

Electronic Alert

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Can the NLRB Really Require Employers to Reopen Closed Stores?

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On December 13, 2023, the prosecutorial wing of the National Labor Relations Board (NLRB) moved to compel Starbucks to “immediately reopen” stores that it had recently closed. While only eight of the stores had unionized, the NLRB counsel seeks to force Starbucks to reopen 23 stores.

Can the NLRB force employers to reopen closed stores?

Yes, unless the employer shows that it would be “unduly burdensome.” The National Labor Relations Act (NLRA) gives the Board broad remedial powers, including the power to order remedies that “make whole” the employee who was wronged.

Take the *RAV Truck & Trailer Repairs* series of decisions from 2020 - 2022. In 2020, the NLRB found that an employer unlawfully laid off employees who signed union authorization cards and partially closed down in 2018 with the purpose of chilling union activity. The Board ordered the employer to reopen its business, restore operations as they had been in 2018, reinstate two employees, and bargain with the union.

The employer appealed and the D.C. Circuit Court of Appeals sent the case back to the NLRB noting that “the Board typically orders an employer to restore the status quo by reestablishing a discriminatorily closed operation unless the employer can show that such a remedy would be unduly burdensome.” Here, the Court said that the NLRB “failed to cite any authority to support the legal legitimacy of an order ... to compel a company to ‘reopen’ an operation that no longer exists due to the loss of a lease ...”.

On remand, the NLRB found that the employer showed an undue burden because it no longer had a lease and restoration would have required renewing a lease that ended 4 years prior and none of the employer’s other facilities were suitable to house RAV.

When is closing a store unlawful under the NLRA?

The Labor Board generally looks to a line of cases stemming from the Supreme Court case *Textile Workers Union v. Darlington Manufacturing Company* to determine whether or not store closures are unlawful. In that case, the Supreme Court held that an employer has the right to completely terminate its business, even if motivated by antiunion animus. However, a partial closing is unlawful if it is “motivated by a purpose to chill unionism.” Generally, the factors identified in *Darlington* that are used to identify when an employer’s closure constitutes an Unfair Labor Practice under the NLRA are:

1. Whether the employer has an interest in another business that could benefit from discouraging unionization via store closure;
2. Whether the employer closed the store in question for the purposes of chilling union activity; and

3. If it is foreseeable that employees at another branch or store will be discouraged from engaging in unionization.

Employers should seek labor counsel when considering a partial closure, especially if there is known union activity.

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