

NLRB General Counsel Memo States Intent to Make Captive Audience Speeches Unlawful

April 12, 2022

National Labor Relations Board (NLRB) General Counsel (GC), Jennifer Abruzzo, has issued a memorandum stating her intent to seek to change the NLRB's longstanding rule allowing employers to hold mandatory meetings during union election campaigns. While the **Memorandum, GC 22-04 (April 7, 2022)**, does not in itself change the law, it does mean the GC will be looking for a test case in which to convince the NLRB to change its long-established precedent on the topic.

Section 8(c) of the National Labor Relations Act, which guarantees an employer's right to speak regarding union issues, has long been understood to authorize so-called "captive audience" meetings. Abruzzo's proposed categorical prohibition would severely hamper this important right and complicate employer efforts to present counterarguments to employees.

In 1948, the NLRB held that Section 8(c) prevented it from concluding that an employer committed an unfair labor practice by conducting a mandatory meeting regarding union organizing efforts. *Babcock & Wilcox*, 77 NLRB 577 (1948). With minor adjustments to prohibit meetings in the last 24 hours before the election, the NLRB has consistently upheld the principle that "captive audience" speeches are not themselves a basis for an unfair practice charge or an election objection. The rule has been followed regardless of whether the NLRB consisted of a majority of Republican or Democratic appointees.

Despite this nearly 75-year-old precedent, the GC has characterized *Babcock* as wrongly decided, and an "anomaly." The memorandum suggests the GC will encourage the NLRB to adopt a revised set of rules that prohibit employers from holding compulsory meetings of employees to discuss union issues and to require the employer to make clear that attendance at any meetings in which union issues will be discussed is entirely voluntary.

The GC further proposes to apply the same rule to any conversation initiated by the employer during working time. This theory is premised on the notion that a mandatory meeting or a discussion during paid work time would interfere with the employee's putative right to "refrain from listening" to the employer's campaign statements.

The memorandum puts employers facing a union organizing campaign between the proverbial rock and hard place. Currently, the law provides that mandatory meetings to discuss the employer's point of view are permissible, and these sorts of meetings are one of the more effective mechanisms employers have for countering union campaign promises and propaganda. However, continued use of "captive audience" meetings or discussions during work time will potentially draw a charge from the GC or an objection to any election the employer wins. Because the NLRB makes law by adjudication, rather than by issuing rules, it could take at least a year, (or likely more) for the test case to work its way through to an NLRB decision and likely appeal to the courts should the GC be successful. Employers may thus be left in legal limbo for an extended period.

The dilemma created by the memorandum does not admit to easy resolution. Employers will want to consider how much they need mandatory rather than voluntary meetings in a particular campaign and whether alternative means of communication can effectively get the employer's message out. In some cases, the use of the captive audience meetings may still be worth the risk presented by the GC's position, but employers should engage in such meetings

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with a full appreciation of the risk.

Miller Canfield continues to monitor GC 22-04 (April 7, 2022) and any related litigation that may arise. We will provide updates and resources to keep our clients abreast of any new developments. As always, please contact the authors or your Miller Canfield attorney if you have any questions.