



# What Employers Need to Know About the Current State of the NLRB

Insights

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A series of game-changing moves from the White House have left employers struggling to understand the lay of the land when it comes to the nation's labor law. Even though it might feel like we're entering uncharted territory, the thought leaders in FP's Labor Relations Practice Group have a pretty good sense of what's in store for employers in the short term and the long term – especially when it comes to the National Labor Relations Board (NLRB). This Insight will capture the current state of affairs and provide an analysis of what you might expect in the coming weeks and months.

## Overview of the NLRB

The NLRB is an independent federal agency established in 1935 under the National Labor Relations Act (NLRA). Its primary role is to enforce labor laws related to union activities and collective bargaining by investigating and prosecuting unfair labor practices in the private sector. In addition, the NLRB oversees representation elections seeking to certify or decertify unions as the representative of employees.

- **For unionized employers:** The NLRA requires employers with unionized workforces to collectively bargain in good faith over wages, hours, and other key employment matters – and the Board oversees all of these processes, from union formation and election to bargaining and potential decertification.
- **For non-unionized employers:** Even in the absence of a union, the NLRA protects employees' rights to engage in "protected concerted activities," such as discussing wages or working conditions – and, once again, the Board enforces these rights. The NLRB polices these rights to ensure there is no interference, restraint, or coercion in exercising these rights. For example, the NLRB might conclude that certain policies prohibit employees from discussing their wages or conditions and thus violate the NLRA.

## NLRB's Leadership Structure

- **The Board:** The NLRB is composed of five members appointed by the President and confirmed by the Senate, each serving five-year terms that are staggered. The President designates one member as the Chairman. The Board acts as a quasi-judicial body, deciding cases based on formal records in administrative proceedings.

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- **General Counsel:** Appointed by the President for a four-year term with Senate consent, the General Counsel functions independently from the Board. This role involves investigating and prosecuting unfair labor practice cases and overseeing the NLRB's regional offices – providing them direction about which kinds of cases to prosecute and which issues to prioritize. While the Board adjudicates cases, the General Counsel determines which cases to prosecute and provides guidance on legal interpretations.

## Recent Events

In his first weeks in office, President Trump took two actions that will impact the Board for years to come.

- **Firing the General Counsel:** It came as little surprise when Trump terminated Jennifer Abruzzo, who had served as NLRB's GC under the Biden Administration. After all, President Biden terminated the prior GC, Peter Robb, within hours of his 2021 inauguration in what was then an unprecedented move. Firing Abruzzo immediately curtailed her expansive agenda, which included protecting workers' rights to wear "Black Lives Matter" insignias, attempting to ban most noncompete clauses, clamping down on so-called "captive audience" meetings, and seeking employment rights for student-athletes. On February 3, Trump appointed William Cowen as the new Acting GC. Cowen was a Regional Director for most of the past decade, and prior to that was the Board's Solicitor from 2006 to 2016 – and even served as a Board Member under a recess appointment by President Bush in 2002.
- **Firing a Board Member:** In what came as a shock last week, Trump terminated a Democratic Board Member, Gwynne Wilcox – an unprecedented move never before seen in the 90 years of the Board. Wilcox was confirmed in September 2023 to a second term set to expire in 2028, even briefly serving as the Board's chair during the final days of the Biden Administration. And even though Trump asserts that Wilcox's philosophy and decision-making justified the termination, Wilcox has already filed a federal lawsuit challenging the action.

## Where Do We Stand?

The Board is now reduced to two Members: Republican Chair Marvin Kaplan and Democratic Member David Prouty. The NLRB requires a three-member quorum to issue decisions – a threshold established by the U.S. Supreme Court in 2010. With only two members seated, the Board does not have a quorum and cannot adjudicate cases or set new legal precedent.

## What Will Continue to Happen Unchanged?

The lack of quorum doesn't necessarily grind things to a halt when it comes to national labor law. The NLRA remains in full effect and employers are still responsible for compliance with all existing laws and standards. In many senses, the Board will continue to function as usual and employers may not feel the impact at all.

- **Representation Petitions and Union Elections:** When a union claims that it has sufficient signatures from a bargaining unit to form a new union, it files a representation petition with the NLRB. Even without a quorum at the top, the regional office will still process the petition and oversee a union election.
- **Regional Director Decisions in Representation Cases:** Regional Directors can still process representation petitions, conduct elections, and certify results without a Board quorum. While the Board typically reviews contested cases, Regional Directors' decisions stand in uncontested cases, even without a Board quorum.
- **Unfair Labor Practice (ULP) Charges:** When an employer, union, or worker files a ULP charge alleging some violation of the NLRA, it's the Board's Regional offices that handle the matter. These will continue to be investigated and processed as usual, up to and including a hearing and decision from an Administrative Law Judge (ALJ). The most common ULPs you might face include:
  - **Interference, Restraint, or Coercion:** A charge that your business unlawfully interfered with employees' rights to organize, form, join, or assist labor organizations, or to engage in other protected concerted activities.
  - **Domination or Interference with a Labor Organization:** If you are alleged to have unlawfully dominated or interfered with the formation or administration of any labor organization or contribute financial or other support to it.
  - **Discrimination in Employment to Encourage or Discourage Union Membership:** A worker or union might claim you unlawfully discriminated in hiring, tenure, or any term or condition of employment to encourage or discourage union membership in any labor organization.
  - **Retaliation for Filing Charges or Testifying:** You might face a charge that you unlawfully retaliated against employees for filing charges with the NLRB or participating in NLRB proceedings.
  - **Refusal to Bargain in Good Faith:** Finally, a union might claim your business unlawfully refused to bargain collectively with properly selected union representatives.
- **Certain Labor Injunctions:** When a union boycotts or strikes in an attempt to force an employer to recognize them and ultimately bargain with them for a contract, the Board has the right to file a Section 10(l) petition in court to try to block the action from continuing. However, a quorum is not needed for such an action.

