Ogletree Deakins

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The Practical NLRB Advisor

The Labor Policy Paradox?

In this Issue

In a November 2023 hearing before the U.S. Senate Committee on Health, Education, Labor and Pensions (HELP), Markwayne Mullin, the conservative Republican senator from Oklahoma, and Sean O'Brien, the president of the International Brotherhood of Teamsters, got into an exchange so heated that Senator Mullin challenged O'Brien to a fistfight. The moment garnered over half a million views and was emblematic of the historical tension between organized labor and the Republican Party.

Fast forward to February 19, 2025, when Senator Mullin posted a video of his more recent meeting with O'Brien in which the two were very convivial. Even more amazing than their *bonhomie* was the purpose of their meeting. Accompanying O'Brien on his trip to visit Senator Mullin's office was President Donald Trump's nominee to lead the U.S. Department of Labor (DOL)—Lori Chavez-DeRemer. Chavez-DeRemer, a former Republican congresswoman from Oregon, was the only Republican to cosponsor the highly controversial Protecting the Right to Organize (PRO) Act while in the U.S. Congress. Also, she reportedly was nominated by President Trump for the DOL post at the explicit urging of O'Brien.

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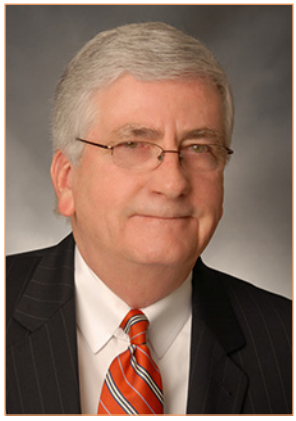
BRIAN IN BRIEF



In the Shakespearean play *Julius Ceasar,* Mark Antony while kneeling by the body of the assassinated emperor, utters the famous line: "Cry 'Havoc!', and let slip the dogs of war." Albeit in a different context, and penned more than four hundred years ago, the line has relevance today.

Whether borne of a desire to rein in the general ubiquity of government regulation, fundamentally alter the tenor of labor relations law, decrease the size of government, or vanquish the "administrative state"—or whether simply the by-product of "moving fast and breaking things," there's certainly no shortage of havoc on the labor-management front. In the last one hundred days, we've witnessed terminations, nominations, and legislative proposals that have left pundits opining. So surely, the dogs of war are on the prowl. In this issue of the *Advisor,* we take a closer look at some of the more significant developments and trends.

As is certainly clear, many aspects of labor law are being combined in the policy blender—and while the mix may seem chaotic, it can also create opportunity. In terms of the National Labor Relations Board (NLRB), this may be the perfect time for employers to stiffen their litigation resolve and expand their strategic and tactical approaches. The days of *pro forma* answers to complaints, unquestioned investigatory compliance, and lockstep acquiescence to Board directives and procedures may be at an end. Instead, the opportunity for creative affirmative defenses, constitutional and procedural objections, and parallel offensive litigation could now be here.

The NLRB has been an agency that has survived because of largely voluntary compliance by employers. However, between the current policy confusion and accompanying legal issues and, ironically, because of the radical enforcement regime of the former general counsel's era, the days of voluntarism, accommodation, and settlement may well be gone. While the chaos may be confusing for us, it's an existential threat to the Board.

Sincerely,

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About Ogletree Deakins' *Practical NLRB Advisor*

At Ogletree Deakins, we believe that client service means keeping our clients constantly apprised of the latest developments in labor and employment law. With the whirlwind of activity taking place at the National Labor Relations Board (NLRB) in recent years—affecting both unionized and nonunion employers—a quarterly newsletter focused on the NLRB is an essential tool to that end.

Ogletree Deakins' *Practical NLRB Advisor* seeks to inform clients of the critical issues that arise under the National Labor Relations Act and to suggest practical strategies for working successfully with the Board. The firm's veteran traditional labor attorneys will update you on the critical issues in NLRB practice with practical, "how-to" insights. Assisting us in this venture are the editors of Wolters Kluwer Legal and Regulatory Solutions' *Employment Law Daily.*

The *Practical NLRB Advisor* does not provide legal advice. However, it does seek to alert employers of the myriad issues and challenges that arise in this area of practice, so that they can timely consult with their attorneys about specific legal concerns.

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The multiple ironies of the meeting were captured in the text of Senator Mullin's post when he noted: "Let's be honest…. the last time @TeamsterSOB and I were in a hearing room together, we almost came to blows. President Trump brought business and labor together in this election. I trust his pick. Let's finish this fight."

Shifting labor policy?

O'Brien's friendly meeting with Senator Mullin was not the first time in the past year that the Teamsters president had appeared in a setting not typically frequented by labor leaders. For example, O'Brien was offered, and accepted, a prime-time speaking spot at the Republican National Convention and has appeared as a guest on news shows. While his gruff demeanor, his combative persona, and his organization's considerable membership make him a great media and political "get," his public ubiquity suggests some deeper tectonic shifts in our politics and labor policy.

Indeed, while he may have endorsed Chavez-DeRemer, it was President Trump who nominated her. If any observer had been asked just a few months ago if a supporter of the PRO Act would have been in line for any Cabinet post in a Republican administration—let alone Secretary of Labor—the answer would have been a resounding no. And, yet, as they say, here we are.

Were the Chavez-DeRemer nomination and subsequent confirmation alone not sufficient proof that something strange might be afoot, Senator Josh Hawley, the conservative Republican senator from the Missouri heartland, dropped a new labor law "framework" that he plans to introduce as legislative proposals, one of which he introduced on March 4, 2025. (A discussion of the Hawley "framework" begins on page 5). The framework mirrors exactly several of the most controversial aspects of the PRO Act, including mandatory first contract interest arbitration, twenty-day "quickie" elections, civil penalties under the National Labor Relations Act (NLRA), and banning of warehouse production quotas. That such proposed legislation would be authored and championed by a Republican would have been unthinkable less than a year ago.

