SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2025-2026 Regular Session

AB 288 (McKinnor)
Version: June 19, 2025
Hearing Date: July 8, 2025
Fiscal: Yes
Urgency: No
ID

SUBJECT

Employment: labor organization

DIGEST

This bill permits private sector employees to petition the Public Employment Relations Board for the resolution of various labor law violations if the National Labor Relations Board cannot fulfil its statutory duties, as specified.

EXECUTIVE SUMMARY

The rights of workers to organize and engage in collective bargaining with their employer are fundamental rights. They are enshrined in the National Labor Relations Act (NLRA), which states that employees "shall have 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.) Under the NLRA, workers' rights are vindicated before the National Labor Relations Board (NLRB), a five-person quasi-judicial body that decides cases regarding workers' rights to organize under the NLRA. However, despite the fact that the NLRB is the primary avenue for workers to assert their labor rights, the NLRB no longer functions in any constructive way. In recent years, the Board has seen the number of petitions for union representation double, while it also struggled with funding and staffing cuts. And just this year, the Trump Administration fired the NLRB Chair Gwynne Wilcox, so that the NLRB can no longer establish a quorum. All of these developments effectively prevent the NLRB from fulfilling its statutory duties. In response, AB 288 proposes a process by which workers in California may bring their claims under the NLRA to the Public Employment Relations Board, if they first submitted them to the NLRB and other conditions are met.

AB 288 is sponsored by the California Federation of Labor Unions, AFL-CIO, the California Teamsters Public Affairs Council, the International Brotherhood of

Boilermakers, Western States Section, and SEIU California State Council. It is supported by numerous other unions and workers' rights organizations. AB 288 is opposed by the California Chamber of Commerce and the Orange County Business Council. It previously passed out of the Senate Labor, Public Employment and Retirement Committee by a vote of 4 to 1.

PROPOSED CHANGES TO THE LAW

Existing federal law establishes the National Labor Relations Act (NLRA) to provide workers in the private sector various rights, protections, and prohibitions regarding concerted activity, unionizing, and collective bargaining. Establishes the National Labor Relations Board (NLRB) to adjudicate claims related to these rights and prohibitions. (29 U.S.C. §§ 151 et seq.)

Existing state law:

1) Provides several statutory frameworks under California law to provide public employees collective bargaining rights, govern public employer-employee relations, and limit labor strife and economic disruption in the public sector through a reasonable method of resolving disputes regarding wages, hours and other terms and conditions of employment between public employers and recognized public employee organizations or their exclusive representatives. Establishes the Meyers-Milias-Brown Act (MMBA), which governs employer-employee relations for local public employers and their employees. (Gov. Code §§ 3500 et seq.)

2) Establishes the Public Employment Relations Board (PERB), a quasi-judicial administrative agency charged with administering certain statutory frameworks governing California state and local public employer-employee relations, resolving disputes, and enforcing the statutory duties and rights of public agency employers, employees, and employee organizations. (Gov. Code §§ 3541 et seq.)

3) Establishes the Prohibition on Public Employers Deterring or Discouraging Union Membership (PEDD), which makes it unlawful for public employers to deter or discourage public employees or applicants to be public employees from: a) becoming or remaining members of an employee organization; b) authorizing representation by an employee; or, c) authorizing dues or fee deductions to an employee organization. (Gov. Code §§ 3550 et seq.)

This bill:

1) Makes the following legislative findings and declarations:
    a) Workers have an inalienable right and a right under the First Amendment to the United States Constitution, to free association and to exercise their

right to collectively bargain over the labor they provide to employers, in order to improve their terms and conditions of employment.

b) The National Labor Relations Act (NLRA) was passed in 1935 as a way to codify those rights for the majority of private sector workers by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection," through the National Labor Relations Board (NLRB), an agency created by Congress.
c) The NLRA recognized workers' inalienable right to control their own labor and was intended to alleviate the labor unrest that predominated before 1935 when employees were forced to find their own avenues to exercise those rights and were often met with violence, by giving workers an avenue to vindicate those rights through a multi-member board of experts who were protected from political removal.
d) Over the past several decades, the NLRB has become less effective at protecting and enforcing workers' rights, due to a variety of factors such as inadequate funding, understaffing, a narrowing of the types of workers who can invoke the protections of the NLRA, and a narrowing of the scope of protected concerted activity.
e) California law has also codified workers' fundamental and First Amendment rights as part of its public policy, stating in Section 923 of the Labor Code that "[workers] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that [they] shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."
f) The NLRB's inefficacy has meant that more and more California workers are being deprived of these rights as employers have become more emboldened than ever. These employers are refusing to bargain and committing other unfair labor practices with impunity. This means that California workers who choose to unionize are often forced to wait for years to have their right to meet their employer at the bargaining table vindicated. That delay incentivizes employers to not bargain in good faith, precludes workers from timely obtaining improved wages and working conditions, undermines union support, and causes workers more instability.
g) A state's power is at its zenith when it is exercising its police power to protect its populace's physical, social, and economic well-being. The Supreme Court has long recognized that "[i]n dealing with the relation of employer and employed, [a state] legislature has necessarily a wide field

of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression." *Chicago, B. & Q.R. Co. v. McGuire* (1911) 219 U.S. 549, 570.

h) California has a right and responsibility to protect workers within its borders and to ensure their health and safety, including by vindicating workers' fundamental and First Amendment right to freely associate in order to improve their terms and conditions of employment when the NLRB cannot adequately protect those rights.

