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Before the U.S. House of Representatives Committee on Education and Workforce

Field Hearing: "Workers in Charge: Restoring Choice and Accountability in the Workplace"

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I. Introduction

Chairman Walberg, Ranking Member Scott, and Members of the Committee, thank you for inviting me to testify, and for holding this hearing in Charlotte.

I have practiced labor and employment law since 2008. I am a shareholder at the international law firm Ogletree Deakins and serve on the steering committee of the firm's traditional labor practice. On the labor side, I represent employers in organizing campaigns, representation elections, unfair labor practice cases, and contract negotiations. I also do a good deal of employment work, including managing discrimination and retaliation claims, wage-and-hour issues, leave, and the policies that govern day-to-day life in the workplace.

I mention the employment side of my practice because it gives me a perspective about the labor issues I'm here to discuss today. Of all the areas I work in, traditional labor law is the one where the rules shift the most commonly. Since I started practicing, I have counseled employers through several reversals of National Labor Relations Board ("NLRB" or "Board") precedent and NLRB guidance on the same issues, sometimes helping employers manage through ping-ponging multiple times on the same issue in a short time span. Simply put, this constant policy oscillation creates confusion and uncertainty for employers and makes it harder for them to maintain or grow their businesses, which has obvious negative impacts for their employees. This is what I would like to talk about today.

I do not intend to testify about any particular bills, but I would like to discuss what employers and employees need from the law that governs their relationship: rules that make sense, that are clear enough to follow, and that will still be the rules a few years from now.

II. Why Labor Law Feels Different

When I advise a client on federal discrimination or wage and hour laws, I can usually tell them where the law is today and where it is likely to go in the future, if at all. Yes, the guidance in those areas does change, but it typically changes through legislation, rulemaking, or a gradual shift over time in court decisions. There is time to prepare, to adjust, to train leaders and non-management employees when appropriate.

The National Labor Relations Act ("NLRA") has not been amended for decades. Its real-world practical impact generally comes from two places: first, guidance memoranda issued by the

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NLRB's General Counsel, which tell the various Regional Offices throughout the country which cases to pursue and what theories to advance, and, second, decisions of the Board, which has long been willing to overrule its own precedent when its membership changes. Both sources of guidance shift with each new Administration.

Courts are now adding another layer. Since the Supreme Court ended *Chevron* deference in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), reviewing courts no longer defer to the Board's reading of the Act simply because it is reasonable. In July 2026, for example, the D.C. Circuit relied on *Loper Bright* to strike down the Board's successor-bar doctrine. *Hospital Menonita de Guayama, Inc. v. NLRB* (D.C. Cir. July 21, 2026). But under its longstanding policy of non-acquiescence, the Board generally continues to apply its own precedent outside the circuit that ruled against it unless and until the Supreme Court weighs in. The result is that the same rule can apply differently depending on where an employer sits. This adds to the uncertainty employers, unions, and employees live with.

The last two years are a good example. In February 2025, the NLRB's Acting General Counsel rescinded 29 memoranda issued by his predecessor. The Board then went most of a year without a quorum. It regained one in January 2026 and has had a functional Republican majority since August. In February and August of this year, General Counsel Crystal Carey issued guidance that changed enforcement priorities and identified a long list of Board decisions she will ask the Board to overrule.

Many of my clients are glad to see that. I understand why. But I would be making the same point if the shift were running the other way. A memorandum from one General Counsel can be withdrawn by the next one, and a decision from one Board majority can be undone by the next majority. What would be best for employers, employees, and unions alike, more than any particular result or outcome, are rules that are clear and that they can count on existing for more than a year or two.

This is not some esoteric legal point. Every time the law moves, the compliance work has to start over. In the context of rules about policies and handbooks, for example, employers have to rewrite their policies. Supervisors have to get retrained. When the rules about who an employer of a group of employees is changes, contracts with franchisees, staffing agencies, and subcontractors have to get reopened. An employer's position or decision that was entirely legally appropriate when a charge was filed can be wrong by the time the case is decided, because the Board often retroactively applies a new standard to conduct that happened under the old one.

Large companies with in-house labor lawyers can manage this, although it is expensive and it is also disruptive. Smaller businesses have a much harder time. They often learn about a change only after they are on the wrong side of it.

