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2025 NLRB Forecast: What Employers Should Expect Under President Trump's Administration

WRITTEN BY

Paul G. Nason | Aaron S. Nava

On January 27, 2025 — seven days after he was sworn in — President Trump fired Gwynne Wilcox, a Democratic member, and former Chair of, the National Labor Relations Board ("NLRB" or the "Board"). Although Wilcox's term was not set to expire until August 27, 2028, President Trump became the first U.S. president to terminate a sitting member of the Board. The next day, January 28, the NLRB announced that President Trump also terminated Jennifer Abruzzo, President Biden's General Counsel of the NLRB ("GC Abruzzo"). President Biden had terminated GC Abruzzo's predecessor, Peter Robb, in January of 2021. On February 3, 2025, President Trump appointed William B. Cowen as Acting General Counsel of the NLRB ("Acting GC Cowen").

Following President Trump's initial actions, the NLRB was left with an interim General Counsel and only two sitting members — Marvin Kaplan (R) and David Prouty (D). With three open seats and no quorum, the Board has been unable to issue any rulings. Meanwhile, Wilcox's termination has presented legal questions that appear destined for the U.S. Supreme Court. On March 6, a federal district judge in Washington, D.C. ordered President Trump to reinstate Wilcox as the third member of the Board. President Trump subsequently appealed the decision to the U.S. Circuit Court of Appeals in D.C. On March 28, a three-judge panel of the Court of Appeals stayed the lower court's ruling to reinstate Wilcox. However, on April 7, the full U.S. Circuit Court of Appeals in D.C. vacated the panel's decision, allowing Wilcox to return to her position on the Board while the three-judge panel considers the merits of the dispute, and setting the stage for a Supreme Court decision.

As the legal battle regarding President Trump's constitutional power to remove NLRB members unfolds, President Trump must also fill the two open Board seats. Although the White House has indicated it is actively working toward naming Republican NLRB nominees to fill those seats, Board Chair Marvin Kaplan has stated that the Senate backlog in the confirmation process will delay this process several months. On March 25, President Trump nominated Crystal Carey for the permanent General Counsel role, which also requires confirmation by the Senate. In the meantime, covered employers must continue to follow the requirements of the National Labor Relations Act ("NLRA") and proceed under ever-changing guidance from the Board and its General Counsel.

Importantly, on February 14, Acting GC Cowen rescinded more than 30 Biden General Counsel memoranda. Although a General Counsel memorandum is not law, it indicates how the General Counsel intends to address issues in his or her investigatory and prosecutorial capacity. General Counsel memoranda also guide Regional Directors on how to enforce the provisions of the NLRA. As a result of these recent rescissions, below are some of the key NRLB developments of which all employers should be aware:

1. Non-Compete Agreements

On May 30, 2023, GC Abruzzo issued GC 23-08, which stifled employers' use of employee non-compete agreements. GC Abruzzo contended that, except in special circumstances, proffering, maintaining, or enforcing non-compete agreements violates the NLRA. However, Acting GC Cowen rescinded GC 23-08 and GC 25-01 (regarding non-competes and "stay-or-pay" provisions). These actions indicate that the Trump Board (and, potentially, other federal agencies) will not prohibit employers' use of non-compete agreements. However, employers should be aware that the NLRB decisions which form the basis of GC 23-08 and 25-01, *McLaren Macomb* and *Stericycle, Inc.*, are still good law and continue to limit the use of non-compete agreements, unless or until the Trump-appointed Board reverses these decisions.

2. Severance Agreements

In addition to scrutinizing non-compete agreements, in *McLaren Macomb*, the Biden-era Board limited employers' use of confidentiality and non-disparagement clauses in severance agreements. Then, in GC 23-05, GC Abruzzo took the position that: (1) any confidentiality provisions must be "narrowly-tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justification," but not the ability of individuals to discuss the severance agreement's terms; and (2) "a narrowly-tailored, justified, non-disparagement provision [must be] limited to employee statements about the employer that meet the definition of defamation as being maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity." GC Abruzzo also recommended expanding the decision to encompass supervisory employees in certain circumstances. Acting GC Cowen rescinded GC 23-05, signaling that he and the Trump Board will aim to reverse *McLaren Macomb* and, once again, permit the use of broader confidentiality and non-disparagement provisions in employee severance agreements.

3. Available Remedies

In its December 2022 *Thryv Inc.* decision, the Biden Board added "consequential damages" to its growing list of remedies available when an employer commits an unfair labor practice. Specifically, the Board held that employers can be ordered to pay for all "direct or foreseeable pecuniary harms" resulting from an unfair labor practice. These consequential damages could involve reimbursement for business expenses, out-of-pocket medical expenses, or restoration of an employee's "book of business." At that time, the Biden Board did not adopt GC Abruzzo's request to require employers to also pay damages for emotional distress or pain and suffering. Nevertheless, the Biden Board continued expanding remedies available under the NLRA. Now, Acting GC Cowen rescinded: GC 21-06 (instructing Regional Directors to seek "the full panoply of remedies available" in cases in which an employer commits an unfair labor practice); and GC 21-07 (instructing Regional Directors to seek consequential damages in settlement agreements). Acting GC Cowen also rescinded GC 22-02 and 24-05 regarding the Board's use of 10(j) injunctions, stating that further guidance will be forthcoming. These actions signal that the Trump Board will walk back the sweeping unfair labor practice damages available during President Biden's administration.

As explained above, General Counsel memoranda are not law. And many of former GC Abruzzo's memoranda were based on a series of Biden Board decisions that drastically altered employers' rights and changed the landscape of union representation elections. Despite the rescission of over 30 Biden-era General Counsel memoranda, binding NLRB decisions will not change until the Trump Board has: (1) a quorum, and (2) an opportunity to address and/or overturn the underlying legal decisions.

In addition to addressing employee non-compete and severance agreements, the Trump Board is also expected to address (and overturn) a variety of additional decisions, including those relating to (1) the Board's test for independent contractors, (2) standards and processes for an employer's voluntary recognition of a union and the related duty to bargain, (3) whether workplace rules and handbook policies chill workers' rights under the NLRA, (4) the standard for unilateral changes to job requirements and working conditions in unionized workforces, (5) whether employers may conduct "captive-audience" meetings during union elections, and (6) whether employers can make comments to employees regarding the potential consequences of joining a union.

As employers await further guidance from Acting GC Cowen (or GC Carey, if confirmed by the Senate) and rulings from the Trump Board, employers should take this opportunity to review their existing policies and procedures, including any current non-compete and severance agreements. In addition, employers should take this opportunity to train managers on updated, and continually changing, NLRB standards, union tactics, and election procedures.

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