



January 2020

**IMAGINE A WORLD IN WHICH . . .**

*. . . you would not have any voice in which of your employees were included in a union-proposed collective bargaining unit – until AFTER a certification election was held (see Ambush).*

*. . . you could not ask potential employees to agree to arbitration rather than class action lawsuits (see Class Action Waivers).*

*. . . you would not be allowed to fire an employee for using racial slurs in your workplace or posting obscene comments about you and your company on social media (see Concerted Activity).*

*. . . workers would not be able to initiate a decertification petition until at least 6 months after collective bargaining negotiations began after a card check campaign and voluntary recognition (see Decertification Procedures).*

*. . . you would have to continue checking off union dues AFTER a collective bargaining agreement had expired (see Dues Check-off).*

*. . . you would be required to allow your employees to use your company email system – off hours – for union organizing activity (see Employee Access to e-mail).*

*. . . you would have to pay your white-collar employees more than \$47,000 to be exempt from overtime (see Fair Labor Standards Act).*

*. . . you would have to report previous labor law violations on a government contract application (see Fair Play and Safe Workplaces).*

*. . . you could be charged with an unfair labor practice just for misclassifying an employee as an independent contractor (see Independent Contractor Status).*

*. . . you could be held liable for labor violations committed by a contractor who supplied you with workers you did not directly control (see Joint Employer).*

*. . . you were required to post a pro-union “Notice of Employee Rights Under the National Labor Relations Act” in your workplace (see Notice Posting).*

*. . . you were required to make and maintain records of injuries or illnesses in your workplace with no statute of limitations (see Occupational Safety and Health Administration).*

*. . . you were required to allow a non-employee union organizer to accompany an OSHA inspector into your place of business (see Occupational Safety and Health Administration).*

*. . . your right to hire someone to provide you with expert labor and legal advice during a union organizing campaign in your company was severely restricted (see Persuader).*

*. . . you did not have the right to deny access to your business property to union organizers distributing material or staging protests (see Premise Access).*

*. . . unions could form multiple collective bargaining units in your company, each of them containing a small fraction of your workforce (see Specialty Health Care).*

*All these unimaginable situations were labor policies put in place by the Obama Administration. None of them remain in place today because of a concerted effort by NAW, our allies in the business community and the current labor agencies to reverse and/or repeal them.*

### **Labor policy 2009-2019:**

One of the largely untold stories of the last ten years involves the radical shift in U.S. labor policy implemented by President Obama and his Department of Labor (DoL) and National Labor Relations Board (NLRB or Board), the response to those labor policies by the business community and the courts, and the systematic restoration of pre-Obama policies by President Trump's labor agencies.

NAW and the Coalition for a Democratic Workplace (CDW), which we help manage, have been involved in this labor policy evolution from the beginning of the Obama Administration, filing almost 70 comments, amicus briefs, and complaints in the courts and regulatory agencies – in addition to our on-going advocacy in the legislative arena. A compendium of these efforts can be found on the “Resources” page on the CDW website: <https://myprivateballot.com/resources/>

The following is a report on many of the actions taken in this labor policy battle since 2009 – listing first the anti-business action of the Obama Administration, then in blue italics the response of NAW/CDW and many others in the business community, then finally – in red – the actions of the current Administration and the courts restoring pre-Obama policies.

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**Ambush:** The Obama Board proposed new “representation case” rules making it easier for a union to win a certification election and limiting the rights of employers to participate in the election process.

*The “Ambush” rule was challenged in court over several years by business organizations; one challenge was successful, the second was not.*

**The current Board published a “request for information” on Ambush in December 2017, and in December 2019 published a new proposed rule.**

**Class Action Waivers/Arbitration:** In 2012 the Obama Board held that it was a violation of federal labor law for an employer to require employees to sign arbitration agreements waiving class action lawsuits (*D.R. Horton*).

*Business groups filed amicus briefs in D.R. Horton and numerous related class action waiver cases, with the NLRB, federal courts, and the U.S. Supreme Court.*

**In May 2018 the Supreme Court held that arbitration agreements that require class action waivers are legal; the current NLRB immediately asked the DC Circuit Court to send back a mandatory arbitration case and announced they would expeditiously resolve 55 additional mandatory arbitration cases currently before the Board.**

**Concerted Activity/Employee Handbook Rules:** Under the National Labor Relations Act, employees (even in a non-union workplace) may engage in protected concerted (Section 7) activity to advance common interests including union organization. The Obama Board took the definition of Section 7 activity to an extreme, ruling that a handbook rule that *does not explicitly impact protected activity* “will still be found unlawful if (1) employees **would reasonably construe** the rule’s language to prohibit Section 7 activity. . .” (emphasis added). Under this overbroad interpretation, the Board ruled unlawful employee handbook rules that, among other things:

- prohibit use of profane, racially or sexually offensive language;
- require confidentiality of information on employee investigations;
- prohibit disclosure of identifiable personal information about employees;
- prohibit wearing of message clothing in lieu of a required uniform;
- ban recording or video-taping inside the company premises;
- require proper conduct;
- ban posting hostile or obscene comments about the company or executives on social media;
- prohibit the use of company trademarks and logos.

