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Déjà Vu All Over Again? NLRB Faces Partisan Overhaul Again with Key Legal Issues Hanging in the Balance

Labor Relations Update on **December 2, 2024**

For the third time in eight years, both the National Labor Relations Board's ("NLRB") prosecutorial and adjudicative arms face a pending partisan overhaul after President-elect Trump's inauguration on January 20, 2025.

While we anticipate that President-elect Trump will immediately terminate the current General Counsel (and Deputy General Counsel)—just as President Biden did on his first day in office (previously covered here and here)—exactly when the majority of the Board will flip from Democrat to Republican is far less certain.

We discuss below the range of potential outcomes and the impact on employers within the NLRB's jurisdiction.

Expected Changes To The NLRB's Prosecutorial Agenda

1. *President-Elect Trump Likely Will Fire GC Abruzzo Shortly After Inauguration.*

Shortly after his January 20, 2025 inauguration, we expect President-elect Trump to fire current NLRB General Counsel Jennifer Abruzzo ("GC Abruzzo"), replace GC Abruzzo with an Acting General Counsel (presumably with a pro-employer track record within the agency), and then nominate a pro-employer successor NLRB General Counsel ("Successor NLRB GC"), who is unlikely to face substantial opposition to confirmation from a 53-47 Republican-controlled Senate. Once confirmed, the Successor NLRB GC will play a significant role in directing the Regions in their investigation of unfair labor practice charges, deciding the cases on which to issue complaints, and seeking Section 10(j) injunctive relief.

2. *The Acting NLRB GC Likely Will Rescind GC Abruzzo's Pro-Employee Guidance Memoranda Before A Successor NLRB GC Is Confirmed.*

Well before a Successor NLRB GC is confirmed, however, whomever President-elect Trump designates as Acting NLRB GC will have the opportunity, as predecessors have done, to rescind some or all of GC Abruzzo's memoranda that established pro-employee enforcement priorities.

It is important to note, however, that President-elect Trump garnered some support from certain labor-union leaders during his campaign and made significant inroads with unionized employees at the ballot box—despite organized labor historically comprising a stronghold for the Democratic Party. So whether the Trump administration will seek to fully reverse GC Abruzzo's agenda remains an open question, particularly in light of President-elect Trump recently announcing Rep. Lori Chavez-DeRemer (R-Ore.) as his Secretary of Labor nominee. While Rep. Chavez-DeRemer would lead the Department of Labor—not the NLRB—as Secretary of Labor, many consider her nomination to be surprising because of her unusually pro-union record (at least for a Republican). Indeed, among other things, Chavez-DeRemer—whose father was a member of the Teamsters, a union which reportedly supported her nomination—was one of only three Republicans in the House of Representatives to co-sponsor the Protecting the Right to Organize Act of 2023 ("PRO Act"), a strongly pro-union bill that Democrats have repeatedly sought (and failed) that would drastically overhaul the NLRA in various respects, such as by prohibiting employers from permanently replacing strikers. (We covered previous efforts to pass the PRO Act here, here, here, here, and here.)

In any event, the following pro-employee initiatives advanced by GC Abruzzo during her tenure are vulnerable for rescission by the Acting (or Successor) NLRB GC:

- **Expanded Remedies in Unfair Labor Practices:** Memoranda GC-21-06 and 24-04, previously covered here and here, which advised all NLRB Regional Offices to urge the Board to exercise its broad discretion in fashioning more fulsome relief for workers impacted by unfair labor practices, including make-whole remedies to cover the cost of economic losses (such as such as healthcare expenses incurred as a result of an unlawful termination of health insurance).
- **"Employee" Status:** Over the years, whether certain groups are considered "employees" under the NLRA has served as a partisan football as well—most recently vis-à-vis college athletes. Richard Griffin—the NLRB GC during President Obama's second term—issued a memorandum at the end of his term in January 2017 declaring Division I Football Bowl Subdivision scholarship football players (among other university faculty and students) to be statutory "employees," which

