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The NLRB: Where Are We Now and Where Are We Going?

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The Board: Where Are We Today?

Position	Member	Party	Entered office	Term expires	Appointed by
Chairman	Marvin Kaplan	Republican	August 10, 2017[163]	August 27, 2025	Donald Trump
Member	David Prouty	Democratic	August 28, 2021[164]	August 27, 2026	Joe Biden
Member	*Vacant*	—	—	August 27, 2028	—
Member	*Vacant*	—	—	December 16, 2027	—
Member	*Vacant*	—	—	December 16, 2029	—

Removal of Member Wilcox

- Jan. 28, 2025: Pres. Trump notifies Member Wilcox (D) by email that she is fired
- Wilcox sues: firing violated NLRA statutory protections for Board members
- NLRA: Board members can only be removed for "cause" and after notice and hearing.
- Removal of Wilcox stopped NLRB from issuing decisions – need 3 members for quorum

Litigation over Member Wilcox's Removal

- District Court enjoined termination and reinstated Wilcox
- Appeals Court at first stayed this order, but then reversed itself, affirming the District Court's decision
- U.S. Supreme Court:
  - Permitted, at least on an interim basis, the removal of Wilcox
  - Briefing on a full decision completed April 16
  - Decision could come at any moment

Litigation over Member Wilcox's Removal

- Trump Administration currently appealing narrow issue: Whether the termination should be stayed pending a decision on the merits
- The ultimate issue, however, is a constitutional one – are the NLRA's removal protections a violation of the separation of powers doctrine
- Outcome of Wilcox's case will have major impact on the NLRB going forward

The General Counsel: Where are We Today?

- Trump terminated Biden-appointed GC Jennifer Abruzzo at same time as Member Wilcox
- William Cowen named Acting General Counsel; Cowen is a long-time NLRB employee, and served on the NLRB itself in 2002
- Cowen quickly revoked more than two dozen memoranda from GC Abruzzo
  - These include many of Abruzzo's most controversial memoranda
  - Similar to the actions of the acting GC that was appointed following Biden's removal of former GC Robb

Rescinded GC Memoranda

GC 21-02: “Recission of Certain General Counsel Memoranda”

- Abruzzo memo altered standard for Board review of lawfulness of employer support for a union’s organization and decertification efforts
- Abruzzo standard: Different standards for organization and decertification elections (“totality of circumstances” for the former, “more than ministerial aid” for the latter)
- Cowen standard: “more than ministerial aid” for both organization and decertification campaigns

Rescinded Memoranda (cont.)

GC 21-06 “Seeking Full Remedies” and GC 21-07 “Full Remedies in Settlement Agreements”

- Both aimed to broaden traditional scope of remedies available to unions, including
  - Compensation for health care expenses because of terminated health insurance; loss of home or credit card late fees; early withdrawal penalties from retirement accounts

Rescinded Memoranda (cont.)

GC 21-08: "Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act"

- History:
  - 2015: NLRB declines jurisdiction over Northwestern student athletes
  - 2023: NLRB allows Dartmouth Men's Basketball team's representation petition to proceed
- Abruzzo memo indicated that student athletes are employees and entitled to NLRA protection

Rescinded Memoranda (cont.)

GC 23-05 “Guidance in Response to Inquiries about the McLaren Macomb Decision” and GC 23-08 “Non-Compete Agreements that Violate the National Labor Relations Act”

- GC 23-05 asserted a ***new*** perspective that language previously deemed lawful in severance agreements—specifically clauses that prohibited employees from disparaging their employers and disclosing the terms of the agreement to third parties—was no longer permissible. This was an expansion of the *McLaren Macomb* decision
- GC 23-08 challenged the legitimacy of non-competition agreements to protect legitimate business interests, such as trade secrets and client relationships

Rescinded Memoranda (cont.)

GC 25-01: “Remedying the Harmful Effects of Non-Compete and ‘Stay-or-Pay’ Provisions that Violate the National Labor Relations Act”

- Non-compete: Directed regions to bring complaints where employee has shown there was (1) a higher paying, vacant job; (2) for which the employee was qualified; and (3) they were discouraged from applying or accepting due to their non-compete
- “Stay-or-pay” – Only acceptable if provision was: (1) voluntary; (2) contains a reasonable and specific repayment; (3) has a reasonable “stay period”; and (4) does not require repayment if terminated without cause

New GC Nominee

- Crystal Carey
- Career:
  - NLRB Attorney from 2009 to 2018
  - Management-side private practice from 2018-2025

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First Cases on the Chopping Block?

Amazon.com Services LLC

- Old rule: employers can require attendance at paid meetings where the employer shares its view on unionization – the "captive-audience meeting"
- *Amazon* outlawed these meetings, finding them *per se* unlawful
- Employers can still host *voluntary* meetings following a safe harbor announcement to employees

First Cases on the Chopping Block?

Siren Retail Corp d/b/a Starbucks

- Starbucks manager said: “If you want a union to represent you—uh—you want to give your right to speak to leadership through a union, you’re going to check off ‘yes’ for the election. If you want to maintain a direct relationship with leadership, you’ll check off ‘no.’”
- Old rule: generalized predictions about nature of relationship between employees and management are allowed

First on the Chopping Block?