2) Specifies that its provisions shall be liberally construed to ensure that all workers in California can effectively vindicate their fundamental rights to full freedom of association, self-organization, and designation of representatives of their own choosing, free from retaliation or intimidation by their employer.

3) Specifies that a workers' rights mean that a worker must be allowed to engage in collective action, to organize, form, join, or assist labor organizations, and, when they choose to do so, collectively through a selected or designated bargaining representative, to engage in effective and expeditious collective bargaining that results in a collective bargaining agreement.

4) Specifies that the state and its political subdivisions may not, directly or indirectly, deny, burden, or abridge the rights described in (2) and (3), above, except as necessary to serve a compelling state interest achieved by the least restrictive means.

5) Permits a worker, as defined, to petition PERB to protect and enforce the specified rights in (2) through (4), above, when:
   a) The worker is subject to the NLRA as of January 1, 2025, and they lose coverage under the NLRA because the NLRA is appealed or narrowed, and they are not otherwise covered by the Railway Labor Act or a law that otherwise subjects them to the jurisdiction of PERB;
   b) The worker is subject to the NLRA as of January 1, 2025, but loses access to an independent, effective, and functioning legitimate and expert NLRB because the NLRB does not have a quorum, or because a lack of funding or staffing prevents the NLRB from fulfilling its statutory duties;
   c) The worker seeks to have the NRLB protect and enforce their rights, as provided, but does not receive a determination or remedy within six months, as specified.

6) Specifies that, should the conditions described in a) through c) of (5), above, change such that there is no longer a loss of coverage under the NLRA or access to the NLRB, PERB shall retain jurisdiction over the matter unless and until the NLRB

seeks to enjoin PERB's continued action, and PERB is ordered to return the matter to the NLRB.

7) Specifies that is does not affect the rights of workers under other federal or state statutes.

8) Permits a worker or their chosen representative to do any of the following:
    a) Petition PERB to certify the worker's chosen representative as the exclusive bargaining representative for any group of similarly situated workers who have designated the representative by a majority showing or who have selected the representative in an NLRB election with objections or challenges pending;
    b) Petition PERB to decide unfair labor practice cases where processing has been excessively delayed by the NLRB, or where the NLRB is unable to effectively execute its statutory duties, as described; or
    c) Seek an order from PERB requiring the worker's employer to participate in binding mediation to resolve any differences between the parties that still exist after the conditions described.

9) In implementing these provisions, permits PERB to:
    a) Certify an exclusive bargaining representative by determining whether a majority of similarly-situated workers selected an entity as their representative for collective bargaining, and order the employer to bargain with the exclusive bargaining representative;
    b) Decide unfair labor practice cases, with reference to its own unfair practice decisions involving its public employee statutes, or to NLRB precedent, in a manner that most expansively effectuates the rights under this bill, and order all appropriate relief for a violation, including civil penalties;
    c) Decide pending objections or challenges to a NLRB election, when brought to PERB under specified circumstances, and to certify workers' exclusive bargaining representatives if appropriate after deciding any objections or challenges;
    d) Order that the employer to submit to binding mediation and assist the parties in finalizing their negotiations for a collective bargaining agreement, as follows:
        (a) Specified conditions described in (12), below, have been met;
        (b) PERB has certified an exclusive bargaining representative, ordered that an employer bargain with the representative, and more than six months have passed without the parties agreeing on and executing a collective bargaining agreement.
    e) Order any appropriate remedy, including injunctive relief and penalties, necessary to effectuate the bill's provisions, including if an employer refuses to comply with an order under the bill.

10) Specifies that any action taken by PERB under the bill's provisions may be reviewed by a state court of competent jurisdiction.

11) Establishes the Public Employment Relations Board Enforcement Fund in the State Treasury, and specifies that any civil penalty collected pursuant to this section must be deposited into the fund, and that moneys in the fund must be available upon appropriation by the Legislature for PERB to fund increased workload.

