

# Unprecedented

## The Trump NLRB's attack on workers' rights

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# Introduction

Under the Trump administration, the National Labor Relations Board (NLRB) has systematically rolled back workers' rights to form unions and engage in collective bargaining with their employers, to the detriment of workers, their communities, and the economy. The Trump board<sup>1</sup> has issued a series of significant decisions weakening worker protections under the National Labor Relations Act (NLRA/Act). Further, the board has engaged in an unprecedented number of rulemakings aimed at overturning existing worker protections. Finally, the Trump NLRB general counsel (GC) has advanced policies that leave fewer workers protected by the NLRA and has advocated for changes in the law that roll back workers' rights.

The Trump board and GC have elevated corporate interests above those of working men and women and have routinely betrayed the statute they are responsible for administering and enforcing. This paper highlights the most egregious actions of the Trump board and GC and evaluates the impact on working people. It is critical that Congress hold the Trump NLRB accountable and that policymakers prioritize legislative reforms that will restore the original promise of our nation's labor law—to encourage and promote the formation of unions and the practice of collective bargaining.

## Background

The NLRA establishes a federally protected right of working people to join together in collective action, whether or not through a union, to improve their working conditions through collective bargaining and other means. The Wagner Act of 1935—the originally enacted version of the NLRA—affirmatively stated its purpose as being to promote and encourage the practice of collective bargaining.<sup>2</sup> Following the Act's passage, the U.S. experienced decades of faster and fairer economic growth that persisted until the 1970s. But since the 1970s, declining unionization has fueled rising inequality and stalled economic progress for the American middle class.<sup>3</sup> (See **Figure A.**)

After decades of decline in the share of workers represented by a union, the American economy is now marked by extreme inequality—the highest ever in U.S. history, according to new Census Bureau data.<sup>4</sup> Chief executive officer (CEO) compensation has grown 940% since 1978, while typical worker compensation has risen only 12% during that time.<sup>5</sup>

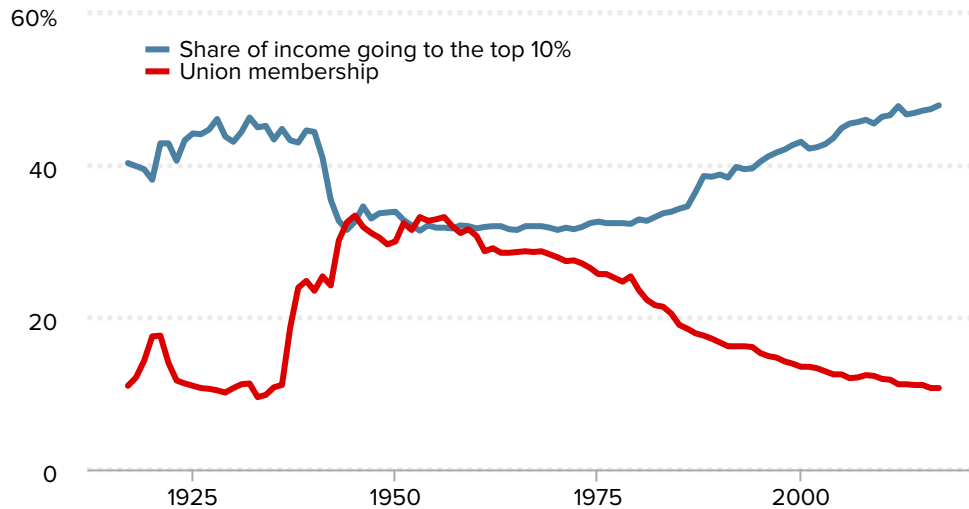
From 1979 to 2016, the wages of the top 1% grew nearly 150%, whereas the wages of the bottom 90% combined grew just 21.3%, roughly one-seventh as fast.<sup>6</sup> Even today's very low unemployment rate has not been enough to spur truly robust wage growth for most workers.

Extreme inequality and wage stagnation for virtually all but the highest earners have left fewer and fewer U.S. workers able to access the middle class. Increasingly, workers are demanding change. Nearly half (48%) of all nonunion workers say they would vote for a

Figure A

## As union membership declines, income inequality rises

Union membership and share of income going to the top 10%, 1917–2017



**Sources:** Data on union density follows the composite series found in Historical Statistics of the United States; updated to 2017 from unionstats.com. Income inequality (share of income to top 10%) data are from Thomas Piketty and Emmanuel Saez, “Income Inequality in the United States, 1913–1998,” *Quarterly Journal of Economics* 118, no. 1 (2003) and updated data from the Top Income Database, updated March 2019.

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union if given the opportunity—a 50% higher share than when a similar survey was taken in 1995.<sup>7</sup> And a recent survey conducted by Gallup found that 64% of Americans have a favorable view of unions.<sup>8</sup> Policymakers too are recognizing that our nation’s current labor law needs to be strengthened.

In spite of this reality, the Trump NLRB has advanced an anti-worker, anti-union, corporate agenda that has undermined workers’ ability to form unions and engage in collective bargaining. Through a series of decisions, rulemakings, and general counsel initiatives, the agency has systematically rolled back worker protections and betrayed its statutory obligation to administer and enforce the NLRA. The Trump board has faithfully acted on a top-10 corporate-interest wish list published by the Chamber of Commerce in early 2017—taking action on 10 out of 10 items on this list (See **Table 1**). And the Trump board has gone beyond the chamber’s policy requests and advanced additional measures that undermine workers’ rights.

Table 1

## Doing the chamber's bidding

Action on the Chamber of Commerce's top 10 list by the Trump board

Chamber wish	Status	NLRB action
Overturn <i>Specialty Healthcare</i> to give employers more say in bargaining unit determinations.	Completed	<i>PCC Structural, Inc.</i> , 365 NLRB No. 160 (2017).
Weaken rules that were adopted in 2015 to streamline representation election process.	In process	Request for comments on modifying or repealing the rules published on December 14, 2017. Reform to election rules listed in the agency's regulatory agenda, indicating that rulemaking is forthcoming.
Overturn <i>Browning-Ferris</i> decision on joint employer.	In process	Trump board attempted to overturn <i>Browning-Ferris</i> in <i>Hy-Brand Industrial Contractors</i> , 365 NLRB No. 156 (December 14, 2017), but had to withdraw the decision because of member Emanuel's conflict of interest. Trump board then proposed a new rule to overturn <i>Browning-Ferris</i> .
Allow forced arbitration:  (a) Allow employers to force employees into arbitration and disallow class or collective claims.  (b) Change the standard so employers can push more disputes into arbitration.	(a) Completed  (b) In process	(a) Supreme Court overturned <i>Murphy Oil</i> in <i>Epic Systems</i> . Trump GC would go further and say group litigation over workplace violations is not protected activity under the NLRA.  (b) Trump GC has urged the board to change the rules in the way the chamber seeks. GC Brief in <i>United Parcel Service, Inc.</i> , Case 06-CA-143062 (March 15, 2019).
Change rules on "management rights" clauses to give employers more power to make unilateral changes and undermine the collective bargaining process.	Completed	<i>MV Transportation, Inc.</i> , 368 NLRB No. 66 (2019); <i>Boeing</i> ; 365 NLRB No. 154 (2017); <i>Raytheon Network Centric Systems</i> , 365 NLRB No. 161 (2017).
Allow employers to undermine the bargaining process by unilaterally imposing discretionary discipline without bargaining with the union.	In process	Trump GC has urged the NLRB to adopt the chamber's position, and in a highly unusual move, the Trump board denied a charging party's request to withdraw a case in order to keep it alive for the NLRB to act. <i>Care One</i> , Case 22-CA-204545, 368 NLRB No. 69 (2019).
Allow employers to deny employees use of the employer email system for communication with co-workers about workplace issues.	In process	NLRB has requested briefs on the issue, and the Trump GC has argued that employers should be able to deny employees access to the company email system. <i>Caesars Entertainment Corp.</i> , Case 28-CA-060841.
Allow employers to fire or discipline workers for profane or offensive language, even if it interferes with protected NLRA activity.	In process	The Trump board has requested amicus briefs on changing its rules to permit employer discipline for profane or racially or sexually offensive language. <i>General Motors LLC</i> , 368 NLRB No. 68 (September 5, 2019).
Allow employers to keep their investigations confidential and gag employees from talking with each other about pending employer investigations.	In process	Trump GC has asked the NLRB to change the law and allow employers to gag employees about employer investigations. <i>Unique Third Store</i> , Cases 27-CA-191574 et al. He has signaled that he wants to overturn precedent requiring employers to turn over witness statements from internal investigations, GC Memorandum 18-02, and Chairman Ring has indicated that he agrees. <i>American Medical Response West</i> , 366 NLRB No. 146, n. 4 (2018).