Historical perspective. The conservative and more recently populist strains running through the Republican Party have, at times, proven attractive to organized labor and union voters. For example, in 1972 there was significant blue-collar support for Richard Nixon and his "law and order" agenda. Indeed, that year the AFL-CIO refused to endorse any presidential candidate—a clear rebuff to a Democratic Party that had routinely held the AFL-CIO's support. The Teamsters went even further and opted to officially endorse Nixon. Ronald Reagan, who was a proponent of collective bargaining and two-time president of the Screen Actors Guild, also enjoyed substantial electoral support from working-class voters. Once again, in 1980 the Teamsters officially endorsed his candidacy as well.

These political marriages, however, have historically been far short of perfect. For example, despite his union *bona fides* and support, Ronald Reagan fired all the air traffic controllers who participated in the unlawful Professional Air Traffic Controllers Organization (PATCO) strike in the summer of 1981. His presidency also witnessed the largest decline in union membership in history—a net loss of more than three million union members, a 14-percent drop off.

Trump and organized labor

History, as they say, doesn't repeat itself, but it often rhymes. In the 2024 election cycle then-presidential candidate Trump enjoyed massive blue-collar support and captured a sizeable share of the union household vote. Although officially endorsed by the AFL-CIO, the United Auto Workers, and others, union support for Kamala Harris in the 2024 election cycle has been almost universally characterized as lukewarm. As noted, the Teamsters refused to endorse either candidate, and its president addressed the Republican convention—a tacit signal of support for Trump. Shortly thereafter, then President-elect Trump returned the favor by nominating Chavez-DeRemer, the Teamsters' preferred candidate, for Secretary of Labor. In the run-up to the inauguration, Trump also publicly backed the International Longshoremen's Association (ILA) in their successful negotiations for a new master contract with the United States Marine Alliance, the multi-employer bargaining group.

Paradoxically, however, while exchanging overtures with organized labor, the Trump administration has simultaneously taken on the entrenched and largely unionized federal workforce. Federal employee unions are now suing the Trump administration over its discharge of probationary employees, its layoffs and furloughs of nonprobationary employees, its early retirement/buyout plan, and its demands

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for accountability and in-person attendance. In early February 2025, the Trump administration dismissed the chair of the Federal Labor Relations Authority (FLRA). The FLRA functions like the National Labor Relations Board (NLRB), except it covers only federal employees.

While the right to fire the GC is now settled, the dismissal of Wilcox has spawned a lawsuit likely to have an enormous impact on administrative and constitutional law.

Even more paradoxically, the Trump administration has taken on the NLRB. Shortly after his inauguration, President Trump fired the NLRB's general counsel (GC), Jennifer Abruzzo, and its acting chair, Gwynne Wilcox. While the right to fire the GC is now settled, the dismissal of Wilcox has spawned a lawsuit likely to have an enormous impact on administrative and constitutional law. As we have noted in the discussion about the Wilcox lawsuit which begins on page 7 of this issue of the *Advisor*, at issue with this and other separations of "independent agency" personnel is whether the for-cause removal protections that the U.S. Congress provided for such individuals is constitutional or not. The issue, which implicates the entire structure of the government's administrative apparatus, centers on the continuing viability of a 1935 Supreme Court of the United States opinion—*Humphrey's Executor v. United States* (295 U.S. 602 (1935))—and will almost surely involve the current Supreme Court revisiting this precedent.

Beyond the personnel changes, the administration's Department of Government Efficiency (DOGE) has begun an audit of the NLRB and has already listed measures such as the shuttering of the NLRB's Buffalo office as a cost-cutting measure. More importantly, in mid-February, President Trump issued an executive order requiring all agencies to submit any new rule or regulation to the White House for review and approval and to obtain clearance and approval for all litigation positions they take in federal court litigation. This requirement constitutes a direct shot at the NLRB, which has always maintained its "litigation independence" to the point of not deeming itself bound by decisions issued by federal courts of appeals that contravene the agency's view of the law (the so-called "non-acquiescence" doctrine).

Two divergent approaches

Under these circumstances, how does one reconcile the apparently oxymoronic view of the Republican Party toward organized labor? How can the same party that plainly wants to "rein in" the NLRB also support a renamed PRO Act? How can an administration that fires the Board's former top prosecutor and chair simultaneously nominate a labor-friendly candidate to lead the DOL? In large measure, any analysis of these issues begins with the recognition that the Republican Party's relationship with labor actually has two versions—the Hawley view and the Trump view. Both recognize the political importance of blue-collar voters to the present and future fortunes of the Republican Party and would not have been elected without their support. However, the two have taken entirely different approaches in attempting to secure that support.

Senator Hawley's approach is based on the notion that what appeals to union organizers also resonates with working-class voters. However, this ideological position is driven by the prevailing myth that the majority of workers want a union in their workplaces and only the obstacles imposed by the NLRA prevent this from happening. If one accepts this premise, then support for the PRO Act or the Hawley revamp would make some sense. The problem is that the predicate for the proposition is demonstrably false since private-sector union membership has plunged over time but not because of any so-called "impediments" with the NLRA. Indeed, the process of organizing has either remained the same or has become simpler while at the same time union density continues to decrease. The reality is that while employees, in the abstract, may like the *idea* of collective action, when confronted with the actual choice, many view the baggage that unions bring as not being worth the price.

Pragmatic vs. ideological. By contrast, the Trump view is not ideological. The administration is starkly transactional in all it does. Policy is invariably formulated according to a cost/benefit analysis and is driven by economic interest. While growing membership, revenue, and power through streamlined organizing is very appealing to union leaders, it means little to nothing to the average worker.

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In the administration's view that is why Senator Hawley's reintroduction of the PRO Act is unlikely to gain traction. Similarly, many employees have either never heard of the NLRB or are not concerned with it. Instead, many view the administration's actions regarding the NLRB in the larger context of a campaign against government inefficiency and cost.

"[T]he administration sees little risk in policy choices that disfavor unions, particularly where the trade-off is a larger economic benefit."