*Business groups filed numerous amicus briefs in cases involving NLRB actions on Section 7 handbook rules.*

**In December 2017 the current Board replaced the “would reasonably construe” standard with a new 3-point standard that would weigh “justifications associated with the rule” as well as potential Section 7 rights. In the specific case, the Board ruled that Boeing properly prohibited employees from videotaping within the company’s manufacturing facility.**

**Decertification procedures:** Historically, if an employer voluntarily recognized a union, employees or a rival union could file a decertification petition 45 days after that voluntary recognition (*Dana Corp*). In 2011 the Obama Board overturned *Dana Corp* and held that a decertification petition could not be filed for at least six months after a voluntary recognition (*Lamons Gasket*).

*Business groups filed amicus briefs in the Lamons Gasket case.*

**In August 2019 the current Board proposed a rule overturning *Lamons Gasket*.**

**Dues check-off:** In 2015 the Obama Board held that an employer was required to check off union dues after the expiration of a collective bargaining agreement (*Lincoln Lutheran of Racine*).

**In December 2019 the new Board overturned the Obama Board decision and restored the precedent that an employer does not have to check off union dues after the expiration of a collective bargaining agreement (*Valley Hospital Medical Center*).**

**Employee access to email:** In 2014 the Obama Board held (*Purple Communications*) that employees have the presumptive right to use the employer’s email system on non-working time for “protected communication” – union organizing and other Section 7 activities – if the employer has otherwise permitted employee use of the email system.

*Business groups challenged the Purple decision in court and participated in related cases before the Board and in the courts.*

**In December 2019 (*Caesars Entertainment*) the current Board overturned *Purple* and restored employers’ rights to restrict use of email systems if they do so on a nondiscriminatory basis.**

**Fair Labor Standards Act/Overtime Rules:** In 2004 the Obama Department of Labor, Wage and Hour Division, promulgated radical new regulations governing the payment of overtime and the so-called “white collar exemption” from the payment of overtime.

*Business groups aggressively opposed the regulations, filing multiple comments with the regulatory agencies and challenging the rule in court in a case in which NAW was a plaintiff.*

**A federal court in Texas ruled in support of the challenge, overturning the entire rule, which was never allowed to take effect. Subsequently the new Labor Department promulgated a moderate new FLSA overtime rule.**

**Fair Play and Safe Workplaces – the “blacklisting” rule:** In 2014 President Obama signed an Executive Order requiring government contractors and subcontractors to disclose previous labor law violations in their contract award process and mandating how these reported violations should be considered by agencies awarding government contracts. The final rule implementing the executive order was scheduled to take effect in October 2016.

*Business groups challenged the blacklisting rule in court.*

**A Federal Court in Texas enjoined the rule; it never took effect.**

**Independent Contractor Status:** During the Obama Administration, both the Department of Labor and the NLRB acted to limit or control the designation of workers as independent contractors as opposed to employees. Specifically, in a case decision issued in September 2014 the Obama Board held that Fed Ex drivers were employees rather than contractors (*Fed Ex Home Delivery*), and the Board’s General Counsel issued a memorandum in August 2016 authorizing regional offices to issue unfair labor practice complaints in some circumstances against employers who allegedly misclassify employees as independent contractors.

*Business groups filed numerous amicus briefs in cases involving independent contractor status.*

**In December 2017 the new NLRB General Counsel rescinded the 2016 Memorandum, and in January 2019 the Board overturned the *Fed Ex* decision, restoring the “traditional common-law test.” Further, in August 2019 the Board ruled in the *Velox* case that misclassifying an employee as an independent contractor is not in and of itself an unfair labor practice.**

**Joint Employer:** In 2015, the Obama Board ruled (*Browning-Ferris*) that an employer can be considered a “joint employer” for collective bargaining purposes (and therefore jointly liable for labor violations committed by franchisees or contractors) even if the employer exercises only indirect control over the employees involved, thus overturning the 30-year precedent that a joint employer had to exercise direct control over employees. While *Browning Ferris* was in the recycling industry, the Obama Board acted aggressively to apply their new joint employer standard in the franchise industry, issuing dozens of complaints against McDonalds as a joint employer with its franchisees as well as targeting other companies in the franchise industry.