was then rescinded by his successor, Peter Robb. Then, Robb's successor, GC Abruzzo, issued Memorandum GC 21-08 in 2021, previously covered here, taking the legal position that college athletes are employees under the NLRA. (As discussed here, here, and here, the employment status of college athletes remains an open question under two ongoing cases before the NLRB involving the University of Southern California and Dartmouth, respectively.) Similarly, the NLRB's position as to the employment status of graduate students has vacillated, depending on the Board's political composition; most recently, in 2016, the NLRB held that that certain graduate students performing teaching or research services under university control in exchange for compensation were employees. *See Columbia Univ.*, 364 NLRB 1080 (2016) (overruling *Brown Univ.*, 342 NLRB 483 (2004), where the Board held that graduate-student teaching and research assistants were not employees). Whether the Successor NLRB GC under the second Trump administration will seek to change the status quo vis-à-vis the employee status of college athletes, graduate students, and/or other groups falling along the margins (*e.g.*, unpaid interns, volunteers, etc.) remains an open question, particularly given that President-elect Trump has not publicly staked out a position on this issue.

- **Employee Monitoring:** Memorandum GC 23-02, previously covered here, in which GC Abruzzo advocated for zealous enforcement and Board adoption of a "new framework" to protect employees from intrusive or abusive forms of electronic monitoring and automated management that interfere with protected Section 7 activity.
- **Confidentiality and Non-Disparagement Clauses:** Memoranda GC 23-05, previously covered here, which advised Regional Directors to advance enforcement of *McLaren Macomb*, 372 NLRB No. 58 (2023) (previously covered here), where the Board found that broad confidentiality and non-disparagement clauses in severance agreements violate Section 8(a)(1).
- **Non-Compete Agreements and "Stay-or Play" Provisions:** Memoranda GC 23-08 and GC 25-01, previously covered here and here, which contend that non-compete agreements, "stay-or-pay" provisions and employee non-solicit agreements are unlawful under the NLRA.
- **Section 10(j) Injunctive Relief:** Memorandum GC 24-05, previously covered here, which implored all Regional Offices to continue "aggressively seek[ing] Section 10(j) injunctions," despite the Supreme Court's recent decision in *Starbucks Corp. v. McKinney* (previously covered here) that upheld a more heightened burden for the Board to obtain injunctive relief in federal district court.

3. *The Successor NLRB GC Likely Will Preview The Precedent-Altering Cases That Will Reach The Board.*

We expect the successor NLRB GC, once confirmed, to issue memoranda detailing legal issues on which Regional Directors are required to submit to the NLRB's Division of Advice for consultation, which preview enforcement and policy priorities by identifying the Board precedent the new GC wishes to challenge. (We expect such memoranda to be swiftly issued, as both Robb and Abruzzo did so within a month of taking office, as previously covered here and here.)

We anticipate that many of the legal issues for which the successor GC may mandate submission to the Division of Advice may involve some of the groundbreaking pro-employee precedent established under the current Board, including:

- **Voluntary Recognition and Election Conduct: *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (Aug. 25, 2023)**, previously covered here, where the Board held that an employer violates the Act when it refuses to recognize, upon request, a union that has been designated as Section 9(a) representative by the majority of employees in an appropriate unit unless the employer promptly files an RM petition with the Board to test the union's majority status or the appropriateness of the unit, assuming that the union has not already filed a RC petition. And after a petition is filed, if an employer subsequently "commits an unfair labor practice that requires setting aside the election, the petition will be dismissed, and the employer will be subject to a remedial bargaining order." The *Cemex* decision is currently being appealed to the Ninth Circuit, which heard oral argument on October 21, 2024 (discussed here).
- **Make-Whole Remedies: *Thryv, Inc.*, 372 NLRB No. 22 (Dec. 15, 2022)**, previously covered here, where the Board expanded its standard make-whole remedy for employees to include compensation for "all direct or foreseeable pecuniary harm."
- **Broad Confidentiality and Non-Disparagement Clauses in Severance Agreements: *McLaren Macomb*, 372 NLRB No. 58 (Feb. 21, 2023)**, previously addressed here, where the Board overruled prior precedent, finding that broad confidentiality and non-disparagement clauses in severance agreements violate Section 8(a)(1).
- **Lawfulness of Handbook Policies and Workplace Rules: *Stericycle, Inc.*, 372 NLRB No. 113 (Aug. 2, 2023)**, previously covered on our blog here and our podcast here, where the Board overruled existing precedent and adopted a stricter test regarding the lawfulness of facially neutral handbook policies and workplace rules.