Table 1  
(cont.)

Chamber wish	Status	NLRB action
Allow employers to keep employees and their supporters off the employer's property to discuss and publicize their views on workplace issues.	Completed	<i>Tobin Center for the Performing Arts</i> , 368 NLRB No. 46 (August 23, 2019); <i>Kroger Limited Partnership</i> , 368 NLRB No. 64 (September 6, 2019); <i>UPMC</i> , 368 NLRB No. 2 (June 14, 2019).

Source: EPI analysis of U.S. Chamber of Commerce, *Restoring Common Sense to Labor Law: Ten Policies to Fix at the National Labor Relations Board*, February 28, 2017.

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## About the NLRB

The NLRB is a small, independent agency charged with safeguarding the rights of workers to organize and engage in collective bargaining. The agency's board, by statute, has five members (with a minimum of three members required for a quorum) who serve five-year terms.<sup>9</sup> The current board is composed of four members: three Trump appointees—Chairman John Ring (a former management lawyer), William Emanuel (another former management lawyer), and Marvin Kaplan (a former Republican Hill staffer)—and one holdover Democratic appointee, Lauren McFerran (a former Democratic Hill staffer and union-side labor lawyer). McFerran's term expires on December 16, 2019. If action is not taken before the expiration of member McFerran's term, the board will drop to three Republican members, with no Democratic appointees on the board.

The agency's general counsel, who is independent of the board and administers the agency's field operations, is appointed to a four-year term. The Trump-appointed GC is Peter Robb, a former management lawyer. The NLRB GC is responsible for investigating charges that employers or unions have violated federal labor law (engaged in "unfair labor practices") and for prosecuting violations; the board decides cases brought by the GC and also engages in rulemaking. Charges are filed by workers, unions, and employers—the NLRB GC has no independent investigative authority and so cannot bring charges on his or her own. But workers are also dependent on the NLRB GC to prosecute their case; they have no other option for obtaining redress when their NLRA rights have been violated (e.g., through arguing their own case before the board or in a private lawsuit). It is up to the NLRB GC to prosecute the case, and if the GC decides not to pursue a case, workers have no recourse. (This is not the case with violations of many other employment laws, such as wage and hour laws, which *can* be pursued by workers.)

## Ethical obligations of board members

Several presidents have issued executive orders imposing ethical requirements for executive branch employees. President Trump revoked President Obama's executive order requiring an ethics pledge and instead issued Executive Order (EO) 13770, "Ethics Commitments by Executive Branch Appointees."<sup>10</sup> Specifically, the Trump EO requires all appointees to observe a two-year ban on participating in "particular matters" related to former employers, a two-year ban for former lobbyists on involvement in matters on which he or she has lobbied, and a five-year ban on lobbying the government for appointees

who leave government service. Trump’s EO adopts the definition of “particular matter involving specific parties” as that found in 5 C.F.R. 2641.201(h)(l). In relevant part, that regulation reads:

Particular Matter involving a specific party or party or parties...include[s] any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest or judicial or other proceedings...only those particular matters that involve a specific party or parties fall within the prohibition.... Such a matter typically includes a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.

## Failure to uphold ethical responsibilities

In February 2018, the NLRB Inspector General (IG) issued a memorandum concluding that, under these ethical obligations, Trump appointee William Emanuel should have been recused from participation in deliberations leading to the decision to overturn an Obama-era board decision dealing with the issue of joint-employer status under the NLRA. The Trump board decision in *Hy-Brand* (discussed in further detail in a later section of this report) was essentially a “wholesale incorporation”<sup>11</sup> of the dissent in the Obama-era board decision (*Browning-Ferris*), and member Emanuel’s former law firm had represented a party in the *Browning-Ferris* case. The NLRB IG determined that the *Hy-Brand* deliberation was a continuation of the *Browning-Ferris* deliberative process and, as a result, member Emanuel should have been recused from participation.<sup>12</sup> The IG recommended that the board consult with the Designated Agency Ethics Official (DAEO) to determine the appropriate action to resolve the issue of member Emanuel’s participation and to “restore confidence in the Board’s deliberative process.” Further, the IG recommended that the NLRB review its internal process for addressing recusal issues and work with the DAEO to resolve any issues.<sup>13</sup>

As a result of the IG’s findings, the Trump board was forced to rescind its decision in *Hy-Brand*.<sup>14</sup> Given the ethical issues precluding the Trump board from issuing a decision overturning *Browning-Ferris*, the Trump board began a rulemaking process on this issue. The proposed rule essentially adopts the Trump board majority’s decision in *Hy-Brand*. The proposed rule is discussed in the section on rulemaking that appears later in this report.

## When ruling on cases, the Trump board has reversed precedent, empowering employers and weakening workers' rights

The Trump board has repeatedly reversed long-standing board precedent, weakening workers' rights and giving more power to employers.<sup>15</sup> In the two years that Republicans have held the majority on the board, they have overturned NLRB precedent in more than a dozen cases. All of these decisions overturning precedent favor employers. None favor workers or unions. In none of these cases did the Trump board follow the NLRB's long-standing practice of seeking public input through amicus briefs before reversing precedent.<sup>16</sup>

The manner and speed with which the Trump board has reversed precedent lays bare their anti-worker, anti-union agenda. And, disturbingly, more decisions are on the horizon, with the Trump GC urging the board to change the law in favor of corporations and against workers in numerous other cases.

The Trump board has weakened workers' rights to organize and engage in collective bargaining in every possible area—in the scope of workers covered under the law, in the definition of what activity is protected under the law, in workers' ability to communicate with their co-workers about workplace issues, in workers' ability to decide which group of co-workers to organize and bargain with, and in workers' ability to strike to achieve their goals. At the same time, the Trump board has given employers new tools to restrict communications by workers and unions, and to undermine collective bargaining relationships by making unilateral changes and refusing to recognize incumbent unions. The sweep and imbalance of the Trump board's decisions are outlined below.

## Constraining how and where workers can organize and protest

(Cases discussed: *Bexar*, *Kroger Limited*, *UPMC*)

In a trio of decisions, the Trump board overturned long-settled law and announced new rules to make it far more difficult for employees and union organizers to talk with employees at the workplace about forming a union and to engage consumers in support of their efforts.<sup>17</sup> These decisions greatly exacerbate an imbalance that already disadvantages workers and unions when it comes to workplace communications.

Employers already have a huge advantage over employees and unions when it comes to communicating with employees about whether to form or join a union. Current law allows employers to communicate their anti-union views freely—over the company email system, in one-on-one meetings with employees, and in mandatory group meetings (also known as “captive audience” meetings); employees are required to attend such meetings and listen to the employer's anti-union views or face termination or other discipline.

Employees and unions do not have the same rights as employers. They do not have a general right of access to the employer's workplace to talk together about workplace issues, nor do they have a right of access to respond to an employer's anti-union campaign, no matter how vigorously and regularly the employer conveys its anti-union views. However, historically union organizers *have* been permitted to come to *public* areas of an employer's property, such as a cafeteria, to talk with employees about unionization. They have also been able to leaflet and communicate on the employer's property in areas where other groups of nonemployees, such as the Salvation Army, have been allowed to solicit.

Now the Trump board has upended the long-standing rules that allowed employees and unions this limited access, dramatically restricting access rights for employees and union organizers. First, the Trump board ruled that off-duty employees do not have a right to handbill or engage in other organizing activity in nonwork areas of their workplace if their employer is a contractor at the workplace as opposed to the owner or holder of the property.<sup>18</sup> This ruling, on a case (*Bexar*) that involved off-duty orchestra musicians leafleting outside a concert hall where they spend 80% of their working hours, dramatically undermines the right of workers to communicate with their co-workers or public supporters. Given the proliferation of contractor relationships and the growth of the "fissured" workplace, the board's decision is highly destructive of organizing rights for a large segment of the private-sector workforce.

In another case (*Kroger Limited*), the Trump board curtailed the ability of union organizers to leaflet and solicit on an employer's property even when the employer had allowed the Salvation Army and the Girl Scouts to solicit for their organizations on the employer's property. It has long been the law that an employer cannot discriminate against the union message if it allows distribution and solicitation on its property by other groups. But the Trump board redefined "discrimination" in the narrowest possible way: Discrimination, in their definition, means giving one group access to the employer's property for actions "similar in nature" to the union's activities while denying access to another group for similar actions.<sup>19</sup> Because the union was soliciting signatures on a petition and the Salvation Army was soliciting money, the activities were not, in the Trump board's view, "similar in nature," even though both activities involved solicitation on the employer's property.