If taming the administrative state, including the NLRB, reduces government spending and ultimately taxes, many private-sector employees appear to be all for it. In a similar vein, federal workers appear not to garner much empathy from either their union or non-union private-sector counterparts. The prevailing private-sector view is that federal workers should be subject to the same rules and vicissitudes of employment as everyone else. Further still, organized labor has increasingly become associated with the more left-wing social issues. Thus, the administration sees little risk in policy choices that disfavor unions, particularly where the trade-off is a larger economic benefit.

That general approach, however, stands in contrast to how the administration has thus far dealt with specific issues. For example, contrast the general approach with specific instances, like the ILA negotiations, where the incoming Trump administration clearly perceived a mutual transactional benefit in supporting organized labor. Then president-elect Trump's intervention demonstrably resulted in a tangible economic benefit to the ILA members and simultaneously benefited the incoming administration by avoiding a dock strike that would have interrupted supply chains and thrown a wrench into its economic plans. Similarly, the administration's tariffs and policies regarding the steel and aluminum industries were of great benefit to the heavily unionized employees in those industries, yet they also squared precisely with the economic and trade policies of the administration. The nomination and subsequent Senate confirmation of Chavez-DeRemer to lead the DOL is equally illustrative since the agency can serve as a hub for aligning both labor and economic policy, and since it lacks control or connection with the NLRB. From the administration's standpoint there's little risk and potentially significant reward in having a union-friendly nominee at the helm of the DOL. On the other hand, it is unlikely that the nominees for NLRB posts will be drawn from the same labor-friendly pool.

Looking ahead

The lessons and implications here are significant. The administration's labor policy is simply pragmatic. Thus, where organized labor can align its members' interests with the administration's larger economic goals, it will be successful. But where it champions anti-business policies that possess no real political or economic trade-offs, it will fail. Politically savvy unions may reap some benefits for their members over the next few years even if they do not swell their membership ranks. Other unions, the NLRB, and legislative proposals like Senator Hawley's, however, appear destined for defeat. Those entities may be in the right church, but they have most definitely picked the wrong pew. ■

The Hawley 'framework' and S. 844

Just one week into the current session of Congress, Senator Josh Hawley (R-MO) announced his new "labor law framework" proposal. The January 10, 2025, manifesto reads more like a Teamsters' wish list than a policy proposal put forward by an otherwise conservative legislator. Indeed, it has been derisively described as the Protecting the Right to Organize (PRO) Act and Employee Free Choice Act (EFCA) "on steroids."

Policy proposals. The "framework" consists of seven policy proposals. Each would be eventually enshrined in actual statutory language, making it impossible for any future Board to change them on its own. The seven proposals are:

1. Mandate that all union certifications be held no more than **twenty business days** after the filing of a petition.
2. Require that following an initial certification the parties convene to negotiate a first collective bargaining agreement (CBA) within ten days and complete

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their negotiations withing ninety days. If there is no agreed-upon contract at that point the matter must be submitted to **binding interest arbitration**.

3. Impose a statutory ban on so-called "**captive audience**" speeches.
4. Provide for enhanced remedial and civil **penalties** for unfair labor practices.
5. Require the posting of an "**employee rights**" **notice**.
6. Establish new workplace **ergonomic standards**.
7. Statutorily bar the use of certain **performance standards**, particularly in warehouse operations.

Senate Bill 844. Senator Hawley also announced his intent to split the framework into separate legislative bills. He made the initial step by introducing Senate Bill 844, the Faster Labor Contracts Act, on March 4, 2025. This legislation would statutorily mandate the ten-day/ninety-day requirement and compel binding interest arbitration as noted in 2., above. First-contract binding interest arbitration was a key feature of both the PRO Act and EFCA. The notion that a final and binding collective bargaining agreement would be determined and imposed on the parties by a third party is unprecedented and completely antithetical to the most basic precepts of traditional U.S. labor relations law and policy.

That such a proposal would be championed now by a Republican senator is, to almost every observer, shocking. In addition to Senator Hawley, the newly minted Republican senator from Ohio, Bernie Moreno, has signed on as a cosponsor of the legislation. As a final shock, the bill's author, Senator Hawley, is a one-time constitutional law professor, and yet the legislation is full of legal infirmities.

Legal concerns

Here are just a few of the legal problems with the Hawley framework in general, and S. 844 in particular. As to S. 844:

- Since an unresolved CBA would be decided by what is essentially a government-appointed arbitrator, its entire content could now constitute "state action," meaning that unlike a private contract, the CBA would be subject to constitutional challenge.
- The inclusion of some "standard" clauses, like "a union shop" provision, may raise equal protection issues.
- The absence of clear contract-making criteria may give rise to claims of arbitrariness and capriciousness and may also result in constitutional violations.
- The timetable in the bill may render an employer's statutory right to seek judicial review of any R-case determination a practical nullity, again giving rise to due process claims.
- Largely directionless contract-making may raise potential infirmities under both the standard nondelegation doctrine, the private nondelegation doctrine, and separation of powers.
- Housing contract-making, investigation, prosecution, and decisional authority all within the executive branch would exacerbate existing constitutional concerns regarding due process and separation of powers.
- Perhaps most egregious, however, is the fact that the bill stands to destroy collective bargaining by having a contract imposed on the parties by an outside government bureaucrat. Doing so would violate the most fundamental tenet of collective bargaining, i.e., that the parties that must live with the contract are the only parties that should make the contract.

As to the remainder of the "framework," and along with the above, here are a few more concerns:

- The penalty provision raises serious Seventh Amendment right to jury trial issues.
- The ergonomic standard may run afoul of the Congressional Review Act.
- The quota restriction likely involves "targeting" and raises equal protection concerns.
- The posting requirement and the captive audience ban may raise serious First Amendment concerns.

