

RECENT MAJOR CHANGES TO THE NLRB

February 19, 2025

There have been major changes to the National Labor Relations Board (NLRB) since President Donald Trump took office for his second term. On January 27, President Trump removed the General Counsel of the NLRB, Jennifer Abruzzo, and board member Gwynne Wilcox, from their positions with the board. Abruzzo's removal from her position was expected, but Wilcox's dismissal marks the first time in the NLRB's history that a president has removed a board member from office.

Additionally, on February 3, William B. Cowen was appointed acting general counsel of the NLRB. Cowen wasted no time in driving policy change, and on February 14, he issued Memorandum 25-05, rescinding several memoranda issued by his predecessor on matters involving noncompete agreements, confidentiality clauses in settlement agreements and electronic monitoring of employees, among others. Cowen indicated he will publish new guidance on these hot topics or will abandon the former decisions altogether.

These developments have left employers with questions about the NLRB's future.

Abruzzo and Wilcox Removal

Jennifer Abruzzo was appointed NLRB general counsel by former President Joe Biden in July of 2021, and was set to serve a four-year term expiring in July of 2025. Abruzzo's removal was expected, as President Biden had previously fired her Trump-appointed predecessor Peter Robb.

Gwynne Wilcox, the first Black female board member, served as one of the five members of the board. Wilcox was nominated by former President Biden, and confirmed by the U.S. Senate, to serve on the board in 2021; in 2023, she was again nominated and confirmed for a second term, set to expire in August 2028.

Unlike Abruzzo, Wilcox's removal was unanticipated. While federal courts have affirmed the president's ability to remove the NLRB's general counsel, this is the first time since the passage of the National Labor Relations Act (NLRA) in 1935 that a president has removed a board member. Following her removal, Wilcox was quick to indicate that she will be pursuing legal challenges to her termination, leaving open the possibility that the move could be overturned.

The Board's Future & Employer Considerations

As a five-member board, the NLRB requires a three-member quorum to make decisions on the cases before it. Now that only two members remain after Wilcox's removal (Republican Chair Marvin Kaplan and Democratic Member David Prouty), decision-making is left at a standstill. The board can still process its cases to move them along but cannot make any decisions on them or set new legal precedent without at least three members.

Notably, on January 31, a lawsuit was filed against the NLRB and its board members titled *Oceans Behavioral Hospital of Abilene v. National Labor Relations Board, et al.* There, the plaintiff is, in part, seeking to enjoin its proceedings before the NLRB, and seeking declaratory judgment that the federal statutes governing removal of NLRB members and Administrative Law Judges are unconstitutional. We are monitoring this case to determine what effect it may have on board proceedings.

Wilcox's removal will also result in a legal battle that may end up before the Supreme Court. If the Court upholds President Trump's decision, it could affect the composition of the board going forward. Even if Wilcox's removal is overturned, however, President Trump will still have two vacant seats to fill – this will result in a 3-2 Republican majority.

In the meantime, employers and practitioners with cases before the board should expect a slowdown for NLRB decision-making until new members are appointed by President Trump and confirmed by the Senate.

Major Rescissions from the Office of General Counsel

Abruzzo's successor, Acting General Counsel William B. Cowen, has rescinded several NLRB memoranda on significant issues in the labor & employment law field. In further detail, some noteworthy rescissions include:

Noncompetes

GC 23-08 – Noncompete Agreements that Violate the National Labor Relations Act – the former General Counsel maintained that the enforcement of noncompete agreements, unless narrowly tailored to special circumstances, violated an employee's right under Section 7 of the National Labor Relations Act (NLRA) to engage in concerted activity.

GC 25-01 – Remedying the Harmful Effects of Noncompete and 'Stay-or-Pay' Provisions that Violate the National Labor Relations Act– the former General Counsel extended his opinion that "stay-or-pay"

provisions, where an employee is required to pay their employer if they separate employment, also violated an employee's Section 7 rights.

Settlement Agreements

GC 23-05 – Guidance in Response to the *McLaren Macomb* Decision – the former General Counsel clarified the *McLaren Macomb* decision, which prohibits severance agreements where employees broadly waive their rights under the NLRA and explained that broad nondisparagement and confidentiality clauses in severance agreements were unlawful. He encouraged employers with severance agreements that contained broad confidentiality clauses to contact employees and advise that such provisions were null and void and the employer would not seek to enforce them.

Electronic Monitoring of Employees

GC 23-02 – Memorandum Regarding Electronic Management of Employees – the former General Counsel aimed to extend Section 7 rights under the NLRA to protect against an employer's use of intrusive artificial intelligence, algorithm-based decision making and surveillance of concerted activity during break times and in non-work areas.

Other Rescissions by Memorandum 25-05:

- GC 21-02 Rescission of Certain General Counsel Memoranda
- GC 21-03 Effectuation of the National Labor Relations Act Through Vigorous Enforcement of the Mutual Aid or Protection and Inherently Concerted Doctrines
- GC 21-04 Mandatory Submissions to Advice
- GC 21-08 Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act
- GC 22-06 Update on Efforts to Secure Full Remedies in Settlements (Revised Attachment)
- GC-23-04 Status Update on Advice Submissions Pursuant to GC Memo 21-04
- GC 24-04 Securing Full Remedies for All Victims of Unlawful Conduct
- GC 24-05 Section 10(j) Injunctive Relief and the U.S. Supreme Court's Decision in *Starbucks Corp. v. McKinney*
- GC 24-06 Clarifying Universities' and Colleges' Disclosure Obligations under the National Labor Relations Act and the Family Educational Rights and Privacy Act
- GC 24-06 Attachment
- GC 25-02 Ensuring Settlement Agreements Adequately Address the Public Rights at Issue in the Underlying Unfair Labor Practice Allegations

What This Means for Employers

Memorandum 25-05 signals that the NLRB will no longer prosecute employers based on the conclusions and theories expressed in the rescinded memoranda. We will continue to monitor as the NLRB offers more guidance on these controversial issues in labor law.

Related Practices

Labor and Employment

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