12) Defines "worker," for its provisions, as:
    a) A worker previously covered by the NLRA if the NLRA is repealed or otherwise narrowed so that it no longer covers a certain type, class, craft, classification, section, or industry of workers;
    b) A worker who is deprived of an independent, effective, and functioning NLRB because the NLRB cannot execute its statutory duties for reasons like lacking a quorum, lacking funding or staffing, or because a legal challenge has determined that it can no longer prosecute cases involving that worker;
    c) A worker who has filed, or whose representative has filed, a representation petition seeking a union election through the NLRB as required by the provisions of the NLRA, but only if one of the following is met:
        (a) More than six months have passed since the petition was filed and the NLRB has not yet scheduled a union election where those workers can decide whether to be represented for purposes of collective bargaining; or
        (b) A representation election has been conducted by NLRB, and the union has prevailed at the election vote count, but because of filed challenges or objections, more than six months have elapsed without a determination by the NLRB regarding those challenges or objections.
    d) A worker who is part of a bargaining unit of similarly situated workers under the NLRA, where a majority of the bargaining unit has designated a union as their exclusive bargaining representative under then-existing NLRB law, and have demanded recognition from an employer, or where a majority of similarly-situated workers have selected a union as their exclusive bargaining representative through a NLRB election, and the NLRB has certified the union, but only if:
        (a) The employer has refused to recognize or bargain with the worker or their chosen representative;
        (b) The worker or their representative has filed an unfair labor practice charge with the NLRB regarding that refusal;
        (c) More than six months have elapsed since the workers or their representative filed an unfair labor practice charge, but neither the NLRB nor an administrative law judge has issued a

bargaining order requiring the employer to bargain in good faith, and the NLRB has not authorized its general counsel to seek, nor has the General Counsel sought, a bargaining order in court under a specified provision of the NLRA; and

(d) The NLRB's general counsel or their subdivisions have not dismissed and upheld on appeal the dismissal of the unfair labor practice.

e) A worker who is part of a bargaining unit under the NLRB, and who designated or selected a representative that has been recognized by an employer or certified by the NLRB if that worker, through their representative, has been engaged in first contract bargaining for over six months without reaching an agreement and executing a collective bargaining agreement governing the terms and conditions of employment, if:
   (a) The worker or their chosen representative has filed an unfair labor practice charge with the NLRB alleging that the employer is not engaging in good faith bargaining;
   (b) More than six months have elapsed since the worker or their representative filed the unfair labor practice charge, but neither the NLRB nor an administrative law judge has issued an order requiring that the employer engage in good faith bargaining and that it cease and desist its failure and refusal to engage in good faith bargaining, and the NLRB has not authorized its general counsel to seek, nor has the general counsel sought, such a bargaining order in federal court under a specified section of the NLRA; and
f) The worker who was terminated and has filed the unfair labor practice charges with the NLRB alleging that the employer terminated them in retaliation for engaging in union activity or other protected concerted activity to improve their terms and conditions of employment, but only if:
   (a) More than six months have elapsed since the workers or their representative filed an unfair labor practice charge as described, but neither the NLRB nor an administrative law judge has issued an order that the worker is reinstated, and the NLRB has not authorized its general counsel to seek, nor has the general counsel sought, reinstatement in federal court under a specified section of the NLRA; and
   (b) The NLRB's general counsel of their subdivisions have not dismissed and upheld on appeal the dismissal of the unfair labor practice charge.
g) A worker who has filed, or whose representative has filed, any other unfair labor practice charges that allege retaliation resulting in adverse action, other than discharge or termination, for engaging in union or other protected concerted activity, if more than six months have passed since

> the charge was filed and the general counsel or their subdivisions have not made a decision to issue a complaint or to dismiss the case and uphold any appeal of the dismissal.

COMMENTS

1. Author's statement

According to the author:

> AB 288 will protect California workers by preserving their fundamental and constitutional rights to free speech and free association. All workers have inalienable rights, and rights under the First Amendment to the United States Constitution and the California State Constitution, to control the labor that they provide and to freely join with their coworkers to achieve improvements.
>
> California cannot and must not sit idly by as California workers are exploited and chilled from exercising their rights. This is unacceptable and frankly, un-American. Our state's power is greatest when it is used to protect its people's physical, social, and economic well-being, and we must allow our workers to exercise that right.
>
> California has a right and responsibility to regulate the working conditions of workers within its borders, including preserving workers' fundamental and constitutionally protected rights to free speech, to free association, and to have a real voice at their workplaces.