For both political and legal/constitutional reasons, it is hard to believe that the "framework" or S. 844 were penned by a senate staffer with the approval of the U.S. Senate's legislative counsel. According to several rumors, both were authored by the Teamsters union and simply introduced with little or no congressional vetting. ■

Federal judge reinstates NLRB Member Wilcox

On March 6, 2025, a federal judge of the U.S. District Court for the District of Columbia ordered that National Labor Relations Board (NLRB) Member Gwynne Wilcox, removed by President Donald Trump during his first days in office, be reinstated to the Board and complete her five-year term, which expires on August 27, 2028. U.S. District Judge Beryl A . Howell ruled that the president does not have the authority to remove a sitting NLRB member without cause.

President Trump removed Wilcox—a Democratic appointee to the NLRB and briefly the NLRB chair—from the Board on January 27, 2025, leaving the Board with only two sitting members and without a quorum to hear cases. Wilcox filed a lawsuit challenging the legality of her removal, alleging her removal violated the National Labor Relations Act (NLRA) because it was without notice or a hearing and without an alleged cause.

The opinion. Judge Howell granted summary judgment for Wilcox on the claims and ordered NLRB Chair Marvin Kaplan, whom President Trump had tapped to replace Wilcox as chair, and his subordinates to "permit [Wilcox] to carry out all of her duties as a rightful, presidentially-appointed, Senate-confirmed member of the Board."

"The President does not have the authority to terminate members of the National Labor Relations Board at will, and his attempt to fire plaintiff from her position on the Board was a blatant violation of the law," Judge Howell wrote in a thirty-six-page memorandum opinion. "Defendants concede that removal of plaintiff as a Board Member violates the terms of the [NLRA], … and because this statute is a valid exercise of congressional power, the President's excuse for his illegal act cannot be sustained."

Constitutional conundrum. Wilcox's legal challenge has raised significant constitutional and separation of powers issues, and Judge Howell's decision has been appealed. In 1935, the Supreme Court of the United States, in *Humphrey's Executor v. United States*, upheld restrictions on the president's authority to remove officers of certain types of independent agencies—in that case, a commissioner of the Federal Trade Commission. The Wilcox case, however, is the first attempt to remove an NLRB member by the president without alleged cause.

The NLRA provides the president with the power to appoint NLRB members "with the advice and consent of the Senate" to five-year terms and to remove "any member … upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause." Judge Howell rejected the Trump administration's argument that removal protections presented "extraordinary intrusion[s] on the executive branch," finding "NLRB Board members' removal protections … are consistent with the text and historical understandings of Article II, as well as the Supreme Court's most recent pronouncements."

"That Congress can exert a check on the President by imposing for-cause restrictions on the removal of leaders of multimember boards or commissions is a stalwart principle in our separation of powers jurisprudence," Judge Howell wrote.

Stay tuned …

If not stayed by a federal appeals court, the decision will reinstate Wilcox to the NLRB, at least for now, as the case has been appealed and could potentially land at the Supreme Court, given the constitutional questions. (See Issue 27 of the *Practical NLRB Advisor* for a more detailed discussion of these constitutional issues).

Wilcox's removal had left the NLRB with only two sitting members: Republican-appointee Kaplan and Democratic-appointee David Prouty. Two members do not constitute a legal quorum, and thus the Board has been unable to decide a growing backlog of cases. With the reinstatement of Wilcox there is now a quorum; however, there is also a political misalignment on the Board. Thus, even though a Republican occupies the White House, the Board now currently has a Democratic majority, and despite the fact the chairman is a Republican, he is now in the political minority. This aberration appears likely to persist for some time, since as this issue of the *Advisor* goes to press, the White House has yet to forward any nominees for the two vacant seats on the Board to the U.S. Senate for consideration.

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An even deeper problem may be brewing because of the reinstatement order. There was little doubt that the Trump administration would appeal Judge Howell's decision regarding the Wilcox removal. That termination is one of several that the administration has made, and all are embroiled in lower court litigation at this point. As noted above, the right of the president to remove members of independent agencies, boards, and commissions, despite congressionally imposed limitations on that right, raises significant constitutional issues that will very likely be decided by the Supreme Court.

Given the high court's composition and its recent jurisprudence, it is certainly a possibility that any restrictions on the president's right to remove executive branch officers will be struck down as contrary to Article II, and that the order reinstating Wilcox (and other discharged federal officers) will be vacated. Should that happen, what happens to all the matters in which Wilcox participates in the wake of her reinstatement? The argument, of course, is that any decisions or orders in which Wilcox cast the third and deciding vote should be declared void since she was not legally serving as a Board member. This argument would seem supported by the Supreme Court's decision in *New Process Steel, L.P. v. National Labor Relations Board*, 60 U.S. 674 (2010). Were that to happen, a newly constituted and legally empowered Board would need to reconsider and reissue all those matters as happened in the wake of *New Process.* ■

Practical takeaways

C-Case respondents and R-Case employers may want to consider raising both the potential Article II infirmity and the prospect of a *New Process* complication as affirmative defenses as grounds for a motion to stay proceedings. While these are unlikely to succeed at the initial stages of litigation, that may not be the case later, and it is important to timely raise them to defend against any future claim that they have been waived. The Board itself needs to recognize that the current situation significantly raises the prospect that its short-term decision-making could all be vacated.

The Board should therefore confine itself to issuing decisions in strictly "run-of-the-mill" cases where all three sitting members agree on the outcome and rationale. Then-members Wilma B. Liebman and Peter C. Schaumber utilized this approach during the pendency of the *New Process* litigation, and it made the post-decisional "clean up" easier. The White House and the U.S. Congress need to move with a greater degree of urgency than has thus far been exhibited to fill the two open Board seats. Since there is no question regarding the legal status of either Kaplan or Prouty's tenure the addition of even a single new member would at least cure any current quorum problem.

Acting GC swiftly rescinds predecessor's memos

On February 14, 2025, National Labor Relations Board (NLRB) Acting General Counsel (GC) William B. Cowen rescinded a series of memoranda issued by his predecessor, Jennifer Abruzzo, including memos on remedies, the rights of college athletes, restrictive covenants, union recognition, and others. The move effectively reshapes federal labor law at the prosecutorial level and signals a new policy direction for the NLRB under the Trump administration.