Lastly, in a third decision (*UPMC*), the Trump board changed the rules on access to nonwork, public spaces by ruling that a hospital could ban a union organizer from talking with nurses in the cafeteria at the hospital, even though the area is open to the public.<sup>20</sup>

Taken together, these decisions dramatically curtail access to the employer's property—including areas that are otherwise open to the public—and deprive employees and unions' opportunities to talk about workplace issues. The Trump board has allowed employers to blatantly discriminate against union communications—singling out and excluding union organizers and others engaging in union communications, while allowing the public generally and other (nonunion) groups access to communicate with its employees or consumers. And, as discussed later in this report, the Trump board has also announced its intention to engage in rulemaking on access to employer



property—presumably to further erode workers’ rights in this area.

## Gerrymandering bargaining units

(Cases discussed: *PCC Structural*s, *Boeing*)

The NLRA gives workers the right to organize in “a unit appropriate” for collective bargaining with the employer.<sup>21</sup> When workers want to form a union, they file a petition with the NLRB seeking an election and they specify the group—the bargaining unit—that is organizing. The Obama NLRB ruled in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), that the bargaining unit sought by employees when petitioning to form a union at their workplace was presumptively appropriate if the employees shared a “community of interest,” and that the NLRB would respect workers’ choice unless the employer made a compelling case as to why the bargaining unit was *not* appropriate.

*Specialty Healthcare* has been upheld by every court of appeals to consider the issue—eight in total. Nevertheless, the decision set off a firestorm of controversy in the business community, which criticized the decision as promoting “micro-units” to benefit unions.<sup>22</sup> Republicans introduced legislation to overturn *Specialty Healthcare*, and it was the number one item on the Chamber of Commerce’s 2017 wish list.<sup>23</sup> It was no surprise, then, that as soon as the Republicans achieved a majority on the NLRB, one of the first decisions they issued was *PCC Structural*s, Inc., 365 NLRB No. 160 (2017), in which the Trump board overturned *Specialty Healthcare*. What was notable about the decision, in addition to overturning a commonsense ruling, is that the board issued the decision without seeking public input on whether it should change the law. This was a departure from long-standing NLRB practice.<sup>24</sup>

In September 2019, the Trump board changed its own *PCC Structural*s standard for what constitutes an “appropriate” bargaining unit, giving employers even greater ability to thwart workers who wish to form a union. In May 2018, 178 workers in two job classifications at a Boeing facility in North Charleston, South Carolina, voted in favor of forming a union. The NLRB regional director had applied *PCC Structural*s and determined that the two job classifications constituted an appropriate bargaining unit. Boeing disagreed and refused to bargain with the new union. After 16 months, the Trump board “clarified” its decision in *PCC Structural*s, added new factors to the bargaining unit test, and ruled that the 178-employee unit was not appropriate. The board now requires that the differences between employees in the requested unit and employees outside the unit outweigh the similarities, even though the NLRA requires “an” appropriate unit, not the “most” appropriate unit or a “more” appropriate unit. As a result of the Trump board’s decision, 178 Boeing employees were denied their bargaining rights.

# Undermining collective bargaining

## 1. Duty to bargain

(Cases discussed: *MV Transportation*, *Raytheon*, *Care One*)

For 70 years, following “one of the oldest and most familiar of board doctrines,” employers have been prohibited from making unilateral changes to wages, hours, or working conditions unless the employer could prove that the union had “clearly and unmistakably waived” its interest in bargaining over the subject.<sup>25</sup> This long-standing rule—upheld by eight courts of appeals—respects the union’s role and the collective bargaining process. But recently, the Trump board overruled this precedent and adopted a new rule allowing employers to make unilateral changes to collective bargaining agreements if there is a reference in the contract to management authority over the subject (the so-called contract coverage rule).<sup>26</sup> The new rule benefits employers by giving them greater leeway to make unilateral changes.

In a second decision undermining the collective bargaining process, the Trump board empowered employers to make unilateral changes upon the expiration of a collective bargaining agreement without bargaining with the union, if the employer has a past practice of making similar changes.<sup>27</sup>

Finally, another significant change that undermines the collective bargaining process is on the horizon. Under current law, an employer may not unilaterally impose discretionary discipline on a member of a new bargaining unit without bargaining with the union, because to do so undermines the new union and the bargaining process. But the Trump board has made clear that it intends to change this rule. The Trump GC has filed a brief urging the NLRB to allow employers to impose discretionary discipline without bargaining. And in a highly unusual move, in *Care One at New Milford*, 368 NLRB No. 60 (2019), the Trump board denied the charging party’s motion to withdraw a charge, in part because the “case presents the board with an opportunity to address significant issues of law,” i.e., change the law. Typically the board allows parties to withdraw charges when they no longer wish to pursue their case, but in this case, the Trump board is so eager to change the law that it is not following standard practice.

## 2. Undermining existing bargaining relationships

(Case discussed: *Johnson Controls*)

When workers form a union, the union remains the bargaining representative unless and until it is voted out by employees. The union negotiates a collective bargaining agreement with the employer, and its status as the employees’ representative continues from contract to contract unless a valid and timely petition is filed challenging the union’s continued status as the choice of a majority of employees. There has long been a narrow exception in the law allowing employers claiming to have evidence that the union no longer has the support of a majority of employees to notify an incumbent union that the employer will be

withdrawing recognition of the union at the end of the current collective bargaining agreement. However, if the union does in fact have the support of a majority of employees at the expiration of the contract and can prove it, it is against the law for the employer to withdraw recognition from the union. This long-standing rule makes sense—employers should not be allowed to unilaterally withdraw recognition from a union that in fact has the support of a majority of employees at the time of withdrawal.

However, in *Johnson Controls, Inc.*, 368 NLRB No. 20, a new rule was announced—that employers are legally permitted to withdraw recognition at the conclusion of the collective bargaining agreement if they have evidence that the union does not have majority support. If the union wants to get its status back, it must file a petition for a new election and prevail in that election. There is no reason to require a union and employees to go through the NLRB election process when the union still has majority support. Moreover, the rule is imbalanced—it allows employers to withdraw recognition without an election, but employers can still insist on an election and refuse to recognize a union based on majority support at the beginning of a bargaining relationship. This imbalanced, unjustified undermining of union status shows the anti-union, pro-employer bias of the Trump board. When coupled with the proposed rule to add delay and uncertainty when employers voluntarily recognize unions (see section on rulemaking), the anti-union bias of the Trump board becomes even more evident.

## Coverage under the law—turning a blind eye to misclassification

(Cases discussed: *SuperShuttle*, *Velox Express*, *GC advice memo on Uber drivers*)

Misclassification of employees as independent contractors is a rampant problem. The U.S. Department of Labor has estimated that as many as 30% of firms misclassify workers as independent contractors.<sup>28</sup> This misclassification robs employees of their rights under the NLRA, because independent contractors are not covered or protected by the Act. Thus, an employer that misclassifies its employees not only cheats the government on employment taxes that are due but deprives employees of their right to organize and form a union.

The Trump board reversed precedent to find that a group of 88 SuperShuttle drivers at Dallas Fort Worth Airport are independent contractors not covered under the NLRA and with no federal right to form a union and bargain with SuperShuttle over the terms and conditions of their work.<sup>29</sup> The test announced by the Trump board for determining independent contractor status elevates entrepreneurial opportunity above other factors, in conflict with the common law test.<sup>30</sup>

Further, the Trump GC recently used this new and erroneous test to conclude that Uber drivers are independent contractors, not employees entitled to coverage under the Act.<sup>31</sup> This means that the general counsel will not pursue complaints by Uber or Lyft drivers that the companies are violating their labor law rights. And because workers do not have an independent means of pursuing cases for labor law violations, the Uber and Lyft drivers

are left without recourse unless and until the general counsel changes their mind or Congress changes the law.<sup>32</sup>

In August, the Trump board overruled a decision by an administrative law judge and ruled that misclassification—however intentional or however motivated to defeat union organizing efforts—is not a violation of the Act.<sup>33</sup> This decision—while not a reversal of precedent because there were no earlier decisions to overturn—significantly weakens the ability of the NLRB to hold employers accountable for illegally denying workers their NLRA rights.