In my opinion, employees feel it too. It is hard to fully appreciate and know your rights, whether you want to organize, choose not to, or simply raise a concern about working conditions, when the rules keep changing. Unions face the same uncertainty. Over time, people begin to believe that outcomes depend on who is in office rather than on what the law says. That undermines trust in the institutions and the laws that Congress creates and enacts.

III. Where Clear Rules Would Help Most

A. Union Elections

As a labor lawyer, I often say during manager training that the choice about whether someone wants to be represented by a union is one of the most important choices an employee has the ability to make about their job. The way our processes work in the United States, when a union is certified, it represents everyone in the unit, including employees who voted against it and those who did not vote at all, and the employer can no longer deal with those employees directly on wages, hours, and working conditions. 29 U.S.C. § 159(a).

For roughly fifty years, an employer presented with a union's claim of majority support, usually based on signed authorization cards, could ask for a secret-ballot election conducted by the Board. *Linden Lumber Div., Summer & Co.*, 190 NLRB 718 (1971). In 2023, the Board changed that. Under *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023), an employer that receives a recognition demand must recognize the union without an election or promptly file its own petition, and certain unfair labor practices during that period can result in an order to bargain without a valid election result.

Since then, the picture has only gotten more complicated. In March 2026, the Board declined an opportunity to revisit *Cemex*. That same month, the Sixth Circuit became the first court of appeals to reject the decision. A month later, the Ninth Circuit upheld the bargaining order in *Cemex* itself without deciding whether the new framework is valid. The General Counsel has now said she will ask the Board to overrule it. This is, to use a highly technical term, a mess.

I believe the secret ballot is the right way for employees to choose to be represented or not to be. It lets each employee decide privately, after hearing from the union and the employer, without anyone looking over their shoulder. I would encourage the Committee to take steps to ensure that employees always have access to secret ballot elections – this is the best mechanism to protect the integrity of the NLRA election process, the rights of employees, and the rights of employers. But whatever the Committee thinks the right process is, employees and employers should be able to know what it will be next year and the year after that.

The rule for counting votes deserve a closer look too. Section 9(a) says a union becomes the representative when it is selected "by the majority of the employees in a unit." 29 U.S.C. § 159(a). Since *R.C.A. Manufacturing Co.* in 1936, however, the Board has certified unions based on a majority of the votes cast, not a majority of the unit. A representation case now pending before the Board shows how the rule plays out today. In a unit of 181 employees, the union won by a count of 87 votes to 73 votes. But 87 employees is fewer than half of the full 181-person unit; a true majority would have required 91 votes. The employer has asked the Board to revisit the votes-cast rule, pointing out, among other things, that card-based recognition already requires support from a majority of the whole unit, and arguing that the Act's text does not support different standards for the two. I take no position on how the Board should decide that case. But it is a fair question why a union can be recognized with cards only if a majority of the unit signs, yet when an election is held a true majority of a unit is not the deciding test.

Whatever the answer, it should come from the statute and stay put. When a decision binds an entire workforce, employees and employers alike should be able to understand, in advance, what it takes to make that decision.

B. Workplace Rules

Nearly every employer has a handbook. It covers things like civility, confidentiality, use of company equipment, recording in the workplace, and harassment. Many of those policies are there because other laws effectively require them. An employer without a clear anti-harassment policy, for example, is in a weak position under federal anti-discrimination law.

The NLRA standard for judging those same policies has changed twice since 2004. When I began practicing, under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the question was whether employees would reasonably read a rule to restrict protected activity. *The Boeing Co.*, 365 NLRB No. 154 (2017) decision replaced that test with one that weighed a rule's effect on employees against the employer's reasons for having it. Then in *Stericycle, Inc.*, 372 NLRB No. 113 (2023), the NLRB went back the other way and told employers to view their rules through the eyes of an economically dependent employee. The General Counsel has now asked the Board to overrule *Stericycle* and return to *Boeing*.

When these standards change, they often create significant ambiguity and interpretive issues about how any given policy is going to be viewed. Employers have to take their best shot at modifying policies or risk running afoul of the Act.

Employers would generally prefer a common-sense and consistent approach to assessing the validity of workplace rules under the NLRA. In my view, that means protecting employees' right to talk about pay and working conditions, while at the same time giving weight to the legitimate reasons employers have for their policies, looking at how a rule is actually applied, and reconciling the NLRA with other federal laws and guidance. A standard like that protects employees and gives employers something they can follow.