Sweeping memo

In Memorandum GC 25-05, the newly installed Acting GC rescinded at least eighteen prior general counsel memoranda and named more that are "rescinded pending further review," including Memorandum GC 25-04, which was issued just days before President Donald Trump took office and addressed the enforcement of the National Labor Relations Act (NLRA) in conjunction with federal equal opportunity laws.

"Over the past few years, our dedicated and talented staff have worked diligently to process an ever-increasing workload," the acting GC said in the memo. "Notwithstanding these efforts, we have seen our backlog

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of cases grow to the point where it is no longer sustainable. The unfortunate truth is that if we attempt to accomplish everything, we risk accomplishing nothing."

On February 3, 2025, President Trump tapped Cowen, who was serving as the Regional Director for the NLRB's Los Angeles Region Office (Region 21), to serve as the acting general counsel. That move came days after President Trump shook up the NLRB, discharging former general counsel Jennifer Abruzzo and removing NLRB Member Gwynne Wilcox, whose term was not set to expire until August 2028.

In his first memo, the acting GC rolled back much of the former GC's policy agenda and set the stage for a new NLRB and labor policy under the Trump administration.

Rescinded memos include:

- GC 21-06—instructing Regions to seek "the full panoply of remedies available" in unfair labor practice (ULP) cases;
- GC 21-07—instructing Regions to craft settlement agreements that "ensure the most full and effective relief";
- GC 21-08—taking the position that certain college athletes are "employees" under the NLRA;
- GC 23-08—declaring that the "proffer, maintenance, and enforcement" of noncompete agreements in employment contracts and severance agreements violate the NLRA;
- GC 25-01—taking the position that so-called "stay-or-pay" provisions are unlawful;
- GC 22-06—advising Regions that they may seek a judgment to force employers to comply with the specific terms of settlement agreements in ULP cases;
- GC 23-02—raising questions about the impact of electronic monitoring on employee's Section 7 rights; and
- GC 23-05—clarifying that the Board's February 2023 *McLaren Macomb* decision that nondisparagement and confidentiality provisions in severance agreements are unlawful applies retroactively to agreements already signed.

The memo also rescinded GC 24-01, which provided guidance concerning the NLRB's 2023 decision to adopt a new union-friendly recognition standard, with the intent to provide further guidance at a later date.

Additionally, the memo rescinded GC 22-04 on the right to refrain from mandatory workplace meetings as "no longer relevant" following the NLRB's November 2024 decision to prohibit so-called "captive-audience meetings" and rescinded GC 21-01 that had allowed mail-in ballot elections, noting that "COVID-19 is no longer a Federal Public Health Emergency."

Non-compete labor policy also rescinded. In a significant development for employers that utilize restrictive covenant agreements, the acting GC also rescinded two restrictive covenant-related memoranda authored by his predecessor: (1) "GC 23-08 Non-Compete Agreements that Violate the National Labor Relations Act" and (2) "GC 25-01 Remedying the Harmful Effects of Non-Compete and 'Stay-or-Pay' Provisions that Violate the National Labor Relations Act."

Memo GC 23-08 declared that the "proffer, maintenance, and enforcement" of non-compete agreements in employment contracts and severance agreements violate the NLRA. According to Abruzzo, who issued that memorandum on May 30, 2023, non-compete "agreements interfere with employees' exercise of rights under Section 7 of the National Labor Relations Act (the Act or NLRA). Except in limited circumstances, I believe the proffer, maintenance, and enforcement of such agreements violate Section 8(a)(1) of the Act."

The acting GC also rescinded GC 25-01, which identified as unlawful many common provisions under which employees must repay their employers certain bonuses and benefits if they voluntarily or involuntarily separate from employment before the expiration of a defined stay period. Abruzzo's enforcement position on stay-or-pay agreements was that they violated Section 8(a)(1) of the NLRA unless they were "narrowly tailored to minimize any interference with Section 7 rights," and employers can meet a specific test for whether the provision "advances a legitimate business interest."

Remaining risk

While the rescission of the memos is a welcome development for the employer community, some labor risk remains relating to these agreements. Abruzzo's positions on non-compete agreements and stay-or-pay agreements are, at least in part, rooted in application of two NLRB decisions:

(1) *McLaren Macomb*, which declared certain nondisparagement and confidentiality provisions

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presented to nonmanagerial employees as violative of employees' Section 7 rights, and

(2) *Stericycle, Inc.*, which adopted a new standard on when an employer work rule infringes on employees Section 7 rights.

The *McLaren Macomb* and *Stericycle* cases are still existing Board law. Efforts to adopt new standards will require a fully constituted NLRB, which presently lacks a quorum. Employers also still need to factor in conflicting decisions by NLRB administrative law judges (ALJ). For example, some ALJs have adopted Abruzzo's position concerning the legality of non-compete agreements for non-supervisory/non-management employees. But other ALJs have concluded that Abruzzo's position does not comport with existing law, and to be enforceable, the positions must first be adopted by the NLRB—which has not yet happened. As a result, employers should continue to be thoughtful and acknowledge that there remains some risk in fully abandoning Abruzzo's positions in the memos. Employers may need to balance that risk against their legitimate businesses interests in having appropriately tailored restrictive covenant protections.

State laws remain in effect. The rescission of the memos alters, and further informs, the risk analysis surrounding the use of these common provisions in employment contracts and severance agreements. Employers may now have more leeway to implement and enforce non-compete clauses without the same level of legal scrutiny or risk of being found in violation of non-supervisory/non-management employees' rights under Section 7 of the NLRA. But employers should note that restrictive covenants for non-supervisory employees continue to be governed by state law—as they traditionally have been. Employers wishing to enforce such agreements should continue being mindful of applicable state law and should ensure that such covenants are tailored to protect their legitimate business interests, including preservation of confidential information, trade secrets, customer goodwill, and fair competition.

