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Blog Post

The Bigger Picture: Biden-Era Precedents on the Chopping Block

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The National Labor Relations Board's recent decision in *Inland Waters Pollution Control, Inc.*, covered here in our latest blog on protections for aggressive bargaining proposals, was notable in its own right; however, it also marks the beginning of something larger for employers. As we previously discussed, the Board spent the past year and a half unable to overturn labor-friendly precedent because it lacked the necessary three votes. James Macy's Senate confirmation on August 7, 2026, changes that dynamic. The Board now has a three-member Republican majority — Chairman Murphy, Member Mayer, and Member Macy — with the votes to act, a significant backlog of pending cases, and several Biden-era decisions expanding employee and union protections squarely in its sights. For a deeper discussion, listen to our Akerman Angle podcast episode on what a new Board majority could mean for employers.

The pace is already picking up. On August 26, 2026, General Counsel Crystal Carey issued Memorandum GC 26-04, publicly identifying the Biden-era precedents she is actively urging the Board to overturn and the specific cases she is using as vehicles to do so. The memo covers many of the same decisions discussed below, including *McLaren Macomb*, *Stericycle*, *Amazon* (captive-audience meetings), *Siren Retail* (employer

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speech), *Cemex*, *Thryv*, and *Lion Elastomers*. It also targets additional precedents on the duty to bargain before changing terms and conditions of employment, union dues obligations, and dress code policies. In other words, the General Counsel has laid out a clear roadmap, and the cases are already in motion.

Here is a non-exhaustive list of Biden-era precedents most likely to be reversed or significantly modified:

Captive-Audience Meetings (*Amazon.com Services LLC*, 2024). The Biden Board prohibited mandatory employer meetings during union campaigns, overturning more than 75 years of established law. For decades, employers relied on these meetings as a key campaign strategy tool. Former Acting General Counsel Cowen had already taken steps to reduce limitations, but a formal Board decision is needed to fully restore the prior rule. The new majority appears positioned to revisit and potentially reinstate the longstanding standard permitting these meetings under Section 8(c).

Workplace Rules (*Stericycle, Inc.*, 2023). This decision replaced the employer-friendly and practical *Boeing* framework with a standard under which facially neutral workplace rules (confidentiality, civility, social media, disruptive conduct) are presumptively unlawful if they could be interpreted to restrict Section 7 rights from the perspective of an economically dependent employee. Significantly, a rule may be invalidated even if never applied to restrict protected activity. The resulting uncertainty has made handbook and policy drafting far more difficult for employers. The new majority appears positioned to revisit and potentially restore a category-based framework that gives greater weight to legitimate employer interests.

Severance Agreements (*McLaren Macomb*, 2023). The Biden Board held that merely offering a severance agreement with broad non-disparagement or confidentiality provisions violates the NLRA, overturning Trump-era precedent that had permitted such provisions absent coercive conduct. The decision called into question standard severance provisions employers had relied on for decades. The new majority appears positioned to revisit and potentially restore employers' ability to use reasonable confidentiality and non-disparagement clauses, likely with carve-outs for core Section 7 activity.

Union Recognition (*Cemex Construction Materials Pacific, LLC*, 2023). Perhaps the most consequential Biden-era ruling, *Cemex* requires employers who receive a union recognition demand to either recognize the union or file an election petition within 14 days. If the employer commits any unfair labor practice during the campaign, the Board may bypass the secret-ballot election entirely and issue a bargaining order. Even a relatively minor violation could result in forfeiture of the right to an election. Combined with quickie election rules and blocking-charge policies, *Cemex* created a legal environment heavily stacked against employers facing organizing efforts. The new majority appears positioned to revisit and potentially return to a standard requiring a clear showing that an employer's unfair labor practices have so tainted the atmosphere that a fair rerun election is unlikely.

NLRA Remedies (*Thryv, Inc.*, 2022). *Thryv* expanded NLRB remedies to include all direct and foreseeable pecuniary harms, well beyond traditional back pay and reinstatement. Notably, in the *Inland Waters* decision itself, Chairman Murphy and Member Mayer stated they would be open to reconsidering *Thryv* in a future proceeding. The Board members' statements strongly suggest *Thryv*'s days are numbered.

Employer Campaign Speech (*Siren Retail Corp. d/b/a Starbucks*, 2024). The Biden Board treated even factually accurate statements about the consequences of unionization as coercive, adopting a strict case-by-case standard with little safe harbor.

Combined with *Cemex*, the wrong statement could trigger a bargaining order rather than a re-run election. The new majority appears likely to revisit prior precedent and may restore legal safe harbors for factual employer speech that does not cross into threats or promises.

Employee Misconduct (*Lion Elastomers LLC*, 2023). Under *Lion Elastomers*, conduct that would result in termination in any other context, including language generally considered racially or sexually offensive, may remain protected when it occurs in the context of a labor dispute. This ruling created significant tension with employers' obligations under anti-discrimination laws to address hostile-work-environment conduct, regardless of context. The new majority appears positioned to revisit and potentially return to an objective standard that allows consistent application of conduct rules in all circumstances.

What Employers Should Do Now

The *Inland Waters* decision and Macy's confirmation together mark a turning point for federal labor law. Employers should:

1. **Review bargaining strategies** with labor counsel, with confidence that aggressive but lawful proposals will not automatically trigger Section 8(a)(1) liability.
2. **Monitor Board decisions** closely as the new majority works through its backlog of pending cases.
3. **Prepare to update workplace policies, handbooks, and severance agreements** as *Stericycle* and *McLaren Macomb* are reversed.
4. **Re-evaluate union campaign strategies** in anticipation of restored tools like mandatory meetings and factual communications about unionization.

5. **Document legitimate business reasons** for bargaining proposals and workplace rules to strengthen legal positions under any framework.

The pendulum is swinging. The combination of the *Inland Waters* decision, Macy's confirmation, and the actions already taken by the Board all point in the same direction: a return to a more balanced legal environment that gives appropriate weight to employers' legitimate business interests. Employers who stay ahead of these developments will be well-positioned to take advantage of the opportunities ahead. To discuss how to take advantage of these shifts, connect with Akerman's Traditional Labor Law Team.
