



Workforce Series: What are the NLRB and Unfair Labor Practices?

Center Forward Basics
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Overview

The National Labor Relations Act (NLRA) of 1935 was a monumental shift in the American labor rights movement. The act established protections for employers to form and join unions, or refuse to do so. It also established the National Labor Relations Board (NLRB), the implementation and enforcement body to investigate and adjudicate violations of those rights, called unfair labor practices (ULPs).

Though the NLRB has gone through several iterations in its history, the agency's structure and authorizing statute have not been significantly changed or updated in decades. The NLRB's current process presents considerable inefficiencies for investigating and trying cases, and many groups question the Board's impartiality. This Basic will examine the history of the NLRB, their process for investigating ULP violations, and potential changes to the agency.

History

The history of the National Labor Relations Board (NLRB) began with the federal government's response to the Great Depression. Congress passed the National Industrial Recovery Act in 1933, establishing protections for collective bargaining rights for unions, but this act was difficult to enforce. In 1934, Congress passed a resolution giving the president the power to appoint a new labor board with subpoena authority, President Franklin D. Roosevelt established the "First National Labor Relations Board."

The first iteration of the NLRB was deemed by many as ineffective and lost much of its jurisdiction following several contentious cases that President Roosevelt removed from their docket, and several federal court decisions limiting the board's power. In 1935, Senator Robert Wagner (D-NY) pushed legislation to establish federal labor policy with the statutory authority that would survive scrutiny from the courts. The new law, the National Labor Relations Act (NLRA), was signed in 1935 and re-established the NLRB as an independent agency made up of three members appointed by the President and confirmed by the Senate.

This renewed NLRB was authorized to enforce employee rights, rather than mediate disputes, and codified employees' rights to form and join unions and laid out employers' obligations to collectively bargain with unions selected by a majority of their employees. Actions by employers to obstruct employees' right to form and join unions or the good-faith collective bargaining process are referred to as "unfair labor practices" (ULPs), and the NLRA laid out 5 categories of ULP complaints that can be brought to the board for investigation and enforcement action.

The next major change to the NLRB came with the passage of the Taft-Hartley Act in 1947, amending some key provisions in the NLRA. Following a massive wave of strikes after World War II, the legislation was meant to address concerns from critics

Center Forward Basics

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In order to meet our challenges we need to put aside the partisan bickering that has gridlocked Washington and come together to find common sense solutions.

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that the original statute and agency was biased towards labor interests. The Taft-Hartley amendments banned a host of aggressive actions previously used by organized labor, established new employer rights, and expanded the board to five members authorized to sit in panels of three to discharge the board's responsibilities. Most significantly, the Taft-Hartley Act also defined unfair labor practices committed by unions, not just employers, and subjected unions to the NLRB's enforcement powers.

What is a ULP?

As defined in Section 8 of the NLRA, an unfair labor practice (ULP) is an action taken by an employer or an organized labor group that impedes an employee's ability to form or join a union, or obstructs the negotiations process between employers and unions.

Categories of ULP charges that can be filed against employers include:

1. Efforts to interfere with, restrain, or coerce employees in the exercise of the rights established in Section 7 of the NLRA - the right for employees to self-organize, bargain collectively through their chosen representatives, engage in other activities for the purpose of collective bargaining, and the right to refrain from any and all such actions
2. Actions to dominate or interfere with the formation or administration of a labor organization, or employee's desire to financially contribute to or otherwise support a labor organization
3. Discrimination in hiring, or any term or condition of employment to either encourage or discourage membership in any labor organization
4. Attempts to discharge or otherwise discriminate against an employee because they have filed an unfair labor practice charge
5. Refusal to collectively bargain with union representatives chosen by the employees

Categories of ULP charges that can be filed against unions include:

1. Efforts to restrain or coerce employees in either exercising or not exercising their rights established in Section 7 of the NLRA, or undue coercion for an employee to participate or not participate in a labor union
2. Attempts to cause an employer to discriminate against an employee with regard to their union membership
3. Refusal to bargain collectively with an employer in good faith
4. Efforts to induce or encourage illegal strikes or employees' refusal to work, including secondary boycotts
5. Forcing employers to make certain work assignments with regard to union membership
6. Forcing employers to bargain with an uncertified union, or a labor representative that was not voted on by the union member employees
7. Requiring union members to pay fees or regular dues found to be excessive or unfair after investigation by the NLRB
8. Pressuring or forcing an employer to pay for work that the employer does not need
9. Pressuring or forcing an employer to pay or deliver services for work that has not been or will not be performed

Filing a ULP Charge

Employers, employees, or unions may file charges against any party they believe to have violated ULP guidelines laid out in Section 8 of the NLRA. Charges of ULP violations must be filed within six months of the incident and with one of the NLRB's 26 regional offices. ULP violations cannot be adjudicated through a lawsuit.

