)") One measure of their impact: As of last October, the Chamber of Commerce was 10 for 10 in getting the board to act on the chamber's recommended changes to weaken workers' organizing and bargaining rights.

One of the board's actions resonates particularly loudly in this moment. Last May, NLRB General Counsel Peter Robb decided that Uber drivers—and presumably other "gig" workers—are not protected by federal labor law because (according to Uber and Robb) they are independent contractors, not employees. As a result, workers who are so

vulnerable in this current crisis won't be protected by the NLRB if they are fired or retaliated against for protesting for better safety on the job.

But the board's actions over the past three weeks has seen their anti-worker, antiunion bias descend to a whole new level.

First, citing the Covid-19 crisis, the board unilaterally halted all elections by workers seeking to form unions. Thousands of workers who were poised to vote on forming unions had their elections canceled—even though the elections could be held by US mail, whose employees are courageously keeping the Postal Service going.

Then, after claiming that the agency could not run elections for workers who want a union, just last week the NLRB issued new rules to make it harder for workers to form and keep a union. The new rules undermine the long-standing practice of voluntary recognition, by which employers agree to recognize and bargain with a union when a majority of employees sign cards saying they want a union. The board is now requiring these employers to post a notice telling workers they can file a petition and have an election to get rid of the union—the very same union that a majority of workers have just chosen. Separately, the new rules call for running union elections and counting ballots even when charges have been filed alleging that an employer has engaged in illegal unfair labor practices that have tainted the election. In an Orwellian twist, the

board calls these new rules, which undermine workers' ability to form and keep their unions, rules to "Protect Employee Free Choice."

After the board got called out publicly by worker advocates and a key congressional leader on this double standard—not running elections when workers want them but issuing rules to undermine worker organizing—the board backtracked and announced that it would resume union elections. The board has so exposed its anti-worker, antiunion bias that many union organizers are doing everything they can to avoid it. Workers will still find ways to join together and take action to improve their jobs. But the board is creating a strong headwind for workers and giving more tools to employers to fight them—the exact opposite of what this agency and this law is supposed to be about.

Sadly, there has been little to no coverage of the board's rollback of workers' rights in the major media. Perhaps, as the November elections get closer, candidates will talk about how a president who claims to be on the side of working people has, through his political appointees, gutted key worker protections.

The Trump appointees to the NLRB should be removed for neglect of duty and malfeasance. There are only two ways that can happen—through presidential action, or by the voters in November.

Unprecedented The Trump NLRB's attack on workers' rights

Report • By **Celine McNicholas**, **Margaret Poydock**, and **Lynn Rhinehart** **Economic Policy Institute** ©

According to an article posted on line by the Economic Policy Institute ©, under the Trump administration, the National Labor Relations Board (NLRB) has systematically rolled back workers' rights to form unions and engage in collective bargaining with their employers, to the detriment of workers, their communities, and the economy. The Trump board [1](#) has issued a series of significant decisions weakening worker protections under the National Labor Relations Act (NLRA/Act). Further, the board has engaged in an unprecedented number of rulemakings aimed at overturning existing worker protections. Finally, the Trump NLRB general counsel (GC) has advanced policies that leave fewer workers protected by the NLRA and has advocated for changes in the law that roll back workers' rights.

The Trump board and GC have elevated corporate interests above those of working men and women and have routinely betrayed the statute they are responsible for administering and enforcing. This paper highlights the most egregious actions of the Trump board and GC and evaluates the impact on working people. It is critical that Congress hold the Trump NLRB accountable and that policymakers prioritize legislative reforms that will restore the original promise of our nation's labor law—to encourage and promote the formation of unions and the practice of collective bargaining.

Doing the chamber's bidding Action on the Chamber of Commerce's top 10 list by the Trump board

