Global Workplace Law & Policy

Labor Rights Under Trump II

Steve Willborn (Spencer Professor of Law, University of Nebraska-Lincoln (USA)) · Wednesday, March 5th, 2025

The National Labor Relations Act (NLRA)[1] is the principal law protecting the labor rights of private-sector employees in the United States. While the second Trump administration's attack on workers is multi-faceted,[2] private-sector workers are by far the largest segment of the work force

at risk.[3] Unfortunately, because of the administrative structure of the NLRA, the rights of these workers are also especially precarious. This article will begin with a primer on the basic structure of the NLRA and then consider the short- and long-term threats posed to worker rights under the NLRA by the Trump administration. In conclusion, the article will suggest that this experience highlights the central importance of institutional design in enacting laws to protect worker rights.

The Structure of the NLRA

Labor policy under the NLRA is politically responsive by design. Most directly, the National Labor Relations Board itself is composed of five members who are appointed by the President and confirmed by the Senate to serve staggered five-year terms, with one member appointed each year. Similarly, the General Counsel of the Board, which prosecutes violations of the Act and administers union elections, is appointed for a four-year term with consent of the Senate. As a result, in theory, even when the Act is administered in good faith, the Act is designed to provide the President with significant influence over the Board sometime during his term. But the Trump administration is not acting in good faith, so the interference with labor rights will be quicker and more severe than the slow-paced turnover of Board members and the General Counsel would indicate.

Functionally, the NLRA establishes two nearly independent agencies: the National Labor Relations Board and the General Counsel. The National Labor Relations Board's five members are the final adjudicative body under the Act. Cases, however, are initially heard by a corps of Administrative Law Judges (ALJs) who conduct the trials and issue proposed findings of fact and recommendations for disposition of the case. If no exceptions are filed to an ALJ's decision in a case, the Board routinely adopts the decision of the ALJ. If exceptions are filed, the case is normally heard by a rotating three-member panel of the National Labor Relations Board, but the full Board may consider cases raising especially important issues. The Board has no power on its own to enforce its decisions; if a party refuses to abide by a Board decision, the Board must seek enforcement in court.

The National Labor Relations Board also has authority to issue rules through a formal rule-making process under the Administrative Procedure Act. That process requires public notice, a comment period, and a waiting period before the effective date of the rule. But even though the Board has rule-making authority, it is much more common for the Board to establish legal rules through case adjudication. In an important labor case affecting all of administrative law, the Supreme Court held that it was largely in the informed discretion of an agency to decide whether to adopt a legal rule through adjudication or through a formal rule-making proceeding.[4] For speed and convenience, the Board generally opts to establish and change legal rules through adjudication rather than through rule-making.

The General Counsel for the Board is the other, almost separate entity established by the NLRA. The General Counsel administers union elections and is the prosecutor for violations of the NLRA.[5] The prosecutor function is especially important in setting labor policy given, as mentioned above, that the Board normally establishes policy through adjudication. The General Counsel decides which issues to focus on and present to the Board. When the General Counsel appointed by President Biden began her tenure, she published a memorandum identifying dozens of rules established in prior Board cases that she would seek to overturn during her tenure.[6] She largely succeeded in those efforts; there were many and very significant changes in labor policy during the Biden administration, almost always favoring employee rights, usually announced

through adjudication. Equally important, the General Counsel also decides which issues to ignore. The litigation process under the NLRA requires charges of violations of labor rights to be filed with the General Counsel; no appeal is available from a refusal of the General Counsel to proceed with a claimed violation. Thus, if the General Counsel refuses to pursue a claimed violation of the Act, there is no recourse.

Short-Term Threats

Shortly after taking office, President Trump removed the General Counsel and a member and Chair of the Board from her position — both during their terms. The former had been done before once (by President Biden), but the latter had never been done before in the nine decades of the NLRA's history. While the NLRA was designed to be politically responsive, the terms of the General Counsel and Board members were designed to provide a cushion to slow and smooth changes between administrations. The removals took the cushion away, permitting faster, more abrupt changes.

One of the first actions by the Acting General Counsel appointed by President Trump to replace the dismissed General Counsel was to repeal the memo of the prior General Counsel announcing all of the changes she would seek to protect employee rights, along with dozens of other General Counsel Memoranda.[7] This was a clear, but unsurprising signal that the new General Counsel would immediately begin to prioritize other cases and issues. It will be very surprising if those other cases and issues do not cut in the opposite direction, that is, they will be likely to limit and qualify employee rights under the NLRA.

The dismissal of the Chair of the Board was a more significant move. Since one other seat was vacant, the Chair's removal means that only two members remain on the Board. In a 2010 case, the Supreme Court ruled that the Board could not operate without a quorum.[8] As a result, until at least one more member is seated, the Board cannot hear cases or promulgate rules. The NLRB has stated that its Regional Directors will "continue their normal operations of processing unfair labor cases and representation cases," but in practice, unless the parties agree, the processes will grind to a halt. The Regional Directors can conduct union elections and prosecute unfair labor practice claims, but if a party appeals any decision to the Board, the Board will not have authority to hear the appeal. Matters will be at a stand-still until a new member is appointed and confirmed.