## Narrowing scope of protections under the NLRA

(Case discussed: *Alstate Maintenance*)

The NLRA protects concerted activity—activity by one or more workers asserting a shared concern—on workplace issues, whether or not workers are engaged in the activity through a formal union. If workers are engaged in advocacy around a workplace issue in a group or on behalf of a group—be it protections against sexual harassment, equal pay, health and safety protections, scheduling fairness, or any other workplace issue—an employer may not interfere with this activity or retaliate against workers engaged in this activity. The Trump board has changed the law to narrow what counts as protected concerted activity. Contrary to long-standing precedent, the Trump board ruled in *Alstate Maintenance, LLC* that an airline skycap (porter) who protested about a lack of customer tips in front of co-workers and a supervisor was not engaged in protected concerted activity—meaning that it was not illegal for the company to fire the worker on account of the protest activity.<sup>34</sup>

## Undermining the right to strike

(Case discussed: *Walmart Stores, Inc.*)

The right to strike—the right of workers to withhold their labor in an effort to put economic pressure on their employer to agree with workers’ demands—is at the core of our labor relations system in the United States. Over a period of years, groups of employees at Walmart—the world’s largest company, with 2.2 million employees—engaged in several short strikes to call attention to issues and to pressure Walmart to change its practices. But in July 2019, the Trump board ruled that a group of 100–130 Walmart workers who engaged in a 5–6 day strike to demonstrate at Walmart’s annual shareholders’ meeting were engaged in an “intermittent” strike that was not protected by labor law. Because the Trump board decided that the strike was an unprotected intermittent strike, Walmart faced no legal consequence for retaliating against the strikers, who included 29 workers who were striking for the first time. In determining that the strike was an unprotected “intermittent” strike, the Trump board made up a new legal test, saying that strikes that take place “pursuant to a ‘plan to strike, return to work, and strike again’” are not

protected. As detailed by member McFerran in her dissent, the majority undermines what the Supreme Court has called the “strong interest of federal policy in the legitimate use of the strike.”<sup>35</sup>

## Permitting employers to fire workers in retaliation for union activity

(Case discussed: *Electrolux Home Products*)

In a disturbing decision, the Trump board found that an employer gave a false reason for firing a pro-union worker, but the Trump board let the employer off the hook, saying that the general counsel did not show that the employer had an anti-union motivation for firing the worker. The employer told the pro-union worker to “shut up” when she made pro-union comments at a mandatory captive audience meeting, but that was not enough evidence of anti-union bias for the Trump board. According to dissenting member McFerran, the decision “marks the first time in history the board has declined to find a violation of the Act when there is clear reason to infer an anti-union motive and no evidence...of any other lawful motive.”<sup>36</sup>

## Expanding management rights—handbook rules

(Case discussed: *Boeing*)

In one of its first decisions, the Trump board overturned long-standing precedent to make it easier for employers to adopt rules, policies, and handbook provisions that workers may reasonably believe restrict them from exercising their NLRA rights.<sup>37</sup> Prior to this decision, the board would find unlawful employer rules that workers could “reasonably construe” to restrict their NLRA rights. For example, an employer’s “no loitering” rule would be deemed unlawful if it was so broad as to be interpreted to prevent workers from remaining at their workplace to engage in protected concerted activity. The Trump board has announced that it will institute a practice that is much less protective of NLRA rights. It will no longer automatically find these rules unlawful, but will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.

# Narrowing the definition of ‘joint employer’

(Case discussed: *Hy-Brand*)

Under every labor and employment law, such as Title VII (discrimination protections), the Fair Labor Standards Act (wage and hour protections), and the NLRA, employees can have more than one employer. For example, temporary nurses hired by a temporary agency but placed at a hospital may be employed by both the temporary agency and the hospital, because both employers control aspects of the employee’s work. As a result, both employers are responsible for upholding workers’ rights and can be held liable for violations of those rights. If the temporary agency fails to pay workers overtime that they are legally due, both the temporary agency and the hospital can be sued for the wage theft. The same is true under the NLRA. Two or more employers may “share or codetermine” workers’ pay, benefits, or working conditions and be considered “joint employers,” meaning both employers have an obligation to bargain in good faith with the workers and can be held liable for violating workers’ rights.

In *Browning-Ferris*,<sup>38</sup> the NLRB updated its test for determining whether two employers are joint employers, and ruled that a recycling company was a joint employer with a staffing service that provided 80% of the line workers to the recycling company. The ruling meant that Browning-Ferris, which directly or indirectly controlled—or had the right to control—major aspects of the contract workers’ terms and conditions of employment, was required to engage in collective bargaining with the contract workers.

*Browning-Ferris* was met with fierce criticism from the business community and Republicans in Congress, who argued that the legal test set forth in *Browning-Ferris* was too broad. Overturning *Browning-Ferris* was listed as the third highest priority on the Chamber of Commerce’s wish list.

Two Republican members then on the NLRB—members Miscimarra and Johnson—dissented in *Browning-Ferris*. At the conclusion of his term as NLRB Chairman, Miscimarra, joined by two new Trump appointees, recycled his dissent in *Browning-Ferris* and tried to use the case of *Hy-Brand* to overturn *Browning-Ferris*. The decision was issued over the strong dissent of the two Democratic NLRB members, who objected on both process and substance grounds. On process, the dissenters criticized the majority for overturning a significant decision without following the NLRB’s long-standing tradition of seeking public input when considering such changes. The dissenters also objected that the Trump board had chosen a case to overturn *Browning-Ferris* where the issue was not presented and neither party had asked that *Browning-Ferris* be reconsidered.<sup>39</sup>

*Hy-Brand* was short-lived. The charging parties in the case—the seven individuals who had been illegally fired for engaging in a strike—filed a motion for reconsideration, objecting to member Emanuel’s participation in the case when his former law firm represented a party

in *Browning-Ferris*, the case being overruled in *Hy-Brand*. *Browning-Ferris* was still an active case pending in the U.S. Court of Appeals for the D.C. Circuit when *Hy-Brand* was decided. The NLRB Inspector General determined that *Hy-Brand* presented the same issue as *Browning-Ferris* and that member Emanuel violated ethics rules by participating in a case involving the same issue as a case involving his former law firm. Following the Inspector General's determination, the NLRB vacated *Hy-Brand*. Thwarted in their effort to overturn *Browning-Ferris* via case adjudication, the Trump board has now proposed to do so through rulemaking.<sup>40</sup>

## More damage on the horizon? The watch list

The Trump board has eroded workers' rights and undermined workers' ability to form unions and engage in collective bargaining with breathtaking speed and drive. Unfortunately, even more damage is still possible. Peter Robb, the Trump NLRB GC, has filed briefs and written memos urging the NLRB to overturn more precedent and further undermine workers' rights, including in the areas outlined below.<sup>41</sup>

### Trying to exterminate Scabby the Rat

In recent years, Scabby the Rat has become a frequent presence at demonstrations where workers and unions have protested unfair practices by employers. During the George W. Bush Administration, the Republican general counsel brought several complaints against unions, trying to ban Scabby by arguing that Scabby's presence was intended to persuade workers not to work for the employer whose labor practices were being protested. But the Obama board, following court precedent, ruled that Scabby was simply a form of speech as part of protest activity,<sup>42</sup> and this decision was upheld by the federal court of appeals. Disregarding this precedent, from the first days of his tenure as general counsel, GC Robb has urged the NLRB to find that Scabby the Rat is unlawful.<sup>43</sup> In the summer of 2019, Robb's office attempted to get a federal court injunction barring a local union from bringing Scabby the Rat (and an inflatable cockroach balloon) to demonstrations protesting a grocery store building a new store with nonunion labor. The judge rejected Robb's request for an injunction, finding that Scabby was part of peaceful protest activity protected by labor law and the First Amendment.<sup>44</sup>

### Limiting what counts as protected concerted activity

Robb has urged the board to rule that the NLRA's protection of "concerted activity" does not protect workers who file group legal claims.<sup>45</sup> If this theory were to be adopted, it would mean that workers who act collectively to file claims for wage theft would not be protected by the NLRA against retaliation by their employer—undermining the definition of "protected, concerted activity." The Trump GC has also urged the board to find that

employers may legally require employees to keep arbitration proceedings confidential, asserting that this restriction does not impinge upon workers' NLRA rights.<sup>46</sup>

## Restricting workplace communications

The Trump GC has urged the NLRB to find that employers may legally prohibit employees from using the company email system to discuss workplace issues, including unionization, even if the email system is regularly used for nonwork communications.<sup>47</sup> The NLRB asked for amicus briefs on the issue on August 1, 2018. The case is still pending before the board. If the NLRB adopts the rule sought by Robb, it will dramatically restrict the ability of employees to discuss workplace issues with each other, exacerbating the existing imbalance between the ability of workers and employers to communicate about unionization at the workplace.<sup>48</sup>

