Legal Update Article

Staying Steady Amid NLRB Upheaval: Q&As on What Employers Can Expect

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Takeaways

- Recently selected acting GC William Cowen's Memo 25-05 rescinds dozens of his predecessor's expansive and novel enforcement priorities.
- However, recent decisions expanding employee rights remain in effect — although they may be reversed by courts or a future Board.
- Also, despite the Board lacking a quorum, the NLRB is not paralyzed for the foreseeable future, regional offices can continue to accept and process unfair labor practice charges and representation petitions, and regions can take action in federal court, including seeking Section 10(j) injunctive relief.

Related link

- GC 25-05 Rescission of Certain General Counsel Memoranda (press release)

Article

Significant changes have occurred at the National Labor Relations Board (NLRB) following President Donald Trump's inauguration. On Jan. 27, 2025, he fired the NLRB's general counsel (GC), Jennifer Abruzzo, and Board chairperson, Gwynne Wilcox. On Feb. 1, 2025, the president fired Jessica Rutter, who was Abruzzo's deputy and became acting GC when Abruzzo was fired. On Feb. 1, 2025, President Trump selected William Cowen to serve as acting GC.

1. Who is William Cowen?

Except for a 10-year period in private practice (1992-2002), Cowen has a long history at the NLRB, where he held a wide variety of high-level positions, most recently, as the regional director in the NLRB's Los Angeles Regional office (Region 21) (2016-2025). Previously, he served as the NLRB's solicitor (2006 to 2016), executive assistant to Board Chairperson Robert Battista (2003-2006), and a Board member under a recess appointment by President George W. Bush (2002). Cowen began his legal career with the NLRB in 1979 and at various times served as a field attorney in a regional office and an attorney in various headquarters divisions.

2. How long can Cowen serve as acting general counsel?

Pursuant to the Federal Vacancies Reform Act, Cowen can continue in this capacity for 210 days starting from the date of the vacancy (Feb. 1, 2025) or, if President Trump nominates a GC, while the nomination is pending in the Senate.

3. Did President Trump have the authority to fire Abruzzo?

Yes. Even though the president fired Abruzzo before the end of her four-year term, the courts have held that the GC serves at the president's pleasure. When former President Joe

Biden took office, he fired then-GC Peter Robb, setting the precedent for the early removal of NLRB GCs.

4. Did President Trump have the authority to fire Wilcox?

That is unclear. Wilcox has filed a lawsuit challenging her firing, and this issue is expected to be addressed by the U.S. Supreme Court. The National Labor Relations Act (NLRA) states that Board members may only be removed "for neglect of duty or malfeasance in office, but for no other cause." President Trump has asserted that this provision violated the Constitution's Take Care clause, which vests the president with the authority to remove principal officers in the executive branch. Although the Supreme Court upheld limits on a president's ability to oust principal officers in 1935 in *Humphrey's Executor v. U.S.,* more recent Court decisions have called this ruling in question.

5. What effect does Wilcox's removal have on the Board's ability to act?

A lot. With three vacancies on the five-member Board, the Board lacks a quorum. The last time this happened (Jan. 1, 2008, to March 27, 2010), the Board tried to continue business as usual. But, in *New Process Steel v. NLRB,* the Supreme Court held that the Board could not act without a quorum and invalidated all Board decisions issued when it had only two members. Until at least one of the vacant Board positions is filled, the Board cannot act.

6. Does this mean the NLRB is paralyzed for the foreseeable future?

Absolutely not. The NLRB had promulgated special procedures to address situations when the Board lacks a quorum so that "normal Agency operations should continue to the greatest extent permitted by law." Under these procedures, certain motions or requests in unfair labor practice (ULP) or representation proceedings that would have normally been filed with the Board are instead filed with the chief administrative law judge or Office of the Executive Secretary for ruling, subject to review by the Board on appeal when it regains a quorum.