2. Justice delayed is justice denied

A right without a remedy is no right at all. The rights of workers to organize and engage in collective bargaining with their employer are fundamental rights. These rights were hard-fought rights that came as the result of thousands of workers speaking up, organizing, and risking their lives as part of the Labor Movement that swept the United States in the early Twentieth Century. They are enshrined in the National Labor Relations Act (NLRA), which states that employees "shall have 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.) Under the NLRA, workers' rights are vindicated before the National Labor Relations Board (NLRB), a five-person quasi-judicial body that decides cases regarding workers' rights to organize under the NLRA. Each member is appointed by the President of the United States on five-year terms, and can only be fired for "neglect of duty or malfeasance in office" after notice and a hearing. (29 U.S.C. § 153(a).) The board acts as an appellate body for regional NLRB administrative law judges, and decides cases

regarding workers' rights under the NLRA. The NLRB also has a General Counsel who is also appointed by the President with the advice and consent of the U.S. Senate to four-year terms. The General Counsel investigates and prosecutes unfair labor practice cases and supervises the NLRB field offices.

Despite the fact that the NLRB is the primary avenue for workers to assert their rights to collectively organize, the NLRB no longer functions in any constructive way. In recent years, the Board has seen the number of petitions for union petitions double, with a 27 percent increase in such petitions between 2023 and 2024 alone.[1] However, at the same time, the NLRB has struggled with funding and staffing cuts. In 2011, the NLRB had 67 percent more staff than it did 13 years later in 2024.[2] At the same time that the NLRB has struggled with caseload and staffing, two other developments existentially challenge its ability to function as a bulwark for workers' rights. The first is the development of numerous lawsuits challenging the constitutionality of the NLRB itself; in a case before the Fifth Circuit Court of Appeals, defendant SpaceX recently asserted that the structure and powers of the NLRB are unconstitutional.[3]

Lastly, on January 27, 2025, President Trump fired the NLRB Chairperson Gwynne Wilcox, despite the statutory requirements that NLRB members only be fired for specified reasons and after notice and hearing. While Chair Wilcox initially succeeded in a suit challenging her dismissal as unlawful, the order of the district court was subsequently stayed by the Supreme Court.[4] Without Chair Wilcox, the NLRB is without a quorum, and cannot meet and decide cases before the Board.

The consequences of a non-functioning NLRB are significant. Research has found that union membership significantly increases worker wages, reduces race and gender pay disparities, contributes to general economic growth, and reduces income inequality.[5] If workers cannot enforce their rights before the NLRB, employers evade consequences for violating their workers' rights, and those rights become meaningless. Delays in enforcing workers' rights also serves to frustrate the rights themselves, as a union effort might die if it does not achieve unionization in a timely manner and workers leave, and claims of unfair labor practice that go unpunished only help employers silence workers'

---

[1] Office of Pub. Affairs, "Union petitions filed with NLRB double since FY 2021, up 27% since FY 2023," Nat'l Lab. Rel. Board (Oct. 14, 2024), https://www.nlrb.gov/news-outreach/news-story/union-petitions-filed-with-nlrb-double-since-fy-2021-up-27-since-fy-2023.
[2] *Id*.
[3] *Space Exploration Technologies Corp. v. NLRB* (5th Cir. 2025) Case No. 24-50627 (pending); Haleluya Hadero, "Amazon and Elon Musk's SpaceX challenge labor agency's constitutionality in federal court," Associate Press (Nov. 18, 2024) https://apnews.com/article/amazon-nlrb-unconstitutional-spacex-elon-musk-ab42977117d883e97110a7bf8e8b257f.
[4] Melissa Quinn, "Supreme Court allows Trump to fire labor board members while case proceeds," CBS News (May 22, 2025) https://www.cbsnews.com/news/supreme-court-allows-trump-to-fire-labor-board-members/.
[5] U.S. Dept. of Treasury, *Labor Unions and the Middle Class* (Aug. 2023), available at https://home.treasury.gov/news/press-releases/jy1706.

rights to organize and encourage continued violations. A right without a remedy is no right at all.

3. AB 288 proposes to protect workers' rights when the NLRB is prevented from achieving its statutory duties

The NLRB clearly intended to provide workers with inalienable rights to organize and collectively bargain. In light of the NLRB's current inability to function the way it was intended, AB 288 proposes to allow California workers to seek redress for their rights under the NLRA at the state's Public Employment Relations Board (PERB). It does so by restating the general rights that workers have: freedom of association, to be represented by representatives of their choosing, to engage in collective bargaining, and to be free from retaliation or intimidation. AB 288 permits a worker to protect and enforce these rights by petitioning to PERB when:

- the worker was subject to the NLRA as of January 1, 2025 and is not subject to another federal labor law, and they lose coverage under the NLRA because the NLRA is repealed or narrowed;
- the worker was subject to the NLRA as of January 1, 2025, but loses access to an independent, effective, and functioning legitimate and expert NLRB because of either the NLRB not having a quorum, or because a lack of funding or staffing prevent the NLRB from fulfilling its statutory duties; and
- the worker sought to have the NLRB protect and enforce their rights, but did not receive a determination or remedy within six months.

If any of these conditions change, AB 288 specifies that PERB retains jurisdiction over the matter unless or until the NLRB seeks to enjoin PERB's continued action and PERB is ordered to return the matter to the NLRB.