The strategy of President Trump and Democrats in appointing a new Board member and having the person confirmed by the Senate is complicated. On the one hand, as indicated above, the Board is largely unable to act to protect worker rights while it lacks a quorum. Given that alone, the Trump administration should be in little hurry to nominate and confirm a new member of the Board. On the other hand, reversing the employee-friendly labor rules of the Biden administration require a fully functioning Board, either to issue new rules or to make changes through adjudication. For this reason, the Trump administration should be interested in quickly nominating and attempting to confirm a Board member. The balance for the Trump administration probably cuts in favor of appointing a friendly Board member and beginning to interpret the Act to make it more employer friendly. Given that, Democrats in the Senate may be less inclined to act quickly to confirm a new Board member (although they do not like the inability of the Board to process elections and cases without a quorum).

As of late February, 2025, President Trump had not forwarded to the Senate the name of a new Board member for the NLRA. I have seen predictions that he will do so soon (to begin the process

of unwinding the moves made by the Biden administration to enhance labor protections for employees) and that he will move slowly (to continue the inability of the Board to function). I have no predictions; a feature of President Trump is his unpredictability. But in the meantime, for now, important cases involving major employers including Amazon, Starbucks, and SpaceX have stalled, along with hundreds of others.

Longer-Term Threats

In the longer-term, existential questions about the fate of the Board are percolating in the courts. One set of threats are claims that restrictions on the President's ability to remove Board members are unconstitutional.[9] The NLRA explicitly permits a Board member to be removed only for "neglect of duty or malfeasance in office, but for no other cause."[10] Restrictions like this are common for the so-called "independent" agencies; this type of protection is one of the factors that makes the agencies independent. *Humphrey's Executor v. United States*,[11] a 1935 Supreme Court decision, upholds that limit on a President's removal power. However, in 2020, the Supreme Court held in *Seila Law LLC v. Consumer Financial Protection Bureau* that limits on the President's authority to remove the head of a single-director agency was an unconstitutional infringement on the President's executive power,[12] with explicit statements by some Justices that *Humphrey's Executor* should be overturned to extend the decision to multiple-director agencies (like the National Labor Relations Board).[13] In *Seila Law*, the Court held that the removal power was unconstitutional, but severed that provision from the rest of the statute, so that the agency in question (the Consumer Financial Protection Bureau) continued to exist, albeit with a director who was subject to at-will removal by the President. This claim is ripe and being litigated both offensively and defensively. Defensively, the Chair of the Board has filed a lawsuit claiming her dismissal violated the NLRA; she will defend the limits on the President's authority to dismiss. Offensively, SpaceX and Amazon have filed a lawsuit, currently before the Fifth Circuit Court of Appeals, claiming that enforcement actions against them should be dismissed because the removal restrictions mean that the NLRA is unconstitutional.

There are two likely possible outcomes on this issue, and one less likely one. The courts could hold that the NLRA's restrictions on the President's authority to remove Board members are proper under *Humphrey's Executor*. In the Board Chair's case, this would mean that the Chair would be re-appointed to her position for the remainder of her term and, more generally, labor policy changes between Presidential administrations would be slowed. It would mean that the claim of unconstitutionality by SpaceX and Amazon would be dismissed. Alternatively, the courts could hold that the restriction on the President's removal power was unconstitutional, but allow the rest of the Act to remain, as it did in *Seila Law*. That would mean the Chair would not be re-appointed and that SpaceX and Amazon would have a somewhat pyrrhic victory (winning on the issue, but not in a way that means the cases against them are dismissed). It is also possible, but unlikely, that the courts could hold that the restriction on the President's removal power was unconstitutional and, because of that, strike down the entire NLRA. That seems unlikely, but not impossible given the current conservative Supreme Court, where these cases are likely to end up.[14]

The SpaceX and Amazon lawsuits also claim that the Act violates the 7th Amendment right to a jury trial. In a recent term, the Supreme Court held that another agency (the Securities and Exchange Commission) violated the 7thAmendment by imposing fines without according the accused party a right to a jury trial.[15] The situation of the National Labor Relations Board is easily distinguishable from that of the SEC in the case both because the Board does not have the

authority to issue fines (generally speaking, only make-whole remedies are available under the NLRA) and because the NLRA identified new "public rights" that were not available at the common law. But the distinctions may not carry the day given the current Supreme Court. On this issue, although it is unlikely a decision against the Board would mean that the entire Act is struck down, requiring the Board to offer jury trials would greatly interfere with its enforcement efforts.

In sum, although I am reluctant to make predictions,[16] I doubt that these attacks will result in the entire NLRA being struck down as unconstitutional. But that may be a worse outcome than a series of decisions that makes the Act ever more unworkable – that requires jury trials, permits free replacement of ALJs and Board members, renders the Board unable to function, etc.