## Ratcheting up prosecution of unions while easing the rules for employers

At the same time the Trump GC is advocating that the NLRB change the law to make it more friendly to employers, he is increasing the NLRB's scrutiny of unions and their practices. Robb has announced a new approach to evaluating whether a union has met its "duty of fair representation," and his office is aggressively investigating DFR charges under his new approach.<sup>49</sup> He has urged the NLRB to change the rules on how unions are required to handle "agency fee" payments by nonmembers and has persuaded the Trump board in one instance to find activities nonchargeable.<sup>50</sup> And Robb has reversed the decisions of the agency's regional directors to bring cases against unions when the regional director, after an investigation, had determined otherwise, far more often than the general counsel has reversed decisions regarding charges against employers.<sup>51</sup>

## The Trump board's unprecedented—and agenda-driven—use of agency rulemaking

Administrative agencies engage in "notice and comment" rulemaking to implement policy and establish specific requirements under the laws agencies enforce. For example, the U.S. Department of Labor has issued numerous rules on worker health and safety, overtime pay, anti-discrimination obligations of federal contractors, pension security, and more.<sup>52</sup> The longest-standing federal rulemaking requirements are in the Administrative Procedures Act (APA).<sup>53</sup> The APA provides procedures for "notice and comment" rulemaking, which involves notice to the public of a proposed rule and an opportunity for the public to submit comments on the proposal. The APA requires that the agency



engaged in rulemaking consider and respond to the issues raised in public comments when issuing a final rule.

While rulemaking in labor and employment matters is not uncommon, the NLRB has historically used rulemaking very rarely. The board has preferred to announce rules through decisions in particular cases. The U.S. Supreme Court has made clear that the NLRB's use of rulemaking by adjudication is valid and lawful.<sup>54</sup> Nevertheless, over the years, a variety of academics and commentators have urged the NLRB to undertake more rulemaking. However, until recently, the NLRB—under both Republican and Democratic administrations—has continued to focus on case adjudication as its chief policy tool.

Why has the NLRB historically preferred adjudication to rulemaking? The agency's structure presents challenges to engaging in large-scale rulemaking efforts. The decision to engage in rulemaking is made by the board members of the NLRB. Each member of the NLRB has his or her own dedicated staff. There is no "pooled" staff for NLRB members. As a result, when the NLRB members engage in rulemaking, they must find ways to allocate their staff to the rulemaking effort and away from case adjudication responsibilities. The NLRB members can also make arrangements to borrow staff from the general counsel's side of the agency. Approximately 94.6% of NLRB staff work under the direction of the agency's general counsel.<sup>55</sup> By statute, the general counsel's operations and the NLRB members' operations must be kept separate, so borrowing staff requires explicit arrangements and agreements that assure this firewall on decisional matters is maintained.<sup>56</sup>

In addition to the challenges posed by the agency's structure, the NLRB's rulemakings have frequently been blocked by Congress or the courts, which likely has contributed to the agency's reluctance to pursue rulemaking.<sup>57</sup>

During the eight years of the Obama administration, the NLRB pursued two rulemakings—a rule requiring employers to post a notice informing workers of their NLRA rights, and rules designed to modernize and streamline the NLRB's long-standing representation election procedures.<sup>58</sup> The election rules were met with intense criticism from the corporate lobby and Republicans in Congress who held numerous oversight hearings and passed legislation (vetoed by President Obama) to overturn the rules.<sup>59</sup>

Business organizations also challenged the rulemakings in court. As a result, the notice posting rule was invalidated. However, the representation case procedures rule was upheld in two separate courts of appeals and remains in effect today, although the Trump board has indicated it intends to change the rules.<sup>60</sup>

Against this backdrop, it is clear that the current NLRB's efforts to undertake not one, but *five* separate rulemakings, is extraordinary and unprecedented. A closer look at the topics covered by rulemaking reveals that the Trump board is using rulemaking to advance an anti-worker agenda, not because rulemaking is the better way to approach the issue but because there are no cases pending at the NLRB to allow them to change the law through adjudication. Moreover, in at least two cases, the Trump board is pursuing change through rulemaking in an attempt to circumvent conflict-of-interest issues that are preventing Republican appointees from participating in decisions on cases presenting the issue. And

all of the NLRB’s proposed rules weaken workers’ rights—there are no proposals to strengthen workers’ rights to organize and engage in collective bargaining. In sum, the Trump board’s use of rulemaking is not “good government.” It is not benign. It is an unprecedented agenda-driven effort to selectively use rulemaking to undermine workers’ rights.

Each of the board’s announced rulemakings is discussed in greater detail below.

## 1. Joint-employer rulemaking

On September 14, 2018, the NLRB published a proposed rule to redefine the joint-employer standard under the NLRA.<sup>61</sup> Over the dissent of the two Democratic appointees to the NLRB, the Trump board proposed a rule that would overturn *Browning-Ferris* and return the board to its earlier, narrower test for finding joint-employer status. The Trump board’s proposed rule has been roundly criticized by unions, worker rights organizations, lawmakers, and scholars as being in conflict with the common law definitions of the employer-employee relationship (which the NLRB is supposed to follow), and for establishing a weaker joint-employer standard than exists under other labor and employment laws. Weakening the joint-employer definition in this manner has serious adverse consequences for working people. With so many workers now employed by temporary agencies and contractors, a weak joint-employer rule could potentially deprive these workers of the ability to bargain with the employer contracting for their services through an intermediary, who in most cases is the employer with ultimate control over wages, hours, and working conditions.

### **Trump NLRB proposed joint-employer rule would cost workers \$1.3 billion in lost wages annually**

Item number three on the U.S. Chamber of Commerce’s wish list is a “joint-employer” policy that enables employers to avoid responsibility and liability under the NLRA. The Trump board’s proposed joint-employer rule would do just that. EPI estimates that workers would lose \$1.3 billion in wages annually. This estimate is conservative because it is based off of Bureau of Labor Statistics data that relies on a self-reported survey of workers who work for contract and temporary help agencies. There is little doubt that this survey undercounts these workers. Establishment surveys—where the firm not the worker does the reporting—would likely provide a more accurate count of workers who are employed by multiple firms and would increase the estimate of lost wages by hundreds of millions of dollars.<sup>62</sup>

Several irregularities have come to light that call into question the process the Trump board has followed in pursuing the joint-employer rule.

First, it is clear that the Trump board is attempting to overturn *Browning-Ferris* by rulemaking rather than adjudication to avoid conflict-of-interest issues involving member Emanuel.<sup>63</sup> But it is not at all clear that reversing *Browning-Ferris* through rulemaking cures Emanuel’s conflict-of-interest issues. The ethics pledge requires that NLRB members not participate in any “particular matter involving specific parties” when the appointee’s former employer is or represents the party. The NLRB’s inspector general previously determined that the *Hy-Brand* decision was the same “particular matter” as *Browning-Ferris* because it involved precisely the same issue. The same is true with the joint-employer rulemaking—If the NLRB were to adopt the joint-employer rule, it would directly benefit Emanuel’s former firm’s client by overturning *Browning-Ferris*.

Second, business interests had secret and outsized influence in the development of the proposed rule. It was revealed through a Freedom of Information Act request that more than 30 corporate trade associations petitioned the NLRB to issue the rule. This fact was not revealed by the NLRB in its proposal. Because of this egregious omission and complaints from congressional oversight committees, among others, the NLRB twice extended the time for submitting comments on the proposed rules.<sup>64</sup>

Recently, another conflict of interest came to light through the work of congressional overseers. The NLRB has hired temporary employees through a contractor—Ardelle Associates—to review comments on the proposed joint-employer rule. Ardelle Associates is a member of two trade associations it uses to hire temporary employees and that filed comments opposing *Browning-Ferris* and supporting the joint-employer rule.<sup>65</sup>

## 2. Amendments to representation election rules

Within weeks of a Trump board being sworn into the NLRB and days before Chairman Phil Miscimarra’s term ended, the NLRB published a Request for Information seeking public input on whether the representation election rules issued by the NLRB on April 14, 2015, should be modified or rescinded.<sup>66</sup> The RFI was issued over the strong dissent of the Democratic appointees to the NLRB. In its spring regulatory agenda, the NLRB indicated the board will consider rulemaking on the board’s current representation case procedures, suggesting that a formal proposal is on the horizon.<sup>67</sup> This has not escaped the notice of the employer community. The SheppardMullin *Labor & Employment Law Blog* reported that “the NLRB will likely soon make modifications in the following substantive areas by APA rulemaking:... A change in the board’s Election procedures/timelines giving employer’s [sic] more time to react to and campaign against union representation.”<sup>68</sup>

## 3. Undermining fair elections and incumbent unions

On August 12, 2019, over the objection of Democratic NLRB member Lauren McFerran, the Trump board proposed three changes that undermine fair representation elections and incumbent unions.

