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What All Hospitality Employers Need to Understand About Labor Law

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Key Take: *All hospitality industry employers, including those without union represented employees, are subject to the National Labor Relations Act and are well advised to monitor the National Labor Relations Board's actions and decisions.*

Hospitality employers cannot ignore labor law just because their employees are not represented by a union. All hospitality employers must fully comply with labor law developments because their employees are protected by the National Labor Relations Act (Act), even in the absence of union representation. As a result, hospitality employers must monitor decisions issued by the National Labor Relations Board (NLRB), which is the federal agency that interprets the Act.

NLRB developments through the years generally swing back and forth, depending on whether there is a Democrat or a Republican in the White House. This swinging pendulum creates a lack of precedent and

stability for employers to rely on. Employers anticipating more favorable decisions with the change in the White House will have to wait because the NLRB cannot issue any decisions until it has a quorum.

Two's Company, but Three Is a Quorum

The Act, created 90 years ago as part of New Deal legislation, established a five-member NLRB to be appointed by the president, with the advice and consent of the Senate. The practical effect is that a Republican president appoints the majority members who are basically pro-employer, and a Democratic president appoints the majority members who are basically pro-union and pro-employee. The Supreme Court decision in New Process *Steel v. NLRB*, 68 U.S. 674 (2010), held that a two-member NLRB does not constitute a quorum, and therefore cannot issue decisions.

The NLRB currently has only one member, as the result of the recent expiration of Member Marvin Kaplan's term, and President Donald Trump's previous removal of Member Gwynne Wilcox. No president has ever removed a sitting NLRB member, who are typically allowed to serve the remainder of their appointed term. On July 17, 2025, Trump nominated two basically pro-employer members: James Murphy's nomination is pending Senate confirmation, and Scott Mayer's nomination remains pending in a Senate Committee.

Until either both NLRB nominees are approved by the Senate, or, if only one is confirmed, the Supreme Court decides whether the president had the authority to remove Member Wilcox, the NLRB will not be able to issue any decision. That Supreme Court decision may have been foreshadowed recently when the Fifth Circuit, in response to challenges brought by SpaceX, Aunt Bertha, and Energy Transfer, issued a preliminary injunction finding that the "for-cause" removal protections for

NLRB members is likely an unconstitutional restriction of the president's authority.

NLRB General Counsel's Actions

Non-union private sector employers can take some comfort in the actions of Acting General Counsel William Cowen, who reversed many of the General Counsel Memoranda issued by his predecessor, Jennifer Abruzzo. Trump's nominee for General Counsel, Crystal Carey, is pending Senate confirmation. Although not of the same legal impact as NLRB decisions, General Counsel Memoranda outline enforcement priorities under the Act. Among the important changes recently authorized by the Acting General Counsel are: (1) narrowing the interpretation of employee rights and protections under the Act, resulting in employers having more leeway to discipline non-union employees who engaged in disruptive or disrespectful behavior; (2) eliminating NLRB enforcement actions that sought to limit electronic monitoring of employees and restrictive covenants in employment agreements; (3) reducing limitations on mandatory employee meetings during union election campaigns; (4) limiting the remedies available to unions and employees under the Act; and (5) clarifying the possible conflicts between speech and conduct protected under the Act but prohibited by various federal anti-discrimination laws.

NLRB Wish List

When the NLRB achieves a quorum and can resume issuing decisions, employers would like several prior NLRB decisions to be reversed or at least limited in order to clarify the Act's application, especially to non-union employees. Included among those decisions are: (1) *Stericycle, Inc.,* 372 NLRB No. 113 (2023), which held that facially neutral employment rules or policies (social media, negative conduct by employees, and maintaining confidentiality) are presumptively invalid if a reasonable employee could interpret them as interfering with employees' rights; (2) *McLaren*

Macomb, 372 NLRB No. 58 (2023), which held that broadly worded confidentiality and non-disparagement clauses in separation agreements were violations of employees' rights; (3) *Home Depot USA, Inc.*, 373 NLRB No. 25 (2024), which held that employees may display political messages on their work uniforms; and (4) *Lion Elastomers*, LLC II, 372 NLRB No, 25 (2024), which limited an employer's ability to discipline employees for verbally abusive conduct related to working conditions, even if that conduct potentially violates anti-discrimination law.

Will States Work to Fill the NLRB Void?

Another development caused by the NLRB's lack of a quorum is the possibility that states will enact laws to fill the void left. Most states have enacted labor laws regulating public employment issues; however, previous state attempts to regulate private employment have been found to be preempted by the Act. Although it is likely that current state attempts to enact private employment laws would meet the same fate, we cannot readily dismiss the notion that states are capable of affecting private sector labor relations. One state, New York, has already amended their State Labor Relations Act to grant the New York Public Employment Relations Board authority to oversee private sector union elections and to investigate and resolve unfair labor practices filed against private sector companies. The NLRB promptly filed a lawsuit contesting the amendment as preempted by the Act. On this note, it will be interesting to monitor the results of an issue that is currently percolating through the courts: whether a state can require a private sector employer to enter into a Labor Peace Agreement with a union as a precondition to granting a state-issued license, or receiving state economic assistance.

Conclusion

Non-union private sector employers must monitor NLRB developments and be prepared for a flurry of activity once the NLRB achieves a quorum, possibly

in the near future. In the meantime, happy 90th birthday to the NLRB! For guidance navigating the pendulum swings of NLRB decisions, reach out to a member of Akerman's Traditional Labor Law Team.