NLRB GC Brief Portends Hefty Labor Law Transformation

By **Daniel Johns** (September 8, 2023)

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An April brief filed with the National Labor Relations Board on behalf of NLRB general counsel Jennifer Abruzzo demonstrates the breadth of potential changes to labor law currently under consideration by the NLRB.

The brief, filed on behalf of the general counsel in the Garten Trucking case, provides a detailed map of where the law may change in the near future on myriad labor law issues.[1] In fact, if the NLRB accepts the arguments made by Abruzzo in Garten Trucking, employers should expect an entirely different landscape for labor law matters generally, and union organizing specifically.

First, in the Garten Trucking case, the general counsel asked the NLRB to overrule the Babcock & Wilcox decision from 1948.[2] That decision, which, given its age, is clearly well established in 2023, concluded that it was not illegal for employers to require their employees to attend meetings in which union campaign issues are discussed. Such gatherings, termed captive audience meetings, represent one of the primary campaign tools employers have to contest unionization efforts.

Based upon the general counsel's position in Garten Trucking, however, captive audience meetings would be illegal under the National Labor Relations Act.

Moreover, the general counsel's brief also proposes to force employers to comply with the following requirements in order to even hold voluntary discussions of unionization with their employees.

> If an employer convenes employees for a … [unionization] meeting on paid time, it must satisfy the following steps to make the meeting voluntary. First, the employer must explain the purpose of the discussion. Second, the employer must assure employees:
>
> > a. that attendance is voluntary,
> >
> > b. that if employees attend, they will be free to leave at any time,
> >
> > c. that nonattendance will not result in reprisals (including loss of pay if the meeting occurs during their regularly scheduled working hours), and
> >
> > d. that employee attendance will not result in rewards or benefits.
>
> If an employer announces a meeting in advance, it must reiterate the explanation and assurances set forth above at the start of the meeting. In addition, the meeting must occur in a context free from employer hostility to the exercise of … [organizing] rights.[3]

Clearly, the elimination of captive audience meetings will shift the organizing framework sharply in favor of unions.

The Garten Trucking brief, however, does not stop there. It also asks to overturn the 2019 Rio All-Suites Hotel and Casino[4] decision and return to the standard set forth in the 2014

Purple Communications Inc.[5] case on an employee's right to use employer email systems for organizing. More specifically, the general counsel seeks to make illegal employer policies that limit employee usage of company email systems to only business purposes.

If the general counsel's position is accepted, employees would have the right to utilize employer email systems to promote unionization, just as they did when the Purple Communications case was in effect. Again, as with the elimination of captive audience meetings, allowing employees to use company email systems during organizing campaigns provides a significant boost for union organizing efforts.

In addition to overturning these two precedents, Abruzzo, relying upon her view of technological change in the workplace, also looks to extend employee rights beyond the use of company email systems. The general counsel wants to expand employees' rights to use many other employer applications and systems for organizing, including any other technology or software used by employers to communicate with employees, such as Slack, WhatsApp, Teams, Zoom and Dropbox, to name a few.[6]

If the general counsel's position is accepted by the NLRB, employees would essentially have the right to utilize every system and application operated by employers for the purpose of organizing in the workplace.

The Garten Trucking brief also seeks another noteworthy change in the law regarding an employee's right to engage in solicitation on behalf of unions in the workplace. In Wynn Las Vegas in 2020, the NLRB expanded the definition of solicitation to include not only co-worker requests to sign cards, but also employee conversations about unionization.[7] In expanding this definition, the Wynn Las Vegas case allowed employers wider latitude to prohibit such conversations during work time.

In Garten Trucking, however, the general counsel aims to overturn Wynn Las Vegas and return to a more limited definition of solicitation involving only union cards. If the NLRB accepts this position, employers would be prohibited from disciplining employees from engaging in solicitation on work time, provided the solicitation does not include a contemporaneous request to sign a card. This would give employees much more freedom to organize on the clock, as long as union cards are not involved.

According to the Garten Trucking brief, the general counsel also wants to overturn the 2019 Tschiggfrie Properties Ltd. decision.[8] In that case, the NLRB ruled that to constitute a violation of the NLRA, the general counsel must provide evidence of a causal connection, whether direct or indirect, between an employee's protected activity and an adverse action taken against the employee.[9]

In requesting to overturn that precedent, the general counsel aims to allow employer liability based solely upon generalized animus toward unions. There would be no requirement to provide specific evidence demonstrating causation with respect to a challenged employer action.

To say the least, this is a significantly easier standard for a union to meet in order to establish employer liability when employees allege they have been disciplined for engaging in organizing activities under the NLRA.

On the issue of establishing employer liability for retaliation against employees engaged in protected activity, the brief also requests that the NLRB overturn the 2019 Electrolux Home Products decision.[10]

In Electrolux, the NLRB held that proof of an employer providing a pretextual reason for a

decision was not enough to conclusively establish unlawful discrimination under the NLRA. In Garten Trucking, the general counsel states that the Electrolux decision allows employers

> to avoid liability by giving sham explanations for discriminatory actions.[11]

Thus, if that position is accepted, then a finding of employer pretext would be sufficient to establish employer liability in all cases.

In sum, in just one recent brief, the general counsel requests the NLRB to overturn at least five precedents, one of which dates back to the 1940s.

Employers would be wise to not just look at what has changed recently in the area of labor law, but to stay abreast of what the general counsel has asked to happen in the future. Even more significant changes are coming, and employers who do not keep up may find themselves navigating without a reliable road map in a changing legal landscape.

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[1] Garten Trucking LC, 10-CA-279843 (2023).

[2] Babcock & Wilcox Co., 77 NLRB 577, 578 (1948).

[3] See NLRB Brief in Support of Exceptions, available at https://www.nlrb.gov/case/10-CA-279843.

[4] Caesars Entertainment Corp. d/b/a Rio All-Suites Hotel and Casino, 368 NLRB No. 143 (2019).

[5] Purple Communications Inc., 361 NLRB 1050 (2014).

[6] See NLRB Brief in Support of Exceptions, available at https://www.nlrb.gov/case/10-CA-279843.

[7] Wynn Las Vegas, 369 NLRB No. 91 (2020).

[8] Tschiggfrie Properties Ltd., 368 NLRB No. 120 (2019).

[9] Demonstrating just how quickly changes are coming, the NLRB "clarified" the meaning of Tschiggfrie Properties on Aug. 28th, stating that the decision was "imprecise" and should not be interpreted to suggest that the standards for finding unlawful retaliation under the NLRA have changed. Intertape Polymer Corp., 07-CA-273203 (2023). It is unclear how this "clarification" will affect the general counsel's attempt to overturn Tschiggfrie Properties.

[10] Electrolux Home Products, 368 NLRB No. 34 (2019).

[11] See NLRB Brief in Support of Exceptions, available at https://www.nlrb.gov/case/10-CA-279843.