- a. **Blocking charges.** The Trump board is proposing to change the NLRB’s long-standing “blocking charge” policy and to allow representation elections to proceed notwithstanding charges of employer interference with employee free choice. The NLRB’s long-standing practice has been to *not* hold an election when allegations are made that the employer has broken the law or interfered with workers’ free choice, because it wastes agency resources to hold elections that may be overturned because of the employer’s interference. But the Trump board has now proposed to conduct the elections and hold (impound) the ballots until the unfair labor practice or interference allegations are investigated.
- b. **Undermining voluntary recognition of unions.** The Trump board has also proposed to undermine the long-standing practice of employers voluntarily recognizing unions upon evidence that the union enjoys the support of a majority of employees. Under the Trump board’s proposal, employers who voluntarily recognize a union selected by a majority of their employees must post a notice about the recognition and give a 45-day period for employees to ask for an election (even though a majority of employees will have just indicated their support for the union). This proposal resuscitates an NLRB decision from the George W. Bush administration that was subsequently overturned during the Obama administration. As the dissenting Democratic member of the NLRB points out, requiring the 45-day notice is a waste of time and resources, because workers vote out their new union so rarely—in only 1.2% of cases.<sup>69</sup>
- c. **Undermining bargaining relationships in the construction industry.** Finally, the Trump board has proposed to undermine collective bargaining relationships in the construction industry by changing existing rules to allow for processing of election petitions when there is already a collective bargaining agreement in place between a construction employer and a construction union. The Trump board initially sought to impose this change through adjudication, but when the case presenting the issue was withdrawn, the Trump board elected to proceed through rulemaking instead—revealing how the Trump board is using rulemaking not because it is appropriate or a better vehicle, but to advance its anti-worker, anti-union agenda.

## 4. Student employees

On September 23, 2019, the Trump NLRB proposed a rule excluding students who work in connection with their studies from coverage under the NLRA. The proposed rule would deprive tens of thousands of teaching assistants and other student employees at private colleges of the right to bargain over pay, benefits, protections against sexual harassment, and other issues of concern. And again, the Trump board is proceeding through rulemaking not because it is the better or more appropriate means of addressing this issue, but because they believe it is the most expedient way of advancing their anti-worker, anti-union agenda.

The Trump board admitted as much in its proposed rule when it noted that it was proceeding through rulemaking because all of the cases presenting the issue of whether student workers are employees covered by the NLRA had been withdrawn, meaning that

the Trump board had no vehicle for denying student workers NLRA protections through adjudication.<sup>70</sup> Moreover, member Kaplan would have been recused from participating in at least one, and likely all, of the cases involving NLRA rights for private university student workers, because his wife is employed by Columbia University—one of the universities that had unsuccessfully challenged NLRA coverage of its student workers.<sup>71</sup> As with member Emanuel's conflicts relating to *Browning-Ferris*, it is not clear that member Kaplan's conflict-of-interest issues are cured by overruling *Columbia University* through rulemaking.<sup>72</sup>

## 5. Access to employer property

The NLRB has also announced that it intends to conduct rulemaking on standards for access to an employer's private property. It is unclear what new rules the Trump board might propose, particularly given the Trump board's extraordinary rollback of employees' access rights in the three recent decisions outlined above.

# Destroying the agency from within—the general counsel and Trump board's one-two punch

The NLRB has undergone several operational and structural reforms under the Trump administration. Despite an increase of workers joining the private-sector workforce, President Trump has proposed reducing the budget, the number of full-time employees, and the agency's capacity. These actions are detrimental to the mission of the NLRB, as it starves the agency of resources needed to serve workers.

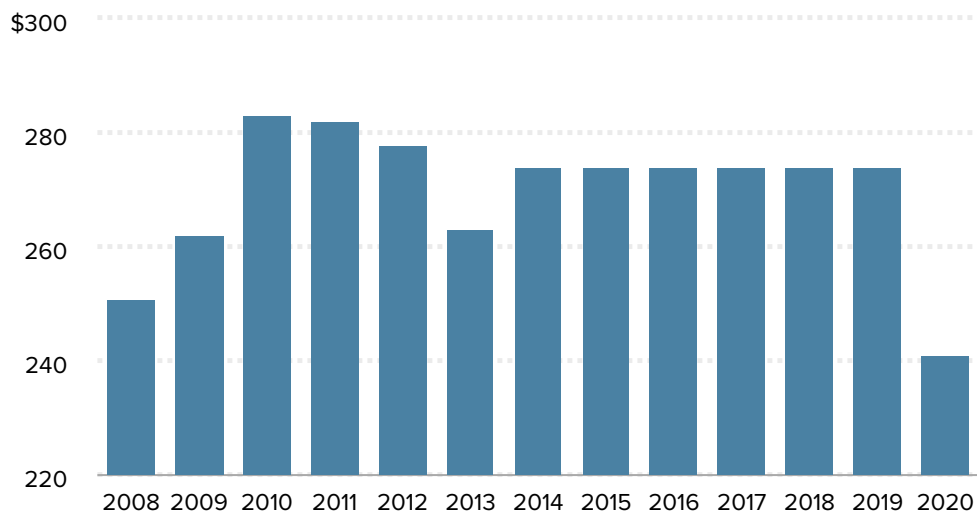
Since the start of the Trump administration, the NLRB's enacted budgets have remained level as the workforce has grown. As shown in **Figure B**, the NLRB budgetary levels have remained at \$274 million for the last six years. However, the Trump NLRB's proposed budget for FY2020 is \$241 million, an 11% decrease from the previous year. Furthermore, the Trump administration has drastically reduced the staffing levels of the agency.

Under the Trump administration, the number of full-time employees at the NLRB has declined. As shown in **Figure C**, the number of full-time employees at the NLRB dropped by 10% between the years 2017 and 2019. The NLRB's budget for fiscal year 2020 shows an even further decline with the request of just 1,280 full-time employees. If staffing levels for fiscal year 2020 are enacted, the number of full-time employees at the NLRB would have declined by 12% under President Trump. The reduction in overall staff includes a 17% decrease in field staff since the start of the Trump administration.<sup>73</sup>

These numbers are worrisome as millions of additional workers have entered the private-sector workforce. As shown in **Figure D**, NLRB staff are responsible for serving more workers than ever before. The number of private-sector workers per NLRB staff increased by 13% within the first year of the Trump administration. The Trump administration has put

Figure B

### Funding for the National Labor Relations Board, fiscal years 2008–2020 (in millions)

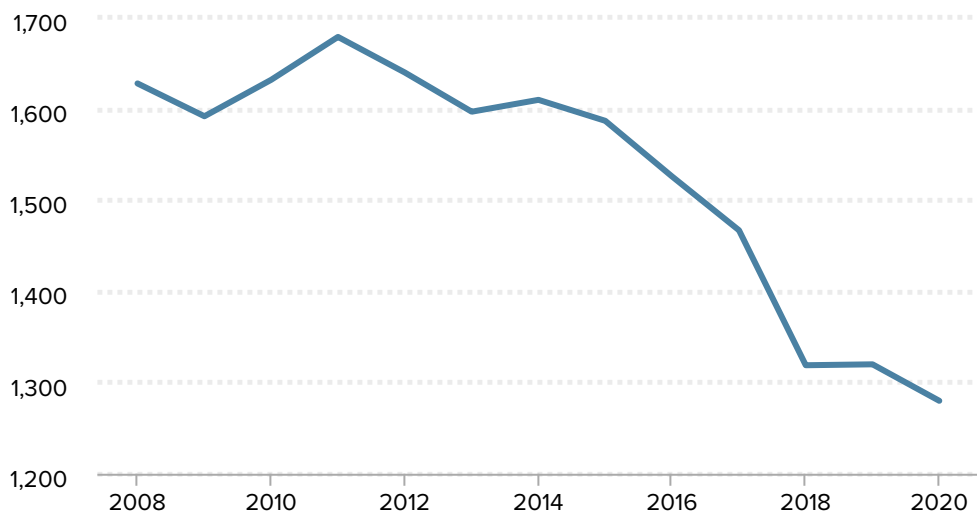


Source: National Labor Relations Board, *Performance Budget Justification* reports, fiscal years 2010–2020, downloadable from <https://www.nlr.gov/resources/performance-budget-justification>, accessed September 25, 2018

