

Donald Trump, Union Buster

The president's appointees to the National Labor Relations Board have already incinerated Obama's labor legacy.

By Mark Joseph Stern



U.S. President Donald Trump delivers remarks at a graduation ceremony at the FBI Academy on the grounds of Marine Corps Base Quantico in Quantico, Virginia, on Friday.

Jonathan Ernst/Reuters

The National Labor Relations Board is an independent agency **tasked with** “encouraging the practice and procedure of collective bargaining.” Under the Trump administration, however, it appears to have adopted a new mission: to incinerate every Obama-era rule as quickly as possible.



MARK JOSEPH STERN

Last week, the NLRB issued a staggering **five decisions** overturning union-friendly rules that the agency had either enacted or strengthened under President Barack Obama. Stacked with a majority of Republican appointees, the board scrapped policies that helped smaller unions organize, bolstered the bargaining rights of franchise employees, and shielded workers from union-busting tactics. And that's just the start: The board's new Trump-appointed general counsel, Peter Robb, has **announced** that he will move to reverse many more Obama-era decisions. This raid on precedent is extremely unusual for an independent agency. It's also fairly predictable. The Trump administration is engaged in a **full-fledged legal assault on unions** that's poised to wreak havoc on collective bargaining.

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Beyond the long-term goal of upending labor law to favor employers, the NLRB has a short-term reason for its anti-union blitz. In August and September, Senate Republicans confirmed **Trump's two nominees** to the five-member board. These new members, who will each serve a five-year term, joined Philip Miscimarra, a Republican whom Trump had previously chosen as chairman, to create a GOP majority. But Miscimarra's own five-year term was set to **end on Dec. 16**. After he stepped down, the board would be deadlocked 2-2 until Trump elevated another nominee (which he'll do at some point in 2018). The NLRB's Republicans thus had a three-month window to immolate their Democratic predecessors' jurisprudence.

So, with startling speed, the GOP majority laid waste to the decisions that refocused the agency on workers' rights under Obama. First, the board **overturned** a 2016 decision requiring settlements to provide a "full remedy" to aggrieved workers. Second, the board **reversed** a 2004 decision bolstering workers' rights to organize free from unlawful employer interference. Third, the board **overturned** a watershed 2015 decision holding employers responsible for bargaining with workers if they have indirect control over those workers' employment or have the ability to exercise control. Fourth, the board **reversed** a 2016 decision safeguarding unionized workers' rights to bargain over changes in employment terms. Fifth, the board **overturned** another 2011 decision protecting the prerogative of a group of employees within a larger company to form a bargaining unit.

All of these rulings were issued in one week—the last week of Miscimarra’s term. Each of them was a 3–2 decision, with Republicans in the majority and Democrats dissenting.

Taken together, this spate of decisions will hinder millions of employees’ abilities to unionize and bargain collectively.

One group of workers will be particularly hard hit by the most indefensible and consequential of these rulings: **fast-food workers**. The 2015 ruling on joint employers likely would’ve revolutionized collective bargaining in the fast-food industry. Fast-food companies like McDonald’s license franchisees to run most of their restaurants. McDonald’s instructs these franchisees on how to operate but leaves them to control many aspects of their day-to-day business. For decades, franchise employees who wished to bargain collectively were caught in a catch-22. Their boss, the franchise operator, could insist that McDonald’s controlled the terms of their employment. But if they tried to bargain with McDonald’s, the company would insist that the franchise operator was their true employer.

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The Obama-era NLRB solved this problem by **clarifying** that companies like McDonald’s are, jointly with franchise operators, employers of these workers. The board held that an employer can be forced to the bargaining table if it exercises “indirect control” over working conditions or if it has the unexercised authority to exert direct control. This new standard allowed unionized employees to negotiate over terms of employment imposed by the company itself, not just those established by their direct supervisors. It would’ve permitted much more meaningful collective bargaining among millions of low-wage workers.

But on Thursday, the NLRB’s GOP majority scrapped this standard, returning to an old, stringent policy that requires employers to exercise “immediate and direct” control in order to be liable under labor law. What’s remarkable here is that it did so in a case that *did not even involve* a dispute over the correct standard. In an unexpected move, the Republican majority simply decided to throw out the 2015 precedent because it (briefly) had the votes to do so. This is not how NLRB jurisprudence typically develops.

In a scathing dissent, the two Democratic board members essentially accused their Republican colleagues of breaking the law. Under the Administrative Procedure Act, which governs federal agencies, the NLRB **must fashion rules** through a process that is both “logical and rational.” To meet this requirement, the NLRB usually **invites the public**

to comment on proposed rules through amicus briefs. The NLRB is especially careful to invite amicus briefing when mulling changes as monumental as this one, which affects innumerable Americans' bargaining rights. Yet the board did no such thing in this case. The Democratic dissenters argued that their colleagues' "failure to engage in the reasoned decision-making required of administrative agencies" violates the APA. (APA-based challenges to NLRB rulings rarely succeed because courts traditionally defer to the board's decisions.)

Another one of the past week's decisions undercuts employees' ability to form small unions within nonunion companies—cosmetic and perfume department workers, for instance, have created their own unit within Macy's. The Obama-era rule, issued in 2011, prevented businesses from busting these "micro-units" by demanding that they include more employees. Eight federal appeals courts have **affirmed** this policy. Now the NLRB has abruptly scrapped it—apparently because three board members do not personally like it.

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Given that this Supreme Court is **extraordinarily hostile** to unions, it's difficult to see the conservative justices blocking any of the NLRB's employer-friendly changes. Moreover, the court **generally defers** to the board's interpretation of law, so while it would've upheld most (if not all) of the Obama-era rules, it will also affirm the Trump-era reversals. That's bad news for workers, because the past week's barrage is only the beginning of the board's revolution. The NLRB's new general counsel, Trump appointee Peter B. Robb, **issued a memo** in December asking regional officers to flag disputes that involved cases handed down "over the last eight years that overruled precedent and involved one or more dissents." With startling candor, this memo telegraphs Robb's desire to overturn Obama-era precedents.

Top Comment

Anyway, just received good news from the Mayo Clinic like five minutes ago. Had to tell someone.
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In early 2018, Trump will appoint another Republican to the board, cementing the GOP majority. In anticipation of that appointment, the NLRB has already **solicited public comment** on a proposal to abolish yet another Obama-era rule allowing workers to unionize through a speedy election. (The board did not solicit comments in any of the cases handed down last week.) The current rule minimizes the amount of time employers can spend dissuading workers from unionizing; by rescinding it, the board will let employers drag out elections and subvert attempts to organize. Since Robb is openly collecting Obama-era precedents to overturn, more reversals will surely follow this one. For instance, one Trump appointee has already **signaled his desire** to overturn a landmark Obama-era decision permitting **graduate students to unionize**.

The NLRB was not designed to veer wildly when the presidency changes hands. Congress **directed the agency** to protect “the exercise by workers of full freedom of association” and “self- organization.” Although conservatives often accused Obama’s NLRB appointees of stretching the law, each of their decisions explicitly advanced this founding mission. Trump’s appointees, by contrast, are contracting the law in a manner that’s utterly incongruous with the policy of the board as prescribed by Congress. All indications are that they’ll succeed in this partisan mission, and American workers will pay the price.

One more thing

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