Chamber wish	Status	NLRB action
Overturn <i>Specialty Healthcare</i> to give employers more say in bargaining unit determinations.	Completed	<i>PCC Structural, Inc.</i> , 365 NLRB No. 160 (2017).
Weaken rules that were adopted in 2015 to streamline representation election process.	In process	Request for comments on modifying or repealing the rules published on December 14, 2017. Reform to election rules listed in the agency's regulatory agenda, indicating that rulemaking is forthcoming.
Overturn <i>Browning-Ferris</i> decision on joint employer.	In process	Trump board attempted to overturn <i>Browning-Ferris</i> in <i>Hy-Brand Industrial Contractors</i> , 365 NLRB No. 156 (December 14, 2017), but had to withdraw the decision because of member Emanuel's conflict of interest. Trump board then proposed a new rule to overturn <i>Browning-Ferris</i> .
Allow forced arbitration: (a) Allow employers to force employees into arbitration and disallow class or collective claims. (b) Change the standard so employers can push more disputes into arbitration.	(a) Completed (b) In process	(a) Supreme Court overturned <i>Murphy Oil</i> in <i>Epic Systems</i> . Trump GC would go further and say group litigation over workplace violations is not protected activity under the NLRA. (b) Trump GC has urged the board to change the rules in the way the chamber seeks. GC Brief in <i>United Parcel Service, Inc.</i> , Case 06-CA-143062 (March 15, 2019).
Change rules on "management rights" clauses to give employers more power to make unilateral changes and undermine the collective bargaining process.	Completed	<i>MV Transportation, Inc.</i> , 368 NLRB No. 66 (2019); <i>Boeing</i> ; 365 NLRB No. 154 (2017); <i>Raytheon Network Centric Systems</i> , 365 NLRB No. 161 (2017).
Allow employers to undermine the bargaining process by unilaterally imposing discretionary discipline without bargaining with the union.	In process	Trump GC has urged the NLRB to adopt the chamber's position, and in a highly unusual move, the Trump board denied a charging party's request to withdraw a case in order to keep it alive for the NLRB to act. <i>Care One</i> , Case 22-CA-204545, 368 NLRB No. 69 (2019).
Allow employers to deny employees use of the employer email system for communication with co-workers about workplace issues.	In process	NLRB has requested briefs on the issue, and the Trump GC has argued that employers should be able to deny employees access to the company email system. <i>Caesars Entertainment Corp.</i> , Case 28-CA-060841.

Chamber wish	Status	NLRB action
Allow employers to fire or discipline workers for profane or offensive language, even if it interferes with protected NLRA activity.	In process	The Trump board has requested amicus briefs on changing its rules to permit employer discipline for profane or racially or sexually offensive language. <i>General Motors LLC</i> , 368 NLRB No. 68 (September 5, 2019).
Allow employers to keep their investigations confidential and gag employees from talking with each other about pending employer investigations.	In process	Trump GC has asked the NLRB to change the law and allow employers to gag employees about employer investigations. <i>Unique Third Store</i> , Cases 27-CA-191574 et al. He has signaled that he wants to overturn precedent requiring employers to turn over witness statements from internal investigations, GC Memorandum 18-02, and Chairman Ring has indicated that he agrees. <i>American Medical Response West</i> , 366 NLRB No. 146, n. 4 (2018).
Allow employers to keep employees and their supporters off the employer's property to discuss and publicize their views on workplace issues.	Completed	<i>Tobin Center for the Performing Arts</i> , 368 NLRB No. 46 (August 23, 2019); <i>Kroger Limited Partnership</i> , 368 NLRB No. 64 (September 6, 2019); <i>UPMC</i> , 368 NLRB No. 2 (June 14, 2019).

Source: EPI analysis of U.S. Chamber of Commerce, *Restoring Common Sense to Labor Law: Ten Policies to Fix at the National Labor Relations Board*

Undermining the right to strike

(Case discussed: *Walmart Stores, Inc.*)

The right to strike—the right of workers to withhold their labor in an effort to put economic pressure on their employer to agree with workers’ demands—is at the core of our labor relations system in the United States. Over a period of years, groups of employees at Walmart—the world’s largest company, with 2.2 million employees—engaged in several short strikes to call attention to issues and to pressure Walmart to change its practices. But in July 2019, the Trump board ruled that a group of 100–130 Walmart workers who engaged in a 5–6 day strike to demonstrate at Walmart’s annual shareholders’ meeting were engaged in an “intermittent” strike that was not protected by labor law. Because the Trump board decided that the strike was an unprotected intermittent strike, Walmart faced no legal consequence for retaliating against the strikers, who included 29 workers who were striking for the first time. In determining that the strike was an unprotected “intermittent” strike, the Trump board made up a new legal test, saying that strikes that take place “pursuant to a ‘plan to strike, return to work, and strike again’” are not protected. As detailed by member McFerran in her dissent, the majority undermines what the Supreme Court has called the “strong interest of federal policy in the legitimate use of the strike.”

Permitting employers to fire workers in retaliation for union activity

(Case discussed: *Electrolux Home Products*)

In a disturbing decision, the Trump board found that an employer gave a false reason for firing a pro-union worker, but the Trump board let the employer off the hook, saying that the general counsel did not show that the employer had an anti-union motivation for firing the worker. The employer told the pro-union worker to “shut up” when she made pro-union comments at a mandatory captive audience meeting, but that was not enough evidence of anti-union bias for the Trump board. According to dissenting member McFerran, the decision “marks the first time in history the board has declined to find a violation of the Act when there is clear reason to infer an anti-union motive and no evidence...of any other lawful motive.”

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