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Figure C

### Total full-time employees at the National Labor Relations Board, fiscal years 2008–2020



Source: National Labor Relations Board, *Performance Budget Justification* reports, fiscal years 2010–2020, downloadable from <https://www.nlr.gov/resources/performance-budget-justification>, accessed September 25, 2018

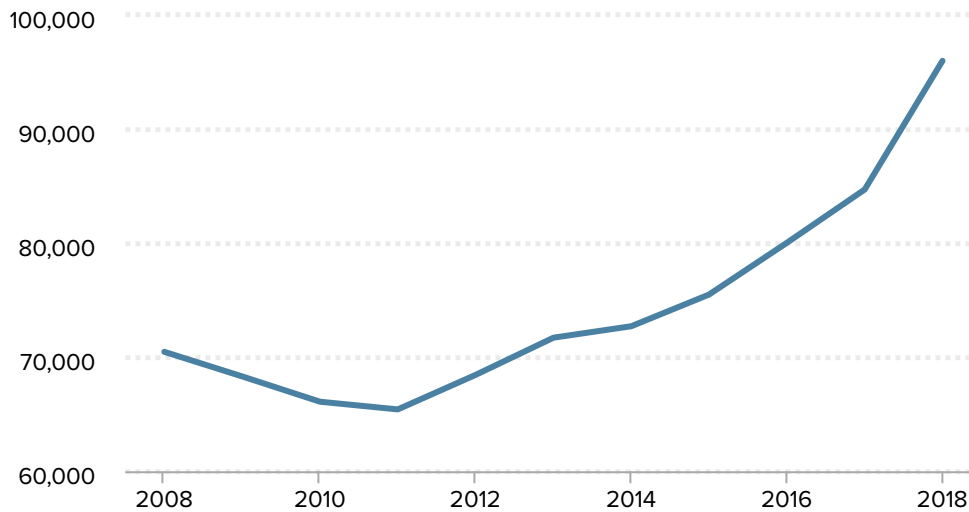
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further strain on staff and workers by shuttering several regional offices. These

Figure D

## The National Labor Relations Board (NLRB) is now responsible for far more workers than it was a decade ago

Number of private-sector workers per NLRB full-time employee, 2008–2018



**Source:** EPI calculations from National Labor Relations Board budget data on full-time employees from 2000–2018 and Current Employment Statistics survey data of private-sector employees from 2008–2018

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organizational and budget changes have had a demoralizing impact on career staff at the agency.<sup>74</sup>

The NLRB has regional and resident offices across the United States to help enforce workers' rights to organize and collectively bargain. At the time of publication, there are 26 regional offices, 9 sub-regional offices, and 12 resident offices to serve the millions of private-sector workers across the country. Of these offices, only 22 have full-time regional directors and 4 have acting regional directors.<sup>75</sup>

## Conclusion

The Trump NLRB has systematically rolled back workers' rights under the NLRA. The Trump board and GC have acted on 10 out of 10 of the Chamber of Commerce's wish list items and have gone even further to narrow the NLRA's protections for working people while granting employers new powers under the Act. These actions are at odds with the agency's statutory mission to protect and promote collective bargaining, and at odds with workers' desire for more of a collective voice in the workplace.

Congress has a responsibility to hold the Trump board and GC accountable for their actions. Through vigorous oversight, Congress can help ensure that the agency performs its statutory duties and that the board's deliberative process does not violate ethical

standards.

Further, policymakers must take action on legislative reform to restore and strengthen workers' rights to organize and collectively bargain. The Protecting the Right to Organize (PRO) Act, introduced by Rep. Bobby Scott (D-Va.) and Senator Patty Murray (D-Wash.), includes many critical reforms. The PRO Act will help ensure that workers' have a meaningful right to organize and bargain collectively by streamlining the process when workers form a union, bolstering their chances of success at negotiating a first agreement, and holding employers accountable when they violate workers' rights. The PRO Act addresses some of the damage inflicted by the Trump board, including remedying the Trump board's proposed joint-employer standard and the Trump board's toleration of misclassification, and the PRO Act restores a meaningful right to strike. Unfortunately, the damage caused by the Trump board continues to mount, so additional legislative measures will be needed to undo the damage and restore workers' rights to join together and bargain for a better life.

## About the authors

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## Endnotes

1. In this report, "Trump NLRB" or "Trump board" refers to decisions and actions by President Donald Trump's Republican appointees to the NLRB. At least two of Trump's appointees participated in each of the decisions described in this report, in some cases joining Republican Phil Miscimarra, a holdover appointee who was designated NLRB Chairman by President Trump, in their decisions. "Trump NLRB" does not refer to Democratic NLRB member Lauren McFerran, whose term expires in December 2019, or former Democratic NLRB member (and Chairman) Mark Pearce, whose term expired in August 2018, because McFerran and Pearce have dissented regularly and strongly from the decisions of the Trump board.
2. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169).
3. Josh Bivens et al., *How Today's Unions Help Working People: Giving Workers the Power to Improve Their Jobs and Unrig the Economy*, Economic Policy Institute, August 2017.
4. United States Census Bureau, "American Community Survey Provides New State and Local



- [Income, Poverty and Health Insurance Statistics](#)” (press release), September 26, 2019.
5. Lawrence Mishel and Julia Wolfe, [CEO Compensation Has Grown 940% since 1978: Typical Worker Compensation Has Risen Only 12% during That Time](#), Economic Policy Institute, August 14, 2019.
  6. Lawrence Mishel and Julia Wolfe, [Top 1.0 Percent Reaches Highest Wages Ever—Up 157 Percent since 1979](#), *Working Economics* (Economics Policy Institute blog), October 18, 2018.
  7. Thomas Kochan et al., [“Voice Gaps at Work, Options for Closing Them, and Challenges for Future Actions and Research,”](#) MIT Sloan School of Management, Institute for Work and Employment Research working paper, June 2018.
  8. Jeffrey M. Jones, [“As Labor Day Turns 125, Union Approval Near 50-Year High,”](#) Gallup website, August 28, 2019.
  9. 29 U.S.C. § 153.
  10. Executive Order 13770, [“Ethics Commitments by Executive Branch Appointees,”](#) 82 Fed. Reg. 9333, January 28, 2017.
  11. National Labor Relations Board, Office of Inspector General, [Memorandum, Subject: Notification of a Serious and Flagrant Problem and/or Deficiency in the Board’s Administration of Its Deliberative Process and the National Labor Relations Act with Respect to the Deliberation of a Particular Matter](#), February 9, 2018.
  12. *Id.*, p. 4.
  13. *Id.*, p. 5.
  14. National Labor Relations Board, Office of Public Affairs, [“Board Vacates Hy-Brand Decision”](#) (press release), February 26, 2018.
  15. This report does not describe all of the board’s decisions since the Republicans gained a majority on the board, but rather focuses on the decisions in which the Trump board has overturned precedent and created new employer-friendly rules.
  16. See member McFerran’s dissent in *Johnson Controls, Inc.*, 368 NLRB No. 20, fn. 25, and cases listed therein. See also *Bexar County Performing Arts Center Foundation*, 368 NLRB No. 46, fn. 2, and cases listed therein.
  17. *UPMC*, 368 NLRB No. 2 (2019); *Kroger Limited Partnership*, 368 NLRB No. 64 (2019); *Bexar County Performing Arts Center Foundation*, 368 NLRB No. 46 (2019).
  18. *Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts and Local 23, American Federation of Musicians*.
  19. *Kroger Limited Partnership*, 368 NLRB No. 64 (2019).
  20. *UPMC*, 368 NLRB No. 2 (2019).
  21. 29 U.S.C. § 159(a).
  22. Andrew Strom, [“So Much for the Concern About ‘Micro-Units,’”](#) *OnLabor* blog, March 7, 2019.
  23. [Workforce Democracy and Fairness Act](#), H.R. 3094, 112th Cong. (2011).