C. Joint-Employer Status

Who counts as the employer of an employee is a basic but fundamental question, and for a long time it had a fairly settled answer. For about thirty years, a business was a joint employer only if it shared or codetermined the essential terms and conditions of another company's employees through direct and immediate control. *TLI, Inc.*, 271 NLRB 798 (1984); *Laerco Transportation*, 269 NLRB 324 (1984). It was a long-standing standard that people understood and could apply pretty consistently.

That changed in 2015, when *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), extended joint-employer status to businesses with reserved or indirect control. A 2020 rule brought back a direct-control test. A 2023 rule broadened the standard again. Congress passed a resolution disapproving the 2023 rule, which was vetoed, and a federal court vacated the rule in March 2024 before it took effect. *Chamber of Commerce v. NLRB*, 723 F. Supp. 3d 498 (E.D. Tex. 2024). The Board formally put the 2020 rule back into its regulations in February 2026.

Franchisors, franchisees, staffing agencies, contractors, and their customers all write their agreements around whatever test is in effect. When the test changes, those agreements have to get renegotiated. It's unnecessary friction. Employees have a stake in this process as well. They are entitled to know who their employer is and who is responsible for their pay and working conditions. A test tied to actual control answers that question for everyone. The most common question I get on this issue now is how long the current rule will last.

D. The Same Pattern Elsewhere

These are not the only examples. Another recent example is the set of rules around mandatory employee meetings. For more than seventy-five years, longer than most of us have been alive, employers could hold mandatory meetings to share their truthful views on unionization. *Babcock & Wilcox Co.*, 77 NLRB 577 (1948). In 2024, the Board prohibited this practice. *Amazon.com Services LLC*, 373 NLRB No. 136 (2024). The General Counsel now wants the Board to go back to the old rule. At the same time, some states have passed their own bans, so an employer with locations in several states may be working under different rules in different places. As another example, the standard for dress codes and union insignia changed in 2019, changed again in *Tesla, Inc.*, 371 NLRB No. 131 (2022), and has since been rejected by a circuit court.

None of these shifts happened because workplaces changed. They happened largely because the people deciding the cases changed.

IV. A Caution on Binding Arbitration

Durability is also the reason I want to say a word about proposals to impose binding arbitration when an employer and a newly certified union cannot reach a first contract. I am not here to address any particular bill, but the concept deserves serious and close scrutiny. The Act requires the parties to bargain in good faith, but it has never required either side to agree on a contract itself or any specific terms. Section 8(d) says that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession," 29 U.S.C. § 158(d), and the Supreme Court has held that the Board may not compel a party to agree to any substantive contract term. *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

Binding arbitration would reverse that principle. An outside arbitrator would set wages, benefits, and working conditions for a period of years, on terms neither side agreed to, for a workforce that may never have seen or ratified them. If a third party will decide the outcome, each side may have a reason to hold to its best position during bargaining and wait for the arbitrator rather than compromise. The arbitrator also does not have to live with the outcome the way the parties do. That matters, because an arbitrator may land on terms that make sense to no one. Smaller employers, which have the least room to absorb a bad result, would carry the most risk.

It would also add another source of instability. Arbitration awards are not precedent, and it would be difficult to predict in advance what a first contract would look like. That is the opposite of the clear, stable rules I am asking the Committee to value.

V. Conclusion

The employers we work with want to do the right thing. They want to treat employees fairly, and they want employees to enjoy coming to work. In the labor arena, we should all be able to align on some common-sense propositions: the rules should be clear and make sense, they should protect employees' rights, they should account for the realities of running a business, and, most importantly, they should provide stability, staying in place long enough for stakeholders to plan around.

I would encourage the Committee to think about how the core standards governing elections, workplace rules, and employer status can be made more durable, so they no longer turn over with

each Administration. One practical step is within the Board's own hands: using notice-and-comment rulemaking, as it has done on joint-employer status, rather than relying on adjudication and guidance memoranda alone. Rules adopted that way can still change, but only after public notice and an opportunity to be heard, which makes change slower, more transparent, and more predictable. Clearer statutory text is a choice for Congress, and I leave that to the Committee. Thank you. I look forward to your questions.