*Over the last several years, business groups have filed multiple comments and amicus briefs in joint employer cases.*

**In May 2018 NLRB Chairman John Ring announced that the Board would propose a new regulation on the joint employer standard, and in September 2018 the Board published a Notice of Proposed Rulemaking. Further, the Board subsequently approved settlements of the complaints against McDonalds. The Department of Labor also indicated it would address the issue.**

**Notice Posting:** One of the first actions of the Obama NLRB was the promulgation of a rule requiring all covered businesses – virtually all private sector businesses – to post a “Notice of Employee Rights Under the National Labor Relations Act” in their workplaces.

*Business groups challenged the rule in two court cases.*

**Two separate U.S. Court of Appeals decisions overturned the rule, which was never enforced.**

**Occupational Safety and Health Administration:** In 2015 OSHA proposed a new “Clarification of Employer’s Continuing Obligation to Make and Maintain Accurate Records of Each Recordable Injury and Illness” – widely seen as an attempt to promulgate a new ergonomics rule, and a transparent effort to circumvent the six-month statutory statute of limitations on such citations. They finalized the rule on December 19, 2016.

**On April 3, 2017, Congress passed, and the President signed into law, a Congressional Review Act resolution disapproving the rule.**

**Occupational Safety and Health Administration:** In April 2013 the agency released a “letter of interpretation” stating that non-employee union agents can accompany OSHA inspectors on safety inspections, even in non-union workplaces.

**In April 2017 the Labor Department rescinded the letter.**

**Off-site and/or electronic voting in NLRB elections:** In June 2010 the Obama NLRB issued an information request with respect to whether they should abandon the long-standing procedure of conducting union certification elections on company property with paper ballots under NLRB supervision, in favor of electronic voting either on-site or in remote locations.

*Business groups filed motions and/or amicus briefs in Mental Health Associates arguing against changes in the election procedures.*

**Persuader:** In 2014 the Obama Department of Labor initiated a rulemaking, and in 2016 issued a final rule, in the “persuader” case, which would have made it more difficult for companies to obtain legal counsel and/or expert labor advice during a union organizing campaign.

*Business groups engaged aggressively in opposition to the Persuader rule, including submitting comments and filing a successful legal challenge to the rule in federal court.*

**In November 2016 a federal court in Texas permanently enjoined the Persuader rule; the Obama Administration appealed that decision but the newly-elected Trump Administration delayed the appeal. In June 2017 the Labor Department issued a new proposed rule rescinding the Persuader rule and in June 2018 the rule was fully rescinded.**

**Premise Access/Employer property rights:** In several initiatives, the Obama NLRB addressed the issue of whether an employer can deny premise access to nonemployees or off-duty employees, in each ruling further restricting and limiting the right of employers to control access to their business property.

*Business groups filed numerous amicus briefs supporting employer property rights in NLRB cases.*

**In June 2019 the NLRB held that an employer may prohibit nonemployee distribution of union literature on company property as long as the company does not allow distribution of other material; in September 2019 the Board further expanded employer rights by permitting them to bar union activists attempting to engage in protest activities while allowing access to other groups not engaged in protest activity.**

**Recess Appointments:** On January 4, 2012, *while the Senate was in pro-forma session*, President Obama “recess-appointed” three individuals to the National Relations Board – appointments that can only be made while the Senate is in recess. The improper recess appointments gave pro-labor forces a working majority on the Board.

*Business groups and others quickly challenged the recess appointments in court, arguing that since the Senate was in session the appointments were unconstitutional. After favorable decisions by the appellate court, the case was ultimately decided by the Supreme Court.*

**On June 26, 2014 the Supreme Court held in an unequivocal unanimous decision that President Obama’s recess appointments were unconstitutional; that decision threw into limbo more than 700 decisions made by the recess appointed Board.**

**Specialty Healthcare/Micro Bargaining Units:** In August 2011 the Obama Board reversed decades of precedent for determining what constituted an appropriate collective bargaining unit. Under the new standard, if an employer argued that the union-proposed unit excludes workers who ought to be included in the bargaining unit, the employer would have to prove an “overwhelming community of interest” among the employees – a standard defined in the decision in a manner that would be practically impossible to meet. The Specialty standard was applied by the Board in multiple subsequent cases, facilitating union-created “micro-bargaining units” within single workplaces.

*The business community filed more than a dozen amicus briefs in cases in which companies challenged the Board’s bargaining unit determinations.*

**On December 15, 2017 the Board overruled Specialty, eliminated the “overwhelming community of interest standard,” and restored the traditional, rational, “community of interest” standard.**