Looking ahead. The rescission of the former general counsel memos under the Trump administration was expected, and more changes at the NLRB and in labor policy are likely to follow. In the memo, Acting General Counsel Cowen indicated that his review was ongoing and that "adjustments will be made as needed." ■

The last of the Biden Board's decisions

In the final weeks of former National Labor Relations Board (NLRB) chair Lauren McFerran's term, which expired on December 16, 2024, the then Democratic-led Board issued three crucial union-friendly decisions that banned mandatory informational meetings, overturned a precedent that said employers could warn workers that unionization might impact the workplace dynamic, and restored the "clear and unmistakable" waiver standard. Here are the details.

No more warnings about workplace dynamic

On November 8, 2024, the NLRB ruled that telling employees unionization could impact their relationship with their employers may violate the National Labor Relations Act (NLRA), overturning forty-year-old Board precedent that had held such statements did not violate the Act. Among other claims, the case involved alleged threats by a supervisor that unionization would result in the loss of employees' ability to address issues with their managers on an individual basis. The NLRB adopted an administrative law judge's (ALJ) finding that such statements about the impact of unionization on the employees' ability to address issues individually with their employers did not constitute unlawful threats.

Nonetheless, a three-member majority of the Board decided to "prospectively overrule" its 1985 *Tri-Cast, Inc.* decision, which held that "[t]here is no threat, either explicit or implicit, in a statement which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before." The majority explained that *Tri-Cast* was "poorly reasoned when it was decided" and has led to "categorically immunized employer campaign statements" that could reasonably be interpreted at threats. "[T]he Board erred in deeming categorically lawful nearly any employer statement to employees touching on the impact that unionization would

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have on the relationship between individual employees and their employer," former NLRB chair McFerran wrote in the decision.

Instead, the Board said "the purposes of the Act are better served if the content and context of such statements are analyzed on a case-by-case basis" consistent with the Supreme Court of the United States' 1969 decision in *NLRB v. Gissel Packing Co*. "Thus, to be deemed lawful, employer predictions about the negative impacts of unionization on employees' ability to address issues individually with their employer 'must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control'," the NLRB decision said. Further, according to the decision, if such a prediction is not based "solely" on the economic necessities known to the employer, then "the statement is no longer a reasonable prediction based on available facts but a *threat of retaliation based on misrepresentation and coercion*." (Emphasis in NLRB decision).

While the decision purports to articulate a standard for analyzing employer statements in context, its application is likely to be highly subjective, inconsistent, and problematic for employers.

Board Member Marvin Kaplan concurred in part and dissented in part. Most importantly, he dissented from the Board's approach on *Tri-Cast*, criticizing the majority's claim that they were "overruling '*Tri-Cast* and its progeny,'" emphasizing the Board's finding that the employer's statements did not constitute unlawful threats and stating that issues in this case did not present an opportunity to overrule *Tri-Cast*.

Looking ahead. While the decision purports to articulate a standard for analyzing employer statements in context, its application is likely to be highly subjective, inconsistent, and problematic for employers. Thus, the Board merely needs to demand evidence that employer claims of this ilk be substantiated by evidence but reject the proffered evidence as insufficient. It is a formulation that seems to permit the arbitrary invocation of violations. Even more significantly, the decision seems to also implicate an employer's constitutional and statutory rights of free speech.

Mandatory informational meetings banned

The majority's attempt to curb free speech and even property rights did not end with *Tri-Cast,* however. Just five days later, the NLRB issued a decision prohibiting the practice of holding mandatory employee meetings to discuss the employer's views on unionization. The decision followed through on the former NLRB general counsel's attack on so-called "captive audience meetings," an important tool for employers to educate workers about the potential workplace implications of unionization. Significantly, the decision overrules a 1948 NLRB decision that found such mandatory meetings were lawful.

Reversing that 75-year-old precedent, the Board held that an employer interferes with employees' organizing rights under Section 7 of the NLRA when it "compels employees to attend a captive-audience meeting on pain of discipline or discharge" to express "its views concerning unionization," "regardless of whether the employer expresses support for or opposition to unionization." "[A] captive-audience meeting is an extraordinary exercise and demonstration of employer power over employees in a context where the Act envisions that employees will be free from such domination," the Board stated. "We thus prohibit captive-audience meetings." Notably, the Board found that employer free speech rights, including those embodied by Section 8(c) of the NLRA—which allows employers to express views without "threat of reprisal or force of promise of benefit"—and the First Amendment "do not insulate employers from liability for such violations."

Member Kaplan dissented in part and issued a separate opinion, arguing the decision was an "unconstitutional overreach" violating employers' free speech rights under the First Amendment. He further criticized the majority for bringing on this "sea change in the legal landscape governing union election campaigns" without inviting other stakeholders or interested parties to weigh in on the issue.

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Mandatory meetings under fire. Employers often hold meetings during a union organizing campaign. These meetings can be an important means for an employer to exercise its right to communicate its position on unionization. However, such meetings have come under increased scrutiny in recent years as several states, such as California and New York, and other jurisdictions have moved to limit or prohibit them, and in April 2022, the former NLRB general counsel issued an official memorandum indicating opposition to the practice.

In its latest decision, the Board highlighted aspects of mandatory meetings that in its view render them coercive and unlawful, including that employers can:

- hold the meetings "repeatedly," "for whatever length of time," and "whenever" they want, except within twenty-four hours of a representation election;
- "observe employees" to assess their reactions to the employers' messages and "with whom they associate"; and
- "silence, or even banish, employees who would express their own views or even just ask questions."

Safe harbor. The Board outlined a "safe harbor" for employers to hold "voluntary," "workplace, work-hours meeting[s] with employees." To fall into this safe harbor, "an employer will not be found to have violated Section 8(a)(1) if, reasonably in advance of the meeting, it informs employees that:

- the employer intends to express its views on unionization at a meeting at which attendance is voluntary;
- employees will not be subject to discipline, discharge, or other adverse consequences for failing to attend the meeting or for leaving the meeting; and
- the employer will not keep records of which employees attend, fail to attend, or leave the meeting."

