

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 22-04

April 7, 2022

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: The Right to Refrain from Captive Audience and other Mandatory Meetings

In workplaces across America, employers routinely hold mandatory meetings in which employees are forced to listen to employer speech concerning the exercise of their statutory labor rights, especially during organizing campaigns. As I explain below, those meetings inherently involve an unlawful threat that employees will be disciplined or suffer other reprisals if they exercise their protected right not to listen to such speech. I believe that the NLRB case precedent, which has tolerated such meetings, is at odds with fundamental labor-law principles, our statutory language, and our congressional mandate. Based thereon, I plan to urge the Board to reconsider such precedent and find mandatory meetings of this sort unlawful.

Section 7 of the National Labor Relations Act promises employees the right to engage in—and to refrain from engaging in—a wide range of protected activities at work.¹ Section 8(a)(1) of the Act bars employers from interfering with employees' choice of whether and how to exercise those rights.² In carrying out its duty to ensure that employers do not unlawfully impair employee choice in that regard, the Board must keep in mind the basic "inequality of bargaining power" between individual employees and their employers, as well as employees' economic dependence on their employers.³

¹ Section 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. It also provides employees with "the right to refrain from any or all of such activities." *Id.*

² Section 8(a)(1) makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1).

³ Section 1, 29 U.S.C. § 151. In addition, the Supreme Court has instructed that employer actions should be evaluated from the perspective of employees who are in a position of "economic dependence" and necessarily pick up threatening implications "that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

Over 75 years ago, the Board recognized that the Act protects employees' right to listen as well as their right to refrain from listening to employer speech concerning the exercise of their Section 7 rights.⁴ Forcing employees to listen to such employer speech under threat of discipline—directly leveraging the employees' dependence on their jobs—plainly chills employees' protected right to refrain from listening to this speech in violation of Section 8(a)(1). The fact that a threat arises in the context of employer speech does not immunize its unlawful coercive effect. The Supreme Court has made clear that threats fall outside the scope of employers' statutory and constitutional free-speech protections.⁵

Contrary to the basic principles of labor law outlined above, the Board years ago incorrectly concluded that an employer does not violate the Act by compelling its employees to attend meetings in which it makes speeches urging them to reject union representation.⁶ As a result, employers commonly use express or implicit threats to force employees into meetings concerning unionization or other statutorily protected activity.⁷ And the Board allows employers to make good on those threats by discharging or disciplining employees who assert their right to refrain from listening by failing to attend, or leaving, such mandatory meetings. That license to coerce is an anomaly in labor law, inconsistent with the Act's protection of employees' free choice and based on a fundamental misunderstanding of employers' speech rights.

I will urge the Board to correct that anomaly and hold that, in two circumstances, employees will understand their presence and attention to employer speech concerning their exercise of Section 7 rights to be required: when employees are (1) forced to convene on paid time or (2) cornered by management while performing their job duties. In both cases, employees constitute a captive audience deprived of their statutory right to refrain, and instead are compelled to listen by threat of discipline, discharge, or other reprisal—a threat that employees will reasonably perceive even if it is not stated explicitly. Inherent in the employment relationship is the understanding that employees cannot, without consequences, either fail to accede to their employer's stated requirement (e.g., that they attend a meeting) or abandon their assigned work duties (e.g., by walking away from employer speech directed at them as they work). Finding such mandatory meetings,

⁴ *Clark Bros. Co.*, 70 NLRB 802, 805 (1946), *enforced*, 163 F.2d 373 (2d Cir. 1947).

⁵ Section 8(c) of the Act shields from unfair-labor-practice liability only expression of "views, argument, or opinion" that "contains no threat of reprisal or force." 29 U.S.C. § 158(c). That provision "merely implements the First Amendment" by preserving "an employer's free speech right to communicate [its] views to [its] employees." *Gissel*, 395 U.S. at 617.

⁶ *Babcock & Wilcox Co.*, 77 NLRB 577 (1948).

⁷ See *2 Sisters Food Group*, 357 NLRB 1816, 1825 n.1 (2011) (Member Becker, dissenting in part) (citing study finding "that in 89 percent of [representation election] campaigns surveyed, employers required employees to attend captive audience meetings during work time and that the majority of employees attended at least five such meeting[s] during the course of the campaign").

including those termed as “captive-audience meetings” to be unlawful is therefore necessary to ensure full protection of employees’ statutory labor rights.⁸

Imposing that long-overdue protection of employees’ right to refrain will not impair employers’ statutory or constitutional freedom of expression. As the Supreme Court has recognized, “employers’ attempts to *persuade* to action with respect to joining or not joining unions are within the First Amendment’s guaranty.”⁹ But “[w]hen to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed.”¹⁰

To ensure that employees are not held captive to employer speech about their union or protected activity, I will propose the Board adopt sensible assurances that an employer must convey to employees in order to make clear that their attendance is truly voluntary.¹¹ Such an approach will appropriately protect employers’ free-speech rights to express views, arguments, or opinions concerning the employees’ exercise of Section 7 activity without unduly infringing on the Section 7 rights of employees to refrain, or not, from listening to such expressions.

In sum, I will ask the Board to reconsider current precedent on mandatory meetings in appropriate cases, including in a brief that will be submitted to the Board shortly. That brief will provide further guidance and argument on this matter. Should you have questions, please contact the Division of Advice.

Thank you, as always, for your dedication to the Act and the mission of the Agency.

/s/
J.A.A.

⁸ That rule would not apply where employers require employees to attend meetings on subjects other than their exercise of Section 7 rights, e.g., a meeting for job training or safety instructions. But it would apply if, for example, the employer uses the meeting to dissuade employees from acting together to improve job training or safety.

⁹ *Thomas v. Collins*, 323 U.S. 516, 537 (1945) (emphasis added).

¹⁰ *Id.* at 537-38.

¹¹ The Board has crafted similar safeguards in other areas of labor law. See *Johnnie’s Poultry Co.*, 146 NLRB 770, 774 (1964) (providing safeguards required when employer questions employees about activity protected by Section 7 in order to prepare defense against unfair-labor-practice charges), *enforcement denied*, 344 F.2d 617 (8th Cir. 1965); *Struksnes Construction Co.*, 165 NLRB 1062, 1062-63 (1967) (same for when employer conducts poll to ascertain whether union enjoys majority employee support); *Allegheny Ludlum Corp.*, 333 NLRB 734, 734 (2001) (same for when employer may lawfully include visual images of employees in campaign presentations), *enforced*, 301 F.3d 167 (3d Cir. 2002).