Under AB 288, a worker or their union representative may request PERB to certify the worker's chosen representative as their exclusive bargaining representative, decide an unfair labor practice case, or require the worker's to employer participate in binding mediation if more than six months have passed without a contract since PERB ordered the parties to bargain. These petitions must initially be filed before the NLRB, and have no action taken on the petition within six months. For PERB to certify a union election, the worker must first file a petition with NLRB seeking a union election through the NLRB, and either six months have passed since without an election scheduled by the NLRB, or an election was conducted in which the union succeeded, but six months have passed since without a the NLRB making a determination because challenges or objections were filed against the election.

PERB may provide various forms of relief for these petitions. It may certify an exclusive bargaining representative and order the parties to bargain, decide ULPs in reference to its own precedent or to the precedent of the NLRB, decide objections or challenges to an NLRB election, order the parties to binding mediation in certain circumstances, and

order any other appropriate remedy, including injunctive relief and penalties. AB 288 also would permit a party to appeal any PERB decision to a state court of competent jurisdiction to review.

4. Questions regarding preemption

Opposition argues that AB 288 is preempted by the NLRA under the Supremacy Clause of the U.S. Constitution that provides that federal law is "the supreme law of the land." (U.S. Const., Art. VI, § 2.) A state law is generally preempted if there is an explicit statement within the federal law that state laws in the area are preempted, if the state law conflicts with the federal law, or if Congress legislated in such a comprehensive way as to occupy the entire field of law. The NLRA does not contain explicit preemption language. Yet the seminal case on NLRA preemption is *San Diego Building Trades Council v. Garmon*¸ which found that if an action is arguably covered by the NLRA, states must defer to the NLRB in resolving the issue. (*San Diego Building Trades Council v. Garmon* (1959) 359 U.S. 236.) In *Garmon*, an employer filed an action in state court seeking an injunction and damages against unions whose workers were planning on going on strike. The employer had initially filed a petition with the NLRB, but the NLRB declined jurisdiction. The Supreme Court found that the state courts could not assert jurisdiction to hear the claims because it involved activity arguably covered by the NLRA. In reaching this conclusion, the Court noted that "the unifying consideration of [the Court's prior labor preemption rulings] has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency." (*Garmon*, 359 U.S. 242.)

However, various cases have limited *Garmon*'s applicability since, and there are arguments for state action not being preempted. In the case of *Smith*, a suit in state court for breach of a collective bargaining agreement was allowed to proceed under a separate federal law even though the activities at issue violated the NLRA, absent serious problems arising with the state court and the NLRB maintaining dual jurisdiction. (*Smith v. Evening News Assoc.,* (1962) 371 U.S. 195.) Recently, the U.S. Supreme Court again cut into the breadth of the *Garmon* doctrine, finding that state court tort claims were not preempted by the NLRA when they involved actions related to a strike that were not protected under NLRB precedent. (*Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local No. 174,* (2023) 598 U.S. 771.) In the concurring opinion of that case, Justice Thomas suggested that the court revisit the *Garmon* doctrine. (*Glacier Northwest* 598 U.S. 788.) In addition, the Tenth Amendment to the U.S. Constitution ensures the broad power of the state to enact laws under its general police powers, which includes those related to employment.

A recent Fourth Circuit case provides additional support to the argument that the state can step in when the NLRB is not functioning as intended. In the case *National Association of Immigration Judges v. Owen (NAIJ)*, the Fourth Circuit found that state court claims relating to employment policies could proceed if the Civil Service Reform Act

(CSRA) no longer provides a functional adjudicatory scheme with which to adjudicate such claims. (*National Association of Immigration Judges v. Owen* (4th Cir. 2025) U.S. App. LEXIS 13487.) Under the CSRA, the Merit Systems Protections Board (MSPB) has the primary authority to adjudicate federal employees' employment-related claims, and a Special Counsel for the MSPB is charged with investigating allegations and prosecuting actions before the MSPB. Typically, because the CSRA creates a "uniform scheme for administrative and judicial review of covered federal employee personnel actions," this comprehensive scheme stripped district courts of jurisdiction to hear cases involving federal employment. (*National Association of Immigration Judges*, U.S. App. LEXIS 13487, 2.) However, the Court asserted that, to maintain Congress's intent for the CSRA to provide the only authority to adjudicate federal employees' employment-related claims to the MSPB, "the MSPB and Special Counsel must function such that they fulfill their roles prescribed by the CSRA." (*Id.*, p. 17.) The Court found that vacancies in the MSPB and the Special Counsel, or when the agency fails to adequately process covered employees' claims, thwart the framework of the CSRA and defeats the Congressional intent behind the CSRA. Thus, the Court ordered the district court on remand to consider whether the CSRA continues to provide a functional adjudicatory scheme. If the district court finds that it does not, the district court cases could move forward.