7. Will the Regional Offices continue to investigate and litigate ULP charges and process election petitions?

Yes. Regions will continue to accept and process ULP charges and make merit determinations. In charges where Regions find merit, they will seek settlement and issue complaint. Likewise, Regions will continue to process representation case petitions, hold hearings in representation cases, conduct elections, and certify results of elections.

8. Can the Regions seek Section 10(j) injunctive relief in federal court without Board authorization?

Yes. Under the Board's 2011 "Order Contingently Delegating Authority to the General Counsel," whenever the Board lacks a quorum, any NLRB actions in federal courts that typically require Board approval may be initiated solely by the GC, including petitions for injunctive relief under Section 10(j).

9. Will we see any changes in the way the NLRB enforces the Act under the new acting general counsel?

Absolutely. Two weeks after his appointment, Cowen signaled that he intends to undo many of his predecessor's policies when he issued GC Memorandum 25-05 (GC Memo 25-05). In this memorandum, he noted that the Agency's "backlog of cases [have grown] to the point where it is no longer sustainable" and took a back-handed swipe at the effect of his predecessor's expansive and novel enforcement priorities: "The unfortunate truth is that if

we attempt to accomplish everything, we risk accomplishing nothing." Overall, GC Memo 25-05 impacts 31 GC memos issued between 2021 and 2025.

Some significant aspects of GC Memo 25-05 include:

- *Signaling how the NLRB will view protected concerted activities.* The NLRA protects employees who engage in "protected concerted activities," which are conduct that is (1) concerted, i.e., engaged in with or on the authority of other employees, as opposed to an individual interest; and (2) for purposes of mutual aid and protection. In GC Memo 21-03, the previous administration took an expansive view of these terms so that they became virtually meaningless, allowing individual activity seemingly unrelated to any collective concern to be construed as protected concerted activity. Cowen's rescission of this memo indicates that the new administration will take a more reserved approach to what will be considered protected concerted activity, and employers will find it easier to defend against ULP charges involving individual employee conduct.

- *Making it easier to settle ULP cases through informal Board settlement agreements.* In GC Memo 22-06, Abruzzo required "full remedies" in settlement agreements for ULP cases. In practice, Regions were often constrained to seek remedies that exceeded what a charging party would be entitled to if the NLRB litigated and won the case. Cowen's rescission of this memo allows Regions more flexibility in negotiating settlements, including the ability to consider risks of litigation and the charging parties' preferences in the settlement calculus.

- *Making it easier to settle ULP cases through private settlement agreements.* Instead of settling a ULP charge with the NLRB, employers sometimes reach a private settlement with a charging party, who then requests that the NLRB dismiss the underlying charge. GC Memo 25-02 made this process more difficult by directing Regions not to approve withdrawal requests unless the private settlement also remedied broader "public rights." The rescission of this memo should make it easier for employers to reach and finalize private settlement agreements without having to include notice postings and other remedies a charging party may not care about.

- *Interfering less with employment agreement provisions.* Abruzzo sought to outlaw non-compete agreements and many common "stay-or-pay" provisions in employment agreements. Cowen has rescinded the memoranda in which Abruzzo directed Regions to find that such provisions were unlawful. Subject to state and other laws, employers have more leeway to structure contracts with these provisions.

10. What is the status of recent Board decisions expanding employee rights?

During the Biden Administration, the Board issued several significant decisions overruling prior Board precedent and dramatically changing labor law. These decisions include:

- Banning "captive audience" meetings in which employers educate employees about the

downsides of unionization
- Banning non-disparagement and confidentiality clauses in severance agreements
- Placing the burden on employers to seek an NLRB secret ballot election if a union claims majority support and demands recognition

These decisions are still the law, although they may be reversed by a court of appeals. Alternatively, a new Board may overrule these decisions in a later case. Cowen's memorandum does not, and cannot, reverse these decisions, but it indicates the current administration will interpret the law and act in a manner that more fairly considers the interests of employers.

Please contact a Jackson Lewis attorney with any questions about the NLRB.