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Employers Weigh Labor Risks as Biden NLRB Policies Await Rewrite

By George Weykamp 2026-09-17T05:39:02000-04:00

Employers are operating in a state of legal uncertainty as they wait for the National Labor Relations Board to begin overturning binding Biden-era precedents that still remain on the books.

General Counsel Crystal Carey's [memo](#) to regional directors last month said she would ask the NLRB to revisit precedential decisions on more than a dozen issues ranging from labor law changes to [dress code policies](#) and [workplace guidelines](#) to mandatory 'captive audience' meetings and [remedies](#) for unfair labor practices.

The top prosecutor said she would urge the board to return to a slew of standards from the first Trump administration that broadly gave employers more leeway for workplace policies.

There's significant uncertainty among management-side attorneys, however, on whether the board will actually be able to tackle everything on [Carey's list](#) while still managing a backlog of thousands of cases. That dynamic raises questions about how employers should operate — and what labor standards they should adhere to — now that the NLRB has gained the third member the Republican majority needed to [change board law](#).

Carey in that [memo](#) said the general counsel's office had completed 9,247 pending cases since she took office in January, but the agency appears to still face a significant backlog. In March, the agency's operations head said that the board had [17,000 open unfair labor practice investigations](#).

"From a practical perspective, people are going to follow the prior board law as long as it's the law to avoid the potential hearings and the cost of litigation that would go with it," said [Grant Pecor](#), an attorney at Miller Canfield.

"And frankly, there's risk because there's no guarantee the new board would overturn" any particular precedent, he added.

Legal Uncertainties

Fluctuating legal standards have become a hallmark as the White House — and NLRB majority status — seesaws between Democrats and Republicans. These ideological shifts typically lead to reversals of the precedents set while the other party was in power.

Management-side attorneys said they typically advise employers to adhere to what's currently on the books, even if the general counsel or the board members themselves have indicated they don't agree with a given policy.

That calculus could change, however, depending on the size of the company and the appetite to push for precedential change.

"If you're a small employer that doesn't have a lot of money to go all the way to the board or certainly go to court, maybe you're going to approach it differently than someone like Amazon or SpaceX," said [Mark S. Spring](#), an attorney at CDF Labor Law LLP.

Practical advice can help employers achieve their goals while remaining within the boundaries of existing case law instead of pushing the envelope and taking on unnecessary risk, said [Jonathan Spitz](#), a management-side lawyer at Jackson Lewis PC.

Spitz noted, for example, that there are ways for a company to gather its employees to speak about unionization without running afoul of the ban on captive audience meetings the NLRB established in [Amazon.com Services LLC](#).

"But when the law is in flux, there's no practical answer, and the client has business objectives, I'm going to look at how it might shake out in the circuit courts," Spitz said.

Accurate predictions are easier to make where federal appeals courts have already weighed in on Biden-era rules.

The US Court of Appeals for the Second Circuit [this month](#) followed the [Fifth Circuit's lead](#) three years earlier when it ruled that the Democratic-led board's 2022 [Tesla Inc.](#) dress code policy finding exceeded the NLRB's statutory authority.

While the board's non-acquiescence doctrine means those decisions only apply in the courts' respective jurisdictions, less litigation-averse clients could use them to challenge board precedents in other circuits, attorneys said.

"I like to be on the more conservative side on those issues that have not been overturned yet," said attorney [Nelson McKown](#) of Spilman Thomas & Battle PLLC. But "if we find ourselves before an appellate court or arguing our position, we have a strong position."

Decision Delays

The board also faces structural challenges — such as the case backlog and a prolonged [overall staffing shortage](#) — that make employers anxious it won't get around to all of the items on Carey's list.

The board lacked a quorum and wasn't able to issue decisions during much of 2025 after President Donald Trump [fired Democratic Member Gwynne Wilcox](#) days after he began his second term.

Two of the NLRB's Republican members — Chair James Murphy and Scott Mayer — also chose to follow longstanding tradition to wait until a three-member majority was seated before making precedential decisions. The third Republican Member James Macy was confirmed by the US Senate last month.

The combination of factors has led to the NLRB being fairly behind what's been typical in past administrations with regard to overturning precedential rulings, observers said.

In her August memo, Carey said she had already urged the board to overturn several Biden-era precedents — including the board's policy on severance agreements in [McLaren Macomb](#) and work rules in [Stericycle](#) .

However, the NLRB's top lawyer noted that she hadn't yet found vehicles for overturning several standards set during the last administration. Those included the board's stance on automatic union dues deductions in *Valley Hospital Medical Center Inc.* and the board's remedial power in *Thryv Inc.*

Management-side attorneys said they are more likely to caution clients to comply with current board

law in case the Republican-led board doesn't address everything from Carey's memo.

"It's almost 2027. We've got another presidential election coming up, and they've got a lot to tackle," McKown said.

"What they're going to get to, what they're not going to get to, what's going to be the perfect test case to overturn precedent — a lot of that seems to be just up in the air," he said.

— With assistance from Robert lafolla.

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