The *NAIJ* ruling can be applied to the current NRLB. Like the CSRA's creation of the MSPB, the NLRA creates the NLRB as the federal board tasked with adjudicating all labor law claims under the NLRA. The NLRA also creates a General Counsel to investigate claims submitted to the NLRB and prosecute those that are meritorious. This arrangement is very similar to that of the CSRA and the MSPB that was at issue in *NAIJ*. Like the MSPB, the NLRB has been stripped of its ability to adjudicate cases by board vacancies that deny it a quorum. However, it is worth noting that the *NAIJ* decision involved whether a court may hear a claim otherwise heard by the MSPB, not about a state agency, and did not involve federal preemption. Nevertheless, the Fourth Circuit's reasoning can be applied to the NLRB and its current lack of a quorum. Under the Fourth Circuit's reasoning, preemption under *Garmon* may not apply when the NLRB is unable to effectuate the legislative scheme of the NLRA.

This argument has a number of other supporting rationales. Surely, in enacting the NLRA, Congress did not intend for workers' labor law claims to go un-adjudicated, with no redress. And yet, without a functioning NLRB or a state avenue for redress, that would be the result of the NLRB's current vacancies. This presents a truly extraordinary, and dangerous, moment in U.S. history, as an arguably unlawful firing of the Chair of the NLRB by the United States President effectively invalidates a statutory scheme enacted by Congress. Such an act threatens the checks and balances and the separation of powers that is foundational to the U.S. Constitutional order. While the preemption doctrines are meant to protect the intent of Congress, the actions of the Trump Administration frustrate that intent.

AB 288 has a number of different "triggers" which would permit a worker to pursue their claims before PERB. The first trigger relies upon a worker who loses their coverage under the NLRA because the Act is either narrowed or repealed. This first trigger is clearly not preempted here, as states are free to regulate labor activity that falls outside of the NLRA. The second trigger, in which the NLRA loses the ability to function due to either not having a quorum or a lack of funding or staffing, could fit within the argument relied upon by the Fourth Circuit in *NAIJ*. Under that reasoning, it could be argued that this trigger is not preempted either because the Congressional intent of the NLRA has been frustrated, and thus the state may proceed. For circumstances where the NLRB has no quorum, this argument is fairly straightforward; however, where the issue is staffing or funding at the NLRB, it may be less clear. The third trigger in the bill permits workers to pursue claims before PERB if the NLRB has not ruled on their claim within six months. As timely adjudication of claims is also essential to the effectuation of the comprehensive statutory scheme of the NLRA, trigger three may similarly be considered permissible under the rationale of *NAIJ*.

While preemption under the *Garmon* doctrine is fairly broad, it is not complete, as outlined above. Moreover, AB 288 is not so much about replacing or making substantive law regarding employees' rights and protected concerted activity, as it is about ensuring that the rights already guaranteed to employees can be *enforced*. It aims to have the state step in only where the NLRB has failed its statutory duties in the administration of the NLRA and labor law. It arguably then only would act to *supplement* the NLRB, not replace it. If the NLRB functioned as it is meant to under the NLRA, AB 288 would not be needed. Unfortunately, in these times, whether the NLRB will continue to function at all is uncertain. The author brings AB 288 to propose a thorough regime by which this is addressed and workers' labor rights under the NLRA can still be protected.

5. Arguments in support

According to the California Federation of Labor Unions, AFL-CIO, which is the sponsor of AB 288:

> The right for workers to join a union and bargain collectively is essential to economic security and human dignity. The right to free assembly, to organize, to form a union, to collectively bargain, and to take collective action to improve wages and working conditions are codified under the National Labor Relations Act (NLRA) for private sector workers and the National Labor Relations Board (NLRB) is the independent federal agency tasked with enforcing the NLRA and protecting workers' rights under the law. Workers also have rights under the First Amendment to the United States Constitution and the California State Constitution, to control the labor that they provide and to freely join with their coworkers to achieve improvements.

California law has also codified workers' fundamental and constitutionally protected rights as part of its public policy, stating in Section 923 of the Labor Code that "[workers] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Despite our laudable public policy, employers continue to use delays in government processes to their advantage by squelching worker organizing efforts and otherwise violating workers' rights with impunity. Even when California workers are successful in unionizing despite the obstacles that employers put in their way, they are often forced to wait for years to have their right to meet their employer at the bargaining table vindicated. Such delays in getting remedial relief not only incentivize employers to refuse to bargain in good faith with workers' chosen collective-bargaining representatives, but it prevents workers from getting improved negotiated wages and benefits in a timely manner, thereby contributing to increased workplace conflict and instability.