- **Protected Activity:** ***Lion Elastomers*****, 372 NLRB No. 83 (2023) (May 1, 2023)** , previously covered here, where the Board overturned recent precedent issued under the Trump administration, making it riskier and more complicated for employers to discipline employees for abusive workplace conduct alleged to have arisen within the context of protected activity under Section 7 of the NLRA.
- **Unilateral Changes:** ***Wendt Corp.*****, 372 NLRB 135 (Aug. 26, 2023)** and ***Tecnocap LLC*****, 372 NLRB 136 (Aug. 26, 2023)**, previously discussed here, where the Board overturned *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017) (previously discussed here), holding that an employer can only implement unilateral changes during a hiatus period between contracts or prior to the execution of a first contract when the action is both (i) consistent with longstanding past practice, and (ii) non-discretionary. (Under *Raytheon*, discretionary changes were permitted.)
- **Protected Activity on behalf of Non-Employees:** ***American Federation for Children, Inc.*****, 372 NLRB No. 137 (Aug. 26, 2023)**, previously covered here, where the Board held that concerted activity by statutory employees on behalf of *nonemployees* can even be protected by the Act if it can benefit the statutory employees—overturning decades of precedent to the contrary.
- **Employer Statements during Campaign:** ***Siren Retail Corp d/b/a Starbucks*****, 373 NLRB No. 135 (Nov. 8, 2024)**, previously covered here, where the Board overruled nearly 40 years of NLRB precedent by holding that employers may violate the NLRA by making statements to workers regarding the impact that unionization would have on the relationship between employees and management.
- **Captive-Audience Meetings:** ***Amazon.com Services LLC*****, 373 NLRB No. 136 (Nov. 13, 2024)**, previously covered here, where the Board overturned overruled 75 years of precedent under the seminal *Babcock & Wilcox Co.*, 77 NLRB 577 (1948) by holding that, going forward, employers violate the NLRA by holding captive-audience meetings, *i.e.*, employer-mandated meetings "at which the employer expresses its views on unionization."

The list above is by no means exhaustive, and the Successor NLRB GC may identify other areas of the law that could be bent more towards management that are ripe for expansion or reversal of existing pro-employee precedent.

We also note that the battle over the joint-employer rule over the last several years (most recently covered here) seems all but over for now after the Biden administration withdrew its appeal of the district court ruling this summer enjoining enforcement of its more relaxed proposed joint-employer rule.

4. *Impact Of Acting/Successor NLRB GC On Existing Litigations.*

The Acting/Successor NLRB GC will also have influence over existing litigations. More specifically, where the NLRB (or a Region) is the party seeking relief or review, the Acting/Successor NLRB GC will generally have the authority to withdraw the complaint/appeal (or direct the Regional Director to do so), which would preserve the status quo.

A more complicated—and unusual—scenario would ensue, however, if the Acting/Successor NLRB GC sought to change its position in a case where the *opposing party* (*e.g.*, a petitioning employer or union) was seeking exception to an ALJ decision before the Board or appellate review of Board decision that was decided in the NLRB GC's favor. This may arise more frequently at the circuit-court level, including in the cases appealing the NLRB's recent pro-employee decisions and the existing *SpaceX* and *Amazon* cases before the Fifth Circuit challenging the constitutionality of the Board (we previously covered *SpaceX* here and here). While we are unaware of any precedent considering such a fact pattern, we note that the interested party whose rights the NLRB GC had been representing *may* be able to step in as intervenor to defend its position.