Lessons for Administrative Institutional Design: A Comparison

Two features of the institutional design of the NLRA make its protection of worker interests especially vulnerable to political sabotage. These features can be highlighted by comparing them to the set of federal laws prohibiting employment discrimination.[17] In its first weeks, the Trump administration peremptorily dismissed the General Counsel of the Equal Employment Opportunity Commission and two of the five members of the Commission, leaving it with only two remaining members (a non-quorum). Although similar to the attack on the National Labor Relations Board, the damage to the nation's non-discrimination efforts will be much less severe.

First, the worker protections of the NLRA are enforced primarily by the federal government. A worker claiming illegal treatment files a charge with a Regional Director of the National Labor Relations Board. At that point, the Board decides whether to pursue the charge against the employer or not and, if it decides to proceed, Board employees prosecute the case. In contrast, enforcement under the antidiscrimination laws is outsourced to the workers themselves through a "private attorneys general" model.[18] That is, although the worker must file a charge with the Equal Employment Opportunity Commission, the Commission's role is quite limited. The Commission has authority to pursue a case on the worker's behalf, but it rarely does in large part because of lack of resources. Instead, if a case cannot be settled, the worker is authorized to proceed on her own and, if she succeeds, the employer pays her attorney's fees and costs. Disabling or hobbling the agency does not preclude enforcement of the antidiscrimination laws, as it does the labor laws.

Second, the NLRA is a strongly preemptive statute, that is, it occupies the field of worker labor protections and preempts any state or local laws that attempt to create or supplement the protections. Thus, if the National Labor Relations Board cannot protect employee rights under the NLRA, then there is no fallback protection. The federal antidiscrimination laws, in contrast, are non-preemptive. They do not preempt state and local laws providing double-protection and most states have laws that protect the same categories as federal law (and often more expansive categories) with their own enforcement agencies and procedures. As a result, if the federal agency is impeded, a worker can turn to a state or local agency for help.

The current fraught situation of worker protections under the NLRA is serious and unfortunate. But it also provides hard-learned lessons about how to structure employee protections in future.

Steven L. Willborn can be reached at Willborn@unl.edu.

References

[1] 29 United States Code §§ 151-169.

[2] The quickest and most highly publicized assault has been on federal-government workers. To date, more than 250,000 federal employees have either accepted a "voluntary" separation (about 75,000) or been dismissed (about 200,000). Sierra Campbell, *How Many Federal Workers has DOGE Laid Off?, The Hill, Feb. 20, 2025*. "DOGE" refers to the Department [*sic*] of Government Efficiency [*sic*], the entity headed by Elon Musk and authorized by President Trump to disrupt the federal workforce.

[3] In January 2025, about 86 percent of nonagricultural wage-and-salary workers were in the private sector (131 million), compared to about 14 percent in the public-sector (22 million). Bureau of Labor Statistics, *Employed Persons by Class of Worker and Part-Time Status*, Table A-8 (2025).

[4] NLRB v. Wyman-Gordon, 394 U.S. 759 (1969).

[5] For ease of explication here, I'm leaving out an administrative layer. The General Counsel supervises 26 Regional Directors who actually receive the charges and administer the elections. However, the Regional Directors report to the General Counsel in Washington, D.C., who has the ultimate authority.

[6] Office of the General Counsel, Memorandum GC 21-04 (Aug. 12, 2021).

[7] Office of the General Counsel, Memorandum GC 25-05 (Feb. 14, 2025).

[8] New Process Steel, L.P. v. NLRB, 560 U.S. 674 (2010).

[9] On the same theory, the Trump administration also contends that restrictions on the ability of the President to remove ALJs are also unconstitutional. Statement from Justice Department Chief of Staff Chad Mizelle (Feb. 20, 2025). ALJs are central to the National Labor Relations Board's ability to process cases. If the President could remove them at will, he could hamstring the agency's ability to handle its case load, appoint ALJs known to be employer friendly, or both.

[10] NLRA, 29 U.S.C. § 153(a).

[11] 295 U.S. 602 (1935).

[12] 591 U.S. 197 (2020).

[13] *See id*. at 238 (Justices Thomas and Gorsuch, concurring).

[14] In the NLRA's early years, the Supreme Court held that the Act was constitutional, but the case was based on different types of claims: claims that the Act exceeded Congress's power under the Commerce Clause of the Constitution and improperly infringed on state powers under the Tenth Amendment. NLRB v. Laughlin Steel Corp., 301 U.S. 1 (1937).

[15] Securities & Exchange Commission v. Jarkesy, 603 U.S. 109 (2024).

[16] Yogi Berra, an American baseball player known for his "insightful" comments, once said that it's tough to make predictions, especially about the future.

[17] Employment discrimination is prohibited by a set of laws targeted to particular types of discrimination: Title VII of the Civil Rights Act of 1964 (addressing race, gender, color, religious, and national origin discrimination); the Age Discrimination in Employment Act; the American With Disabilities Act; etc. All of the acts have similar, although not identical, enforcement schemes.

[18] The leading case recognizing this model is Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

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