Siren Retail Corp d/b/a Starbucks (cont'd)

- New rule: case-by-case basis
  - This limits an employer's ability to educate employees on consequences of unionization and make predictions about the type of relationship employees will have with management
- If this remains the law, employers will have to exercise increased caution when crafting campaign messages

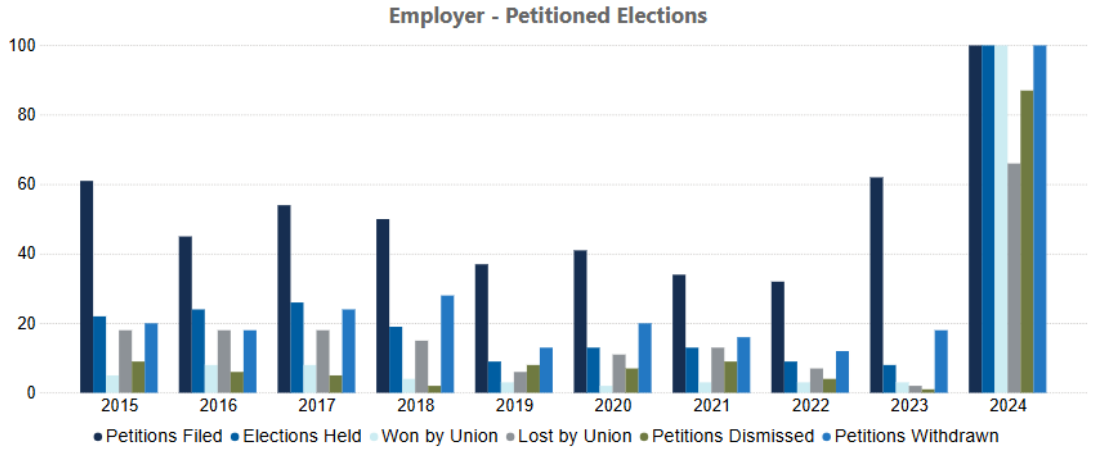
Other Vulnerable Precedents

Cemex

Involved allegations of multiple ULPs during "critical period" of election campaign. *Cemex* announced two tectonic changes

- De-facto card check recognition: Union collects authorization cards (or other showing of support) from 50%+1 of employees in bargaining unit and makes recognition demand
  - Old rule: Union must petition for election before employer is required to recognize union
  - New rule: When presented with recognition demand, employer must (1) Immediately recognize union; (2) File an election petition within two weeks; or (3) Take no action and defend against refusal-to-bargain ULP

Significance of *Cemex*, in a Graph!



Fiscal Year	Petitions Filed	Elections Held	Won by Union	Lost by Union	Petitions Dismissed	Petitions Withdrawn
2024	489	178	140	66	87	115
2023	62	8	3	2	1	18

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Other Vulnerable Precedents

Cemex

- "Lowered the bar" for issuing a bargaining order
  - Old rule: NLRB would order bargaining *only* if there is proof of unlawful conduct sufficiently severe as to make it "improbable" that a "fair election" can be held
  - New rule: NLRB will order bargaining if ULP was committed, except for violations that were so "minimal and isolated" that it is "virtually impossible" the election results were affects

Back to Trump-Era Joint Employer Rule

- NLRB used its rulemaking power in 2020 to promulgate rule with stricter standards for joint-employer status
  - Focused on right to control rather than exercised control
  - Struck down by the courts, however
  - NLRB withdrew last of its appeals in August 2024
- Current rule (from Trump I): "Substantial direct and immediate control" over one or more essential terms or conditions of employment

Court of Appeals Case to Watch

District Hospital Partners, L.P.

- Employer operates unionized hospital in Washington, D.C.
- Bargaining for successor union contract, employer proposes (among other things):
  - Limits on union's right to strike;
  - Elimination of binding arbitration for disciplinary decisions, including discharge;
  - Management rights clause providing discretion to management in several areas

Court of Appeals Case to Watch (cont.)

- Rules
  - NLRB does not assess if a proposal acceptable or unacceptable, but does determine whether bargaining demands evidence bad faith bargaining
  - Inference of bad faith exists if employer's proposals, taken as a whole, leave employees with substantially fewer rights and less protection that provided by law without a contract.
  - Is employer "stripping" union of any "meaningful method" of representing employees on important conditions of employment

Court of Appeals Case to Watch (cont.)

- Employer refused to grant wage increase until contract was ratified
- Employees circulated decertification, which more than half signed, submitted to employer, and employer withdrew recognition
- Held (2-1 decision): Employer violated NLRA.
- Appeal: recently argued at D.C. Circuit; decision anticipated later this year.

Legislative Activity

- **“Current law stacks the deck in favor of anti-union employers”**
- Who said it?
  - A: Former Ohio Sen. Sherrod Brown (D)
  - B: President Trump (R)
  - C: Missouri Senator Josh Hawley (R)
  - D: Vermont Senator Bernie Sanders (I)

Legislative Activity: Times are Changing

- Labor policy no longer tracks cleanly to political party
- The (Bipartisan) Faster Labor Contracts Act
  - 2 Republican sponsors
  - 3 Democratic sponsors
- Requires first contract procedures if a union wins an election, culminating in interest arbitration
- Similar to Ohio public sector process, but even there, process is limited to “safety-sensitive” public employees

Faster Labor Contracts Act: Key Changes

- Mandatory bargaining must begin within 10 days of a written request from the union (after the union is certified or recognized as the bargaining agent)
- If no agreement is reached within 90 days, mandatory mediation
- If no agreement after 30 days of mediation, there is binding arbitration of a 2-year contract

Legislative Activity

- "Pro-Worker Framework for the 199th Congress"
  - Bans "captive-audience" meetings
  - Require employers to affirmatively notify new employees of labor rights
- New Secretary of Labor, Lori Chavez-DeRemer (R), supported the Protecting the Right to Organize Act as a member of Congress

Wrap-up

- Probably an employer-friendly shift at NLRB – sooner or later, depending on outcome of *Wilcox* dispute
- In the meantime, AGC Cowen has beaten a significant retreat from former GC Abruzzo's interpretation of the statute
- Mixed signals on the legislative front

QUESTIONS?

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