Employers must actually follow through on those assurances and will even be found to have compelled attendance if "under all the circumstances, employees could reasonably conclude that attendance" was mandatory or "could reasonably conclude that their failure to attend or remain at the meeting could subject them to discharge, discipline, or any other adverse consequences."

Looking ahead. While the Board has provided employers a safe harbor, the decision is likely to further restrict employers' ability to communicate with employees and educate them on the impact of unionization. To many, this decision in the labor relations context mirrors a larger and even more troubling trend of censoring or limiting speech with which the government then in power may disagree.

'Clear and unmistakable' waiver standard restored

Finally, on December 10, the Board reverted to the "clear and unmistakable" waiver standard for evaluating whether an employer made unlawful unilateral changes without first giving the union notice and an opportunity to bargain. This decision will make it more difficult for employers to unilaterally make workplace changes without first bargaining with their workers' union, even when they seek to act under the authority of a negotiated management rights clause in a collective bargaining agreement (CBA). The decision by former chair McFerran was joined by Member David Prouty and Member Gwynne Wilcox, with Member Kaplan dissenting.

The ruling replaces the "contract coverage" standard from a 2019 Board decision, where employers could unilaterally change working conditions if the change was "within the compass or scope" of contract language, allowing employers to implement changes. "[W]e find that the contract coverage test adopted in [2019] undermines the [National Labor Relations Act's] central policy of promoting industrial stability by encouraging the practice and procedure of collective bargaining," the Biden Board said in the decision.

Management rights. The decision involved a waste hauling company that purchased and installed video cameras for its fleet of four hundred trucks—most of which were driven by bargaining unit drivers —without providing prior notice to the union or an opportunity to bargain. The cameras could monitor drivers and could be used for disciplinary purposes. The union objected, arguing that the installation of the video cameras is a mandatory subject of bargaining. When the employer proceeded to install the cameras, the union filed an unfair labor practice charge alleging that the employer violated Section 8(a)(5) and (1) of the NLRA, which prohibits

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employers from making unilateral changes and refusing to bargain collectively with their employees' chosen union representative.

Even though the administrative law judge (ALJ) agreed that the employer failed to provide the union with prior notice and a meaningful opportunity to bargain, the ALJ found the installation of the cameras was "covered" by the management rights clause's right to "implement changes in equipment." According to the ALJ, "by agreeing to the management-rights language," the union had "relinquished the right to bargain over the effects of the [employer's] decision to install the cameras."

'Clear and unmistakable' waiver. In its decision, a three-member majority of the Board rejected the "contract coverage" standard applied by the ALJ and restored a "clear and unmistakable" waiver standard under which broad management rights language will not insulate employers from their duty to bargain. Under the "clear and unmistakable" standard, the Board "will look[] to the precise wording of relevant contract provisions." Management rights clauses "couched in general terms" and which do not refer to "any particular subject area will not be construed as waivers." An employer may be able to demonstrate a waiver by pointing to evidence from the bargaining history that "shows that the specific issue was 'fully discussed and consciously explored' during negotiations and that 'the union consciously yielded or clearly and unmistakably waived its interest in the matter.'"

Applying this new standard in the case, the Board found that the management rights clause in the employer's CBA "lack[ed] the degree of specificity required to constitute a clear and unmistakable waiver of the Union's right to bargain over the installation and use of cameras to monitor and potentially discipline unit employees." Further, the Board found the employer had failed to point to anything in the bargaining record that would indicate the parties had considered the potential for the installation and use of such cameras. The Board ordered the employer "to bargain, on request by the Union, over the decision and its effects."

In a dissenting opinion, Member Kaplan criticized the Board majority for acting when it appeared from the record that the employer never actually installed the cameras in the trucks of unit employees and that it had, in fact, bargained over the installation. Member Kaplan further criticized the Board for asserting that the employer had to bargain over the purchase of the cameras and intent to install the cameras in its entire fleet of four hundred trucks when only five or six were driven by bargaining unit employees represented by the union.

Looking ahead. The Board's restoration of an impractical clear waiver standard not only makes work-related decisions the subject of mid-term bargaining, but it also deters unionized employers from being agile, flexible, and responsive to rapid changes in the workplace. The safe harbor of a management rights' clause is now vitiated unless an employer can somehow anticipate every specific workplace change it might conceivably want to make over the life of a CBA and list those specific changes within the clause. Finally, it is worth noting that in reviving the "clear and unmistakable waiver standard" the Biden Board managed to discount decisions out of the D.C. Circuit, as well as the First, Second, and Seventh Circuits, all of which have adopted a "contract coverage" approach and rejected the very theory the Board again adopted. ■

Other NLRB developments

Circuit court decisions

D.C. Cir.: Employee unlawfully fired for union activity. The U.S. Court of Appeals for the D.C. Circuit affirmed a National Labor Relations Board (NLRB) decision finding that a commercial property management company unlawfully discharged an engineer who had been involved in an organizing campaign and union election. The employer claimed that it fired the employee because it was seeking to comply with New York City's order requiring COVID-19 vaccinations in the workplace. However, his

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abrupt discharge occurred after almost two months of the employer's non-enforcement of the order and after he had stated his intent to come into compliance with the order the next day. The D.C. Circuit declined to decide whether the company owner's statement that the employer was a "non-union building" was protected under Section 8(c) of the National Labor Relations Act (NLRA) since even absent the statement, there was ample evidence of anti-union animus that included suspicious timing—the employee was discharged within two weeks after the union filed for an election (*Acumen Capital Partners, LLC v. National Labor Relations Board*, Dec. 13, 2024).