Workers are irreparably harmed by these delays as they are often forced to abandon their efforts to act collectively to improve their circumstances, leaving them trapped in exploitative working conditions. Such a failure to protect workers' rights also opens the door to the kind of industrial unrest and violence against workers that plagued labor relations in our country prior to 1935.

While the National Labor Relations Act codified some of these worker rights, these rights do not arise only from the National Labor Relations Act. These rights are much more fundamental and are ingrained in workers' ability to control their own labor and their livelihoods. On top of that, although the National Labor Relations Board has long been the primary vehicle for protecting worker rights, this federal scheme is failing to adequately protect them.

The authority of the NLRB is currently threatened by legal challenges filed by numerous corporations. SpaceX and Amazon have both filed numerous lawsuits alleging that the NLRB is unconstitutional. Those lawsuits are just a few among more than two dozen challenges to the legitimacy of the NLRB by employers.

Even before these legal challenges, the NLRB has struggled to provide effective relief for workers seeking to organize. The recent surge in union organizing resulted in an increase in election filings that has more than doubled since 2021 and went up 27% from 2023 to 2024. The increase in election cases filed has also increased unfair labor practices cases, which were up 22% from 2023 to 2024. The

surge in activity, however, resulted in fewer resolved cases, with 46% more cases unresolved in 2024 than 2023. At the same time as cases skyrocket, the NLRB continues to be underfunded and understaffed. Since the early 2000s, staffing in field offices has shrunk by 50% and in 2011, when there was a similar surge in cases filed, the NLRB had 62% more field staff.

The impact on workers is profound. The Economic Policy Institute did a case study of union drives at Starbucks, Amazon, and Trader Joes, and found that corporate union busting and delay tactics have a powerful chilling effect on workers who are intimidated out of supporting the union or cannot afford to wait years for a first contract. Even with hundreds of unfair labor practice charges, workers are still thwarted by the lack of enforcement and progress on their unionization drives. An understaffed NLRB is no match for the nearly $400 million corporations spend every year on "union avoidance" consultants and anti-union campaigns.

California cannot and must not sit idly by as California workers are exploited and chilled from exercising their rights. The state's power is at its zenith when it is exercising its police power to protect its populace's physical, social, and economic well-being, and we must exercise that right. As the Supreme Court has long recognized, "[i]n dealing with the relation of employer and employed, [a state] legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression."

6. Arguments in opposition

According to the California Chamber of Commerce, which opposes AB 288:

While we understand uncertainty that is occurring as a result of the current federal administration, AB 288 is plainly preempted by federal law. Even if it were upheld, the consequence would be two different entities interpreting federal law with PERB having the explicit right to disregard NLRB precedent.

AB 288 is Preempted Under Garmon Because It Proposes to Regulate Union Relationships That Are Governed by Federal law

The NLRA provides for workers' rights to organize. The NLRA exclusively governs those rights. The NLRB is an independent federal agency established by the NLRA. Its primary role is to enforce labor laws related to union activities and collective bargaining by investigating and prosecuting unfair labor practices in the private sector. It also oversees representation elections seeking to certify or

decertify unions as the representative of employees. The NLRB has regional offices located throughout the country.

Because the NLRA establishes and solely governs workers' rights to organize, courts have repeatedly held that states are prohibited from regulating this space under the longstanding doctrine of preemption. AB 288's attempt to give PERB the ability to adjudicate issues in lieu of the NLRB is a clear example of *Garmon* preemption. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

The present lack of a quorum at the NLRB and hypothetical scenarios about what *may* happen does not allow AB 288 to escape preemption. The NLRA is still law, and it continues to be enforced by the NLRB's regional offices. Those offices are continuing to process elections, certifications, petitions, and unfair labor practice charges. This is also not the first time the NLRB has operated without a quorum.

Further, AB 288 contains a clause that appears to be broader than the NLRA. Proposed section 923.1(a)(3) provides that the state or local entities cannot "*deny, burden, or abridge the rights described in this subdivision except as necessary to serve a compelling state interest achieved by the least restrictive means.*" That is the standard for strict scrutiny, which is reserved for scenarios where a person's constitutional right is at stake or where a law is based on a suspect classification, such as race or religion. In other words, AB 288 would create new, preempted substantive law (by creating a new substantive section), and then attempt to require these new rights be treated as if they were written in the constitution. To be clear, AB 288 is not a constitutional amendment - so we do not believe it is appropriate for AB 288 to attempt to pretend its provisions are akin to constitutional text and inhibit the Legislature's ability to ever amend this section.

AB 288 Creates Inconsistent Enforcement of Labor Laws

Even if AB 288 were upheld, we are concerned about creating inconsistent enforcement across PERB and the NLRB. For example, proposed section 923.1(d)(1)(B) provides that PERB can decide cases based on NLRA precedent or its own precedent as it applies to public employees (who have the right to organize under separate, California-specific laws) in the manner that most expansively provides the rights provided for under AB 288. Not only does this bolster the argument that AB 288 is preempted, but it also effectively encourages PERB to not follow NLRA precedent in certain circumstances.