Changes To The Makeup of the 5-Member NLRB

In addition to the changes to the Board's prosecutorial arm, we also expect the Board's five-member quasi-judicial body—which currently comprises only four members, three Democrats and one Republican—to transition to a Republican majority during President Trump's term. The majority-status of the NLRB plays a key role in fashioning federal labor law, as the NLRB decides cases, overturns precedent, and issues rules (such as the "quickie" election rules that were implemented on December 26, 2023 and discussed here). The timing of *when* the NLRB majority will flip to a Republican majority is far from certain.

1. *Will The Lame-Duck Senate Confirm The Pending Nominees?*

In June 2024, President Biden nominated NLRB Chair Lauren McFerran (Democrat) for a third term and Joshua Ditelberg (Republican) to fill the vacant fifth seat.

Both nominations cleared Committee and would be subject to a floor vote before the lame duck session of the Senate. On November 23, 2024, Senate Majority Leader Chuck Schumer announced on social media that "[c]onfirming the NLRB nominees is one of our highest priorities, and we're going to do everything we can do to get it done by the end of the year."

If they are confirmed, as expected, then the NLRB likely would retain its Democratic majority until the term of current NLRB member David Prouty expires on August 27, 2026, after which President-elect Trump likely would appoint a Republican replacement to be confirmed by the Senate—more than a year and a half into his four-year term. During this time, we would expect the NLRB GC to refrain from bringing potentially precedent-altering decisions to the NLRB's docket—in both directions.

2. *If The Democrats Retain A NLRB Majority Until August 2026, Will President-Elect Trump Exercise His Removal Authority For NLRB Members?*

In the event Ms. McFerran and Mr. Dietelberg are confirmed—depriving President-elect Trump of a Republican-majority Board until August 2026—there is speculation that, after he assumes office, President Trump will attempt to discharge the Democratic members of the Board, which would set up a fascinating constitutional fight. Section 3(a) of the NLRA states that "[a]ny member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause," which is why presidents have traditionally permitted NLRB members to complete their terms as a matter of course. President-elect Trump could attempt to strain the definition of "neglect of duty or malfeasance in office" or he could argue this requirement is unconstitutional under Article II, which requires that the president "shall take Care that the Laws be faithfully executed," meaning the president cannot be prohibited from hiring and firing certain administrative officials, such as Board members, at will. Indeed, as alluded to above, similar arguments have been lodged (and recently argued before the Fifth Circuit)—both by Elon Musk's SpaceX and by Amazon—as to the alleged unconstitutional nature of NLRB Administrative Law Judges, as previously covered here, here, and here.

3. *If The Lame-Duck Senate Does Not Confirm Chair McFerran, Then The Republican Majority Likely Will Flip In 2025.*

If the current Senate does not confirm Chair McFerran's third term (which would also mean that they would not confirm Mr. Ditelberg's nomination, who was proposed simultaneously with McFerrran) by January 3, 2025, then the NLRB could have a Republican majority shortly after President-elect Trump's inauguration, depending on how quickly he nominates (and the Senate confirms) two replacement Republican nominees to create a Republican majority until Member Marvin Kaplan's term expires on August 27, 2025.

Regardless of the Senate's actions, as evident by the recent decisions overturning precedent involving employer statements during organizing campaigns and captive-audience meetings, we expect the current NLRB will continue to issue decisions in an expeditious manner before the end of 2024 that continue to overturn existing precedent in favor of unions and employees.

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We will continue to monitor future developments, and, as always, will cover noteworthy updates on our blog, Labor Relations Update.

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