Board agents gather evidence, and in some cases affidavits from witnesses to investigate each charge. The findings are evaluated by a Regional Director, who will decide if there is sufficient evidence to support the charge. Decisions typically take 7 to 14 weeks after the charge is filed, but can take longer in some cases. If the NLRB finds sufficient evidence, the Board will take every effort possible to facilitate a settlement between the two parties. In the absence of a settlement agreement, the agency will issue a complaint.

If a complaint is issued, the NLRB will become a representative for the charging party in a hearing before an NLRB Administrative Law Judge. After the hearing, the Administrative Law Judge will file a decision recommending the Board either order the respondent to cease and desist on the ULP violation in question and provide appropriate remedy or relief, or dismiss the complaint. If the charging party or respondent do not file an exception or appeal to the judge's decision, the findings from the trial will automatically become the decision and order of the NLRB.

A federal Appellate Court can enforce, set aside, or remand any part of the case before the Administrative Law Judge and the Board's order, and decisions to dismiss charges can be appealed to the NLRB Office of Appeals in Washington, D.C. within two weeks of the ruling. The Office of Appeals may remand an appeal case to regional offices for further investigation. The NLRB's General Counsel makes the final decision on any appeal cases that recommend overturning the Regional Director's original determination. Decisions to dismiss ULP charges are not reviewable in court, so there is no further recourse if the Office of Appeals upholds the case.

Recent Trends and Future Outlook

The NLRB receives roughly 20,000 ULP charges a year. After a dip in charges filed during the COVID-19 pandemic, the charges have trended upward towards their previous average, with 17,998 charges in 2022. Of the charges filed in 2022, 28% were settled, and 4% were issued as complaints to a judge for trial. The outcomes of charges in 2022 track generally with the data on ULP charges filed in the last decade, with roughly 30% of charges filed ending in settlement between parties, and roughly 5% being filed as complaints for a trial each year. In any given year, more than half of ULP charges are dismissed in the investigation process for not having sufficient evidence, and a majority that are found to have sufficient evidence are settled.

Critics of the current policy for investigating ULPs note the high proportion of complaints that are ultimately dismissed or found to be lacking evidence, and highlight the time and financial cost to both the employers and unions defending the charges, as well as the strain on the NLRB's resources. In contrast to a civil complaint, ULP charges do not require notice pleading, and present very little detailed information about the alleged violations upon filing. A notice pleading legal standard requires the plaintiff to present the basic facts of their case before the court. Advocates argue if the NLRB were to institute a higher standard of information to file a charge, that could greatly reduce the time and resources spent on investigations, and could also give employers and unions a much clearer picture of what violations are alleged against them and remedy bad behavior sooner.

Additionally, in September 2022, the Board proposed a new joint-employer standard that would substantially broaden companies' responsibility for potential ULP violations. This change would be especially impactful to franchisors and contractors, who may be held responsible for ULP charges against employers at a separate business. The debate on this policy change has fluctuated between several presidential administrations, and businesses are looking to find a level of certainty and predictability in the NLRB rules that will allow them to grow and accommodate their own changing workforce.

With an increasingly digital economy, the American workforce and the future of work is changing quickly. Despite that, the NLRB and its authorizing statute has not undergone comprehensive review or significant changes since the Taft-Hartley amendments in 1947.

Links to Other Resources

- Society for Human Resource Management - [Categories of ULPs by employers](#)
- Society for Human Resource Management - [Categories of ULPs by labor organizations](#)
- NLRB - [Process chart for filing a ULP charge](#)
- NLRB - [The number of ULP charges filed in recent years, and case outcomes](#)

- NLRB - [Remedial actions to ULP charges](#)
- NLRB - [Proposed joint-employer changes](#)