AB 288's Six Month Delay Threshold is Arbitrary

AB 288 provides that workers can turn to PERB when the NLRB takes more than six months to respond. The bill implies that, at that point, workers have been deprived of an effective NLRB. However, the NLRA does not include statutory

deadlines when it comes to the NLRB rendering case decisions. The timelines provided for in AB 288 are arbitrary and again do not rescue AB 288 from being barred by preemption. In other words, state law cannot compel the NLRB to act more quickly, and it can't "step in" when the NLRB is taking too long to act.

SUPPORT

California Federation of Labor Unions, AFL-CIO (sponsor)
California Teamsters Public Affairs Council (sponsor)
International Brotherhood of Boilermakers, Western States Section (sponsor)
SEIU California State Council (sponsor)
AFSME California
Air Line Pilots Association
Alliance San Diego
Association of Flight Attendants - CWA (AFA)
Bluegreen Alliance
Building Justice San Diego (homework San Diego)
California Alliance for Retired Americans (CARA)
California Association of Psychiatric Technicians
California Coalition for Worker Power
California Conference Board of the Amalgamated Transit Union
California Conference of Machinists
California Environmental Voters
California Environmental Voters (formerly CLCV)
California Federation of Teachers AFL-CIO
California Iatse Council
California Nurses Association
California Professional Firefighters
California School Employees Association
California State Legislative Board of the Smart - Transportation Division
California State Pipe Trades Council
California Teachers Association
California Working Families Party
Center on Policy Initiatives
Coalition for Humane Immigrant Rights (CHIRLA)
Coalition of Black Trade Unionists, San Diego County Chapter
Culver City Democratic Club
Employee Rights Center
Engineers and Scientists of California, Ifpte Local 20, AFL-CIO
International Alliance of Theatrical Stage Employees
International Brotherhood of Electrical Workers, Local 1245
Koreatown Immigrant Workers Alliance (KIWA)
Los Angeles Alliance for a New Economy (LAANE)
Los Angeles Black Worker Center

National Union of Healthcare Workers (NUHW)
Northern California District Council of Laborers
Office & Professional Employees International Union, Local 30, AFL-CIO
Partnership for the Advancement of New Americans — Pana
Pillars of the Community
Professional and Technical Engineers, Ifpte Local 21, AFL-CIO
Sag-aftra, AFL-CIO
San Diego Black Workers Center
San Mateo Labor Council, AFL-CIO
SEIU Local 1000
Sheet Metal Workers' Local Union No. 104 (SMART)
Sheet Metal, Air, Rail, and Transportation Workers, Local 105
South Bay Labor Council
State Building and Construction Trades Council of California, AFL-CIO
UAW Region 6
Unite Here, AFL-CIO
United Domestic Workers/AFSCME Local 3930
United Food and Commercial Workers, Western States Council
United Nurses Associations of California/union of Health Care Professionals
United Steelworkers District 12
United Taxi Workers of San Diego
Utility Workers Union of America, AFL-CIO
Writers Guild of America West

OPPOSITION

California Chamber of Commerce
Orange County Business Council

RELATED LEGISLATION

Pending Legislation:

AB 1340 (Wicks, 2025) would establish the Transportation Network Company (TNC) Drivers Labor Relations Act to require PERB to protect TNC drivers' collective bargaining rights under the Act. This bill is currently pending before the Senate Labor, Public Employment and Retirement Committee.

AB 672 (Caloza, 2025) requires a plaintiff or petitioner filing a civil action seeking injunctive relief against certain specified labor actions, and which public employment labor relations are regulated by PERB, to provide written notice to PERB, among other provisions. AB 672 is currently pending before this Committee.

AB 283 (Haney, 2025) establishes the In-Home Supportive Services (IHSS) Employer-Employee Relations Act to shift collective bargaining with IHSS providers from the county or public authority to the state, and creates methods for resolving disputes involving wages, benefits, and other terms and conditions of employment between IHSS providers and the state. This bill is currently pending before the Senate Appropriations Committee.

Prior Legislation: SCA 7 (Umberg, 2023) would have established a broad-based constitutional right for any person in California to form or join a union and for that union to represent the person in collective bargaining with the person's respective employer. SCR 7 died in the Senate Elections and Constitutional Amendments Committee.

PRIOR VOTES:

Senate Labor, Public Employment and Retirement Committee (Ayes 4, Noes 1)
Assembly Floor (Ayes 68, Noes 2)
Assembly Appropriations Committee (Ayes 12, Noes 0)
Assembly Labor and Employment Committee (Ayes 7, Noes 0)
Assembly Public Employment and Retirement Committee (Ayes 6, Noes 0)

****