### What is Now Stalled Without a Quorum?

But there are still plenty of consequences to having a two-member Board that falls short of a quorum. Here are actions that are temporarily halted until a quorum is present:

- **Appeals:** Most notably, both sides have the right to appeal ALJ decisions to the Board – and these Board decisions become the law of the land and set precedent for employers across the country. But

a two-member Board cannot issue appeals decisions, leaving all existing and future appeals in limbo for the foreseeable future.

- **Certain Injunctions in Significant Matters:** In certain ULP matters considered to be especially significant, the NLRB can go straight to a federal court seeking an order to have the action halted. The NLRA lists 15 types of situations where these requests for Section 10(j) injunctions are allowed, including cases where employers are alleged to have unlawfully terminated employees involved in union organizing efforts, threatened employees with adverse consequences for supporting a union, or refused to bargain in good faith with duly recognized unions.
- **Issuing Regulations:** Besides making national law through issuing decisions, the Board has the right to propose and finalize regulations that apply to employers nationwide. In recent years, the Biden Board issued new rules changing the state of the law related to joint employer status, union elections, and other matters. However, without a quorum, the Board cannot wipe these regulations off the books or start the ball rolling on new rules.
- **Reviewing Contested Representation Elections:** While regional offices are still permitted to run union representation elections, any disputes arising from these elections that require Board review can't be resolved without a quorum.
- **Enforcing Subpoenas:** The Board has no authority to enforce or challenge subpoenas in court without a quorum, potentially derailing investigations and ULP prosecutions.
- **Requests for Review:** Parties can also go straight to the Board to submit requests for review in certain cases. The Board usually disposes of these requests in short opinions that resolve the matter. But without a quorum, it cannot do so.

## What's Next?

We expect three things to happen in the coming weeks and months:

- **Trump will appoint and the Senate will approve at least one more NLRB Member.** This will create a quorum and clear the path for Republican-appointed Board Members to enact their agenda, just as the Biden Board did when it gained power several years ago. We expect the Board to then revisit and reverse key precedents established during the Biden administration on issues such as joint employer status, worker classification, employer handbook policies, and protected concerted activity.
- **Wilcox will likely launch a legal challenge to her termination.** While courts have recognized the president's power to remove certain independent agency heads (particularly those with single-director structures), whether the president possesses unfettered at-will removal authority over multi-member boards like the NLRB is subject to ongoing legal disputes. If courts rule that Trump did not have the power to terminate Wilcox and order her to be reinstated, it could throw into doubt any and all actions taken by the Board in the interim – which would be a chaotic outcome for all.

- **The General Counsel will shift strategic priorities.** Once a permanent GC is installed, we expect the tone and direction of investigations and prosecutions to shift significantly away from its recent pro-labor stance. We expect a narrower view of “employee” status under the NLRA, confirmation that gig workers are independent contractors outside the scope of federal labor law, and broader employer authority over employee activities.

## Best Practices for Employers Moving Forward

- **Monitor NLRB Developments:** With the Board now lacking a quorum, expect limited adjudicatory activity in the short term. But you should remain alert for administrative, rulemaking, or interim guidance from the new General Counsel. The best way to stay tuned is subscribe to [Fisher Phillips’ Insight System](#) to receive the most up-to-date information directly in your inbox.
- **Review Current Labor Policies:** Examine your employee handbooks, work rules, and disciplinary procedures to confirm they meet the most recent NLRB standards. A management-friendly Board is expected to moderate the more extreme decisions from the Biden Board, but that transition will take time.
- **Maintain Open Communication With Employees:** In an environment of uncertainty, clear and regular communication helps prevent misunderstandings or union-related escalation. Reinforce any open-door policies, encourage feedback, and foster a positive workplace culture to reduce the appeal of organizing efforts.
- **Evaluate Positive Employee Relations and Bargaining Strategies:** The unpredictable nature of future Board composition and decisions means that you should ensure your positive employee relations strategies remain legally compliant. If you are already unionized or facing union organization, anticipate that a new GC or new Board majority could revisit some of the Biden-era interpretations on bargaining obligations and employer defenses.

## Conclusion

We will continue to monitor this and related issues and provide updates when necessary, so make sure you are subscribed to [Fisher Phillips’ Insight System](#) to receive the most up-to-date information directly in your inbox. If you have any questions, contact your Fisher Phillips attorney, the authors of this Insight, or any member of our [Labor Relations Group](#) or [Government Relations Group](#).

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