

Major Changes at the NLRB: A New Acting General Counsel, the Rescission of Biden-Era General Counsel Memoranda, and the Disappearing-Reappearing Quorum

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To say that the past fifty days have been a period of significant changes at the National Labor Relations Board (“NLRB” or “Board”) is surely an understatement.

On [January 27th](#), the President terminated Biden appointee Jennifer Abruzzo from her role as the Board’s General Counsel and on February 3rd appointed [William Cowen](#), a career Board lawyer, to serve as Acting General Counsel.

That same day, [the President fired Gwynne Wilcox](#) from her position as a Member of the Board. The firing of Wilcox left the Board without a quorum, which it must have to issue decisions and engage in rulemaking. Wilcox brought a lawsuit in the U.S. District Court for the District of Columbia challenging her termination and seeking a declaratory judgment holding that the President could not terminate a Board Member other than for cause as defined in the National Labor Relations Act (the “Act”) and seeking her immediate reinstatement to her seat on the Board. On March 6, 2025, U.S. District Judge Beryl A. Howell granted Wilcox [summary judgment](#) and ordered Board Chair Marvin Kaplan to reinstate her for the remainder of five-year term which is set to expire on August 27, 2028. So where does this leave employers, unions and anyone else who has business before the Board?

While we believe these changes mean more employer-friendly labor policies coming down the road during a Trump administration, we provide a summary below of the current state of affairs and how to comply with existing law in the interim.

The Board: With or Without a Quorum

Prior Board actions established guidance to ensure the agency’s continued ability to be able to function in the absence of a quorum, recognizing that without a quorum the Board is not able to issue decisions or engage in rule making. While Member Wilcox has been reinstated to the NLRB by order of the D.C. District Court on March 6, 2025, the Trump administration is appealing and seeking a stay of that order and there is a good possibility that the issue will ultimately be considered by the

Supreme Court. On Tuesday, March 18, 2025, the Court of Appeals for the D.C. Circuit will hear oral argument on the issue. If the court stays or reverses the D.C. District Court's order, then the NLRB could once again be without a quorum, in which case the NLRB will implement the contingency plans summarized below.

Under the Board's 2011 "Order Contingently Delegating Authority to the General Counsel" contained at 76 FR 69768, any NLRB actions in federal courts that typically require Board approval are able to be initiated by the General Counsel. This includes the ability to initiate and prosecute proceedings under Section 10(j) or Section 10(e) or (f), and contempt proceedings pertaining to the enforcement of or compliance with any order of the Board. The General Counsel also has full and final authority and responsibility on behalf of the Board to certify to the Attorney General the results of any secret ballot elections by employees as to whether they wish to accept a final settlement offer made by their employer.

In the absence of a quorum, the Board's regulations (subpart X of 29 CFR Part 102) provide that the NLRB's Chief Administrative Law Judge (ALJ) has the authority to rule on requests for special permission to appeal, motions for default judgment, summary judgment, or dismissal of unfair labor practice complaints (even though such decisions cannot be appealed to the Board to be ruled upon until a later date)

From the perspective of employers with matters before the NLRB and the practitioners representing them, whether the Board has a quorum or not, nothing will change, deadlines must still be complied with, and filings should proceed as normal. When filing, if documents would typically get filed with the Board, practitioners should continue to file documents in that manner and the Executive Secretary's office will administratively direct the documents to the appropriate parties for review. However, cases cannot be decided, which means that any reversals of precedents adopted by the Board during the Biden administration cannot occur until there is not only a quorum but a new majority to make such decisions.

The Acting General Counsel's Actions to Date

President Trump's decision to fire General Counsel Abruzzo from her post came as no surprise given that four years earlier, President Biden on his first day in office fired [John Ring](#), who had been nominated to that role by President Trump during his first term and confirmed by the Senate. Abruzzo during her time in the General Counsel's role pursued an aggressive pro-labor agenda and sought to not only reverse actions taken during the first Trump administration but to go far beyond prior interpretations of the Act and [impose new limits on employers' rights and actions](#).

Almost immediately upon appointment, given Member Wilcox's removal from the NLRB, Acting General Counsel GC Cowen advised his staff to pull its arguments addressing the constitutionality of the NLRB's structure and expanded remedies in violation of the Seventh Amendment right to a jury trial in *Space Exploration Technologies Corp. v. NLRB*, No. 24-40315 (5th Cir. Feb. 3, 2025). In that case, respondent Space X is seeking review of the decision to apply such expanded remedies.

On the heels of that directive, he issued [General Counsel Memorandum 25-05](#), Recission of Certain General Counsel Memoranda, essentially reversing the expansive positions taken by Abruzzo during her time in the role. General Counsel Memoranda are significant because they identify the priorities and direction that the [General Counsel](#), who is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the NLRB field offices in the processing of cases.

Enhanced Remedies Are Being Revisited

Among the GC Memos withdrawn were those calling for the Board to adopt enhanced remedies beyond the traditional back pay, reinstatement and notice posting, seeking to severely limit employer rights to communicate with employees prior to votes by employees on questions concerning union representation and attempts to require employers to recognize and bargain with unions in circumstances in which unions had not won a vote. Other now- withdrawn GC Memos provided directives on how to interpret and comply with the Board's [Cemex Constr. Materials Pac., LLC](#), 372 NLRB No. 130 (Aug. 25, 2023) and [McClaren Macomb](#), 372 NLRB No. 58 (Feb. 21, 2023) decisions.

The Board's *Cemex* Decision Will Also Likely Be Moved Away From

[Cemex](#) holds that when a union requests recognition based on claimed majority support of employees in an appropriate bargaining unit, an employer must either recognize and bargain with the union or file an [RM petition](#), seeking a representation election, within two weeks to hold a secret-ballot election to confirm the union's claim of majority support. Failing to file or recognize and bargain with the union could trigger an unfair labor practice ("ULP") charge as could changes to employee terms and conditions of employment after the union demands recognition. *Cemex* represented a major expansion of the Board's historical use of bargaining orders as a remedy for unfair labor practices

The Acting General Counsel Is Expected to Likely Ask the Board to Overturn Its *McClaren Macomb* Decision

In *McClaren Macomb*, the Board held that the mere proffering by an employer to an employee of a severance agreement that contain a confidentiality clause and/or a non-disparagement clause constitutes an unfair labor practice, because it found such provisions impermissibly infringe on employees' rights under the Act, including the ability to discuss wages, hours, and other terms and conditions of employment and thereby hinder employees' ability to collectively organize or seek union representation or assistance from the NLRB.

While these cases remain good law today, it is likely that the Acting General Counsel or a new appointed and Senate confirmed General Counsel GC will find cases to challenge these holdings and raise those issues before a newly comprised NLRB (when there is one), that will reverse or overrule them. In the interim, for any memos that do not provide guidance on cases decided by the NLRB, we anticipate that GC Cowen will issue new directives shortly that address the memos he rescinded.

Given these developments and explanations by the Acting General Counsel and Board Members, practitioners are advised to continue operating as they have been prior to January 2025 and meeting required deadlines and complying with NLRB decisions that remain good law until receiving any new or additional information to the contrary. We will continue to follow and report on these developments.

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