



September 11, 2024

Dear Senator,

The Retail Industry Leaders Association (RILA) opposes the renomination of National Labor Relations Board (NLRB) Chair Lauren McFerran. As an industry that strives to provide flexibility, upward mobility, and the power to choose one's own path, the decisions of Chair McFerran have made disruptive interactions in the workplace more common - ultimately eroding workplace culture, and productivity.

RILA is the U.S. trade association for leading retailers. We convene decision-makers, advocate for the industry, and promote operational excellence and innovation. Our aim is to elevate a dynamic industry by transforming the environment in which retailers operate. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than \$1.5 trillion in annual sales, millions of American jobs, and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad.

As retailers continue to focus on building a 21st century retail workforce that is diverse, innovative, and skilled it is imperative for Congress and the agencies, including the NLRB, to reimagine outdated labor laws to foster innovation, enhance communication between employers and employees, and promote employee rights. Chair McFerran has done the exact opposite. Under her leadership the actions of the NLRB have created an unlevel playing field filled with procedural landmines that undermine historical commonsense policies that work for employees and employers.

Leading retailers know that retail is for everyone; it is the place for a first job, a second chance, a third act, or a side hustle – the retail workforce is truly representative of the American workforce. Unfortunately, throughout the Chair's tenure on the Board, she has demonstrated an expansive and precedent altering view of the National Labor Relations Act (NLRA), and those actions have had a detrimental impact on retail operations including interactions between retail workers and customers. She has allowed increasingly aggressive, untenable, and at times unlawful positions on many significant issues that have only increased uncertainty in the workplace and litigation in the courts, making retail business operations more difficult for workers and the communities they serve. Chair McFerran has consistently upheld a reckless view of speech in the workplace by helming case decisions that put the NLRA at odds not only with common sense but with Title VII of the Civil Rights of 1974.¹

Chair McFerran's position has consistently supported that the NLRA provides a wide spectrum of protected speech even if that speech is political, abusive, or even discriminatory.² It is difficult for retailers to maintain an effective workforce policy when employees and customers don't feel safe and secure in an inclusive environment. This is highlighted by the Board's action to force a business to reinstate an employee who hurled sexually charged and abusive insults at a coworker because

¹ <https://i4aw.org/wp-content/uploads/2024/05/Battlestudy-web.pdf>

² <https://www.rila.org/blog/2022/08/the-nlr-free-speech-contortions>

Chair McFerran concluded the speech was protected under the NLRA.³ To make matters worse the Board also determined in the case of *Lion Elastomers LLC and United Steel* that there should be considerable leeway to partake in “abusive conduct” during activities otherwise protected by Section 7 of the NLRA.⁴ This shocking decision demonstrates the Board’s complicity in protecting the use of offensive and abusive conduct that conflicts not only with proper workplace conduct but may conflict with an employer’s legal obligation to protect employees from discrimination including color, religion, sex, national origin, age, and disability.

It is undisputed that employees, whether union or not, have the right under the NLRA to speak about conditions of work. However, this right does not and should not shield an employee from acting in an otherwise abusive, harmful or illegal manner. In addition, the NLRA’s right to discuss conditions of work does not and should not extend to matters of politics that have no or minimal connections to working conditions.⁵ It has been clear that political slogans do not qualify as union insignia since the NLRA’s Section 7 has long recognized that an employer may restrict messages that it reasonably believes may harm its relationship with customers or its public image. This right needs to be upheld and protected but unfortunately, again, Chair McFerran has taken the opposite approach that will no doubt harm all those involved.

The NLRB plays a critical role in shaping the legal landscape for labor relations and workplace practices. It is essential that the Chair of the NLRB understands the challenges faced by all stakeholders including workers and employers while maintaining a commitment for a balanced, harmonious, and fair environment for labor-management relations. Chair McFerran has routinely guided what is supposed to be an independent agency to become an “*all of government*” approach to the detriment of the economy, employers and employee free choice. Leading retailers strive to make their employees and customers feel safe and secure, but Chair McFerran and the Board’s crusade to empower union rights over all other considerations (including the law) will create more discord, and disruption to workers, businesses, and customers.

For the above reason, RILA opposes the renomination of Lauren McFerran as Chair of the NLRB. We believe her continued leadership would ultimately hinder leading retailers’ efforts to cultivate a 21st century retail workforce that is diverse, innovative and skilled. Thank you for considering our concerns on this important matter.

Respectfully,



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³ <https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=408278>

⁴ <https://ogletree.com/insights-resources/blog-posts/nlrb-ruling-makes-it-more-difficult-for-employers-to-discipline-employees-over-outbursts/>

⁵ <https://www.rila.org/retail-litigation-center/first-amendment-overturn-nlrb-uniform-decision>