3d Cir.: Unilateral grant and reduction of COVID-19 bonuses unlawful. The U.S. Court of Appeals for the Third Circuit held that the NLRB's factual findings that COVID-19 bonuses provided to the staff of a nursing home were tied to employment-related factors and represented a form of hazard pay such that they were properly considered wages or other terms and conditions of employment were supported by substantial evidence. Furthermore, a management rights clause in the parties' collective bargaining agreement (CBA) did not authorize the unilateral payment of the COVID-19 bonuses because it did not survive the expiration of the CBA. "[P]er ordinary principles of contract law, the durational silence in the management rights clause suggests it did not survive the CBA's expiration to form part of the postexpiration status quo," explained the Third Circuit. Moreover, "[w]e have long espoused the Board's policy that 'waivers of statutorily protected rights must be clearly and unmistakably articulated' and absent some clear statement to the contrary, a 'management rights clause does not survive the expiration of the CBA'" (*Alaris Health at Boulevard East v. National Labor Relations Board*, Dec. 9, 2024).

5th Cir.: Employee unlawfully fired for raising employment complaints with client. A divided three-member panel of the U.S. Court of Appeals for the Fifth Circuit upheld an NLRB decision concluding that an employer unlawfully discharged a lead auditor at a grocery client's food distribution warehouse because she engaged in concerted activity at a meeting with the client's director of distribution. The appeals court first

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Circuit split on Board's authority to issue remedy

A divided three-member panel of the U.S. Court of Appeals for the Ninth Circuit enforced an NLRB order finding that a major retailer unlawfully locked out union members who unconditionally offered to return to work following a strike and awarded the workers broad "make-whole relief" pursuant to a previous decision. The Ninth Circuit held that the Board did not err in modifying the ALJ's recommended order to amend the "make-whole remedy" to provide that the employer "shall also compensate the employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful lockout, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings."

Finding that substantial evidence supported the Board's conclusion that the employer could not show a "'legitimate and substantial business justification'" for the lockout and that the employees "were not clearly and fully informed of conditions they need to satisfy to be reinstated," the Ninth Circuit nonetheless also found no abuse of discretion in the Board's decision not to award additional "extraordinary remedies" requested by the union. Judge Bumatay, dissenting in part, questioned the authority of the Board to issue these remedies (*International Union of Operating Engineers, Local 39 v. National Labor Relations Board*, Jan. 21, 2025).

The Ninth Circuit decision stands in direct contrast to an early decision by the Third Circuit in which the federal appeals court vacated the Board's issuance of expansive remedies while enforcing the agency's underlying unfair labor practice (ULP) finding. The Third Circuit held that the Board lacks statutory authority to order these types of remedies, reasoning that compensatory relief simply cannot exceed that which the employer unlawfully withheld which was precisely what these remedies would do. Practitioners should note that this type of a circuit split is one of the basic reasons that the Supreme Court of the United States grants *certiorari* to resolve a particular issue.

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found that there was insufficient evidence to support the Board's inference that the executive who fired her knew of her purportedly protected concerted activity of sending a message regarding her pay to the owner of a major customer of the client. However, the court found that there was sufficient evidence for the Board's alternative finding that the employer violated the NLRB by discharging her because she raised group employment complaints with the client's distribution director—which was supported by evidence that the decisionmaker told her that she was being discharged because she violated his directive not to bring company-related issues or concerns to the client (*Capstone Logistics, L.L.C. v. National Labor Relations Board*, Nov. 25, 2024).

7th Cir.: NLRB award in favor of fired med tech vacated. The U.S. Court of Appeals for the Seventh Circuit denied the NLRB's petition for enforcement of an award in favor of a fired interventional radiology (IR) technologist after determining that substantial evidence did not support a finding that the decisionmaker was aware of the employee's protected activity when the decision was made to end his employment. The employee alleged that he was fired after making a comment in a meeting that nurses were not allowed to operate a piece of medical equipment known as a C-arm, pushing back on an administrator's request to have nurses set up the C-arm prior to early surgeries. However, the court found that the decisionmaker was not present at the meeting, testified that he was unaware of the comment, did not hear of the comment from anyone else at the meeting, and had fired the employee for performance-related concerns (*Capitol Street Surgery Center, LLC v. National Labor Relations Board*, Dec. 12, 2024).

NLRB rulings

Unilateral implementation of overtime policy unlawful. The NLRB ruled that a hospital employer's unilateral implementation of its "star system" for assigning overtime to bargaining unit registered nurses was unlawful because "retroactive application of the clear and unmistakable waiver standard restored in *Endurance Environmental* was appropriate," and here, "the Union did not clearly and unmistakably waive its right to bargain over mandatory overtime." The Board also held that the management rights clause the employer relied upon did not mention mandatory overtime in any way. Further, "there is no past practice that would warrant a finding that the parties understood that the [employer] had the unilateral right to implement the star system of mandatory overtime." The employer also violated Section 8(a)(5) and (1) by unreasonably delaying in providing information requested by the union (*Hospital Español Auxilio Mutuo de Puerto Rico, Inc.*, Dec. 16, 2024).

Scheduling reassignment violated NLRA. A divided three-member panel of the NLRB ruled that an employer violated Section 8(a)(3) and (1) by unlawfully changing the work schedule of two firefighters assigned to logistics roles from a detached schedule to a shift schedule. Additionally, the Board determined that a supervisor violated Section 8(a)(1) by making statements to a senior firefighter that constituted threats that his job might be in danger after he filed a grievance regarding the assignment of a logistics position. "Even if [the supervisor's] statement was meant as a helpful warning or made without animus, it clearly conveyed that management viewed [the firefighter] in an unfavorable light because of his protected activity and that [the firefighter's] job could be in jeopardy," stated the Board. Member Kaplan filed a separate dissenting opinion in which he found that, "[c]onsidering the clear analytical infirmities in the judge's rationale for his wholesale discrediting of the [employer's] witnesses, coupled with his determination to eschew consideration of witness demeanor, the traditional deference that the Board affords to a judge's credibility resolutions is unwarranted here" (*Amentum Services, Inc. fka AECOM Management Services, Inc.*, Dec. 16, 2024). ■

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