24. *PCC Structural, Inc.*, 365 NLRB No. 160 (2017), at 15 (dissent).
25. *MV Transportation, Inc.*, 368 NLRB No. 66 (2019), at 25 (member McFerran, dissenting).
26. *MV Transportation, Inc.*, 368 NLRB No. 66 (2019).
27. *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017).
28. Lalith de Silva et al., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, U.S. Department of Labor, Employment and Training Division by Planmatics, Inc., February 2000.
29. *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019).
30. Lawrence Mishel and Celine McNicholas, *Uber Drivers Are Not Entrepreneurs: NLRB General Counsel Ignores the Realities of Driving for Uber*, Economic Policy Institute, September 20, 2019 (explaining how the Trump board's SuperShuttle decision conflicts with the common law test).
31. National Labor Relations Board, Office of the General Counsel, *Advice Memorandum, Subject: Uber Technologies Cases 13-CA-163062 et al.*, April 16, 2019.
32. The NLRB has also asked for amicus briefs on the question of whether the NLRB should use its discretion and decline to exercise jurisdiction over charter schools. See *KIPP Academy Charter School, 02-RD-191760*, Notice and Invitation to File Briefs (Feb. 4, 2019). The NLRB's decision could significantly impact the ability of charter school teachers to organize and engage in collective bargaining.
33. *Velox Express, Inc.*, 368 NLRB No. 61 (2019).
34. *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019). Further, the Trump GC is urging the NLRB to further weaken the law on what constitutes protected activity.
35. *Walmart Stores, Inc.*, 368 NLRB No. 24 (July 25, 2019), member McFerran dissent quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 235 (1963).
36. *Electrolux Home Products, Inc.*, 368 NLRB No. 34, at 9 (member McFerran, dissenting) (2019).
37. *Boeing*, 365 NLRB No. 154 (2017).
38. *Browning-Ferris*, 362 NLRB No. 186 (2015). The NLRB's *Browning-Ferris* decision was upheld by the U.S. Court of Appeals for the D.C. Circuit in December 2018.
39. The legal issue in *Hy-Brand* was whether two entities were so closely intertwined that they actually constituted a single employer. The administrative law judge had determined that the companies were a single employer, and that was the issue in the case before the NLRB. Nevertheless, the Trump board used *Hy-Brand* to overturn *Browning-Ferris*.
40. Definition of Joint Employer, 83 Fed. Reg. 46681–46697 (September 14, 2018).
41. Robb issued a memo on December 1, 2017, within two weeks of being sworn into the general counsel's job, directing regions to notify him of cases that presented the opportunity to urge the NLRB to reverse Obama-era precedent. See GC Memorandum 18-02 (December 1, 2017).
42. *Sheet Metal Workers International Association, Local 15 (Brandon Regional Medical Center)*, 356 NLRB 1290 (2011).

43. See, e.g., *Construction & General Building Laborers' Local 79 (Mannix Family Market)*, Case 29-CC-241297 (complaint alleging that Scabby the Rat violates secondary boycott restrictions); *IBEW Local 98 (Fairfield Inn)*, Case 04-CC-223346 (brief arguing that inflatable rats and bullhorns violate secondary boycott restrictions); *IUOE Local 150 (Donegal Services, LLC)*, Cases 13-CP-227526 et al. (cases arguing that inflatable rats and banners violate secondary boycott restrictions); *BAC (Madison Throop)*, Cases 13-CC-236063 et al. (same); *IBEW Local 134*, Case 13-CC-225655 (same).
44. *NLRB v. Construction & General Building Laborers' Local 79*, Case 19-CV-3496 (July 1, 2019).
45. Answering Brief of the General Counsel, *Tarlton and Son, Inc.*, Case 32-CA-119054 (February 26, 2019). Robb asserts that his position is in keeping with the Supreme Court's decision in *Epic Systems*, but nothing in *Epic Systems* suggests that employers may lawfully retaliate against workers for filing group legal claims.
46. Brief in Support of Exceptions, *Pfizer, Inc.*, Case 10-CA-175850 (March 21, 2019).
47. Brief for the General Counsel, *Caesars Entertainment Corp.*, Case 28-CA-060841.
48. See supra at 6-7 (prior discussion of imbalance between employer and union workplace communications).
49. GC 19-01, GC's Instructions Regarding Section 8(b)(1)(A) Duty of Fair Representation Charges.
50. See *United Nurses and Allied Professionals*, 367 NLRB No. 94 (2019) (lobbying expenses not chargeable); GC Memorandum 19-04 (advocating for new rules on Beck notices).
51. Robert Iafolla, "Trump's Top Labor Lawyer Seeking Pro-Union Findings to Overturn," *Bloomberg Law*, May 2, 2019. (Robb "is on pace this fiscal year to revive seven times more unfair labor practice cases that were brought against unions than against employers.")
52. Heidi Shierholz, "Testimony for Hearing on Regulatory Reform," testimony before the U.S. House of Representatives Committee on Education and the Workforce, Subcommittee on Workforce Protections, May 23, 2018.
53. 5 U.S.C. § 551 et seq.
54. *NLRB v. Bell Aerospace Co.*, 416 US 267 (1974).
55. National Labor Relations Board (NLRB), *Performance Budget Justification 2020*, accessed October 4, 2019.
56. In addition, the agency is prohibited by statute from employing economists. 29 U.S.C. § 154(a). This historical relic inflicts an unnecessary and significant obstacle to the NLRB undertaking the sorts of research and analysis it would likely want to understand and justify any proposed rules.
57. In the 1980s, the board set out to do rulemaking to implement the U.S. Supreme Court's decision in *Communication Workers of America v. Beck*. In part because of the capacity issues described above, the appointees could not complete the rulemaking during the Bush administration, and at the beginning of the Clinton administration the proposal was withdrawn. A few years later, the NLRB attempted to pursue rulemaking to establish a presumption that a bargaining unit at a single location was appropriate. This rule would have spared the NLRB from holding lengthy hearings and collecting extensive evidence on what is typically a straightforward issue when workers file a petition for a representation election. The NLRB was attacked by Republicans in Congress over the proposal, who held oversight hearings and included riders on the NLRB's appropriations for

several years prohibiting the NLRB from publishing a final rule. In the face of this opposition, **the proposed rule was withdrawn.**

- Jeffrey S. Lubbers. "The Potential of Rulemaking by the NLRB." *FIU Law Review* 5, no. 2 (Spring 2010): 411-436. <https://ecollections.law.fiu.edu/lawreview/vol5/iss2/10/>
58. The election rules were issued twice, after a court invalidated the first rules due to a technicality.
  59. National Labor Relations Board Union Election Rule, S. J. Res. 8, 114th Cong. (2015).
  60. National Labor Relations Board (NLRB), "**NLRB Rulemaking Agenda Announced**" (press release), May 22, 2019.
  61. Definition of Joint Employer, 83 Fed. Reg. 46681–46697 (September 14, 2018).
  62. Celine McNicholas and Heidi Shierholz, "**EPI Comments Regarding the Standard for Determining Joint-Employer Status**," Comments submitted to National Labor Relations Board, December 10, 2018.
  63. National Labor Relations Board, Office of Inspector General, **Memorandum, Subject: Notification of a Serious and Flagrant Problem and/or Deficiency in the Board's Administration of Its Deliberative Process and the National Labor Relations Act with Respect to the Deliberation of a Particular Matter**, February 9, 2018.
  64. **The Standard for Determining Joint-Employer Status; Extension of Comment Period**, 83 Fed. Reg. 64053 (December 13, 2018).
  65. Ian MacDougall, "**Trump's NLRB, Trying to Cut Protections for Millions of Temps and Fast-Food Workers, Trips Up Again**," *ProPublica*, September 16, 2019.
  66. Representation-Case Procedures, 82 Fed. Reg. 58783–58790 (December 14, 2017).
  67. Chairman Ring recently gave a speech indicating that new rules would be proposed "in the coming months." See Chris Opfer, "**Labor Board to Continue Tinkering With Union Election Rules (1)**," *Bloomberg Law*," October 7, 2019.
  68. Keahn Morris, John Bolesta, and James Hays, "Breaking with Tradition, the Current NLRB Is on a Rulemaking Tear: Election Procedures, Recognition Bar, and 9(a) Collective Bargaining Relationships," *SheppardMullin Labor & Employment Law Blog*, August 13, 2019.
  69. 84 Fed. Reg. 39950 (August 12, 2019), citing *Lamons Gasket*, 357 NLRB at 742.
  70. 84 Fed. Reg. 49694 (September 23, 2019).
  71. <https://columbiagradunion.org/app/uploads/Kaplan.-Marvin-E.-AMENDMENTEA-20170717.pdf>
  72. See supra 4-5.
  73. Ian Kullgren, "**NLRB Loses Field Staff**," *Political Pro*, April 1, 2019.
  74. *Id.*
  75. National Labor Relations Board, n.d. "Regional Offices" (web page). Accessed October 4, 2019.