



Legal Updates

BMT CONFERENCE
MILWAUKEE, WI
JUNE 4, 2025

LUCAS AUBREY
SHERMAN DUNN, P.C.

Overview

■ The NLRB Board

- ❑ Current members
- ❑ Challenges to foundational structure of the NLRB
- ❑ Significant Decisions

■ Federal Mediation and Conciliation Service (FMCS)

Challenges to the NLRB

NLRB Overview



■ The Board

- ❑ Appellate court – reviews ALJ and Hearing Officer decisions
- ❑ 5 seats – 5-year terms
- ❑ Nominated by President, confirmed by Senate.
- ❑ **Traditionally, the party holding the White House appoints the majority**

■ The General Counsel

- ❑ Prosecutes unfair labor practices
- ❑ Oversees Regional offices
- ❑ Conducts representation election cases
- ❑ 4-year term
- ❑ **Nominated by President, confirmed by Senate**

NLRB Overview



■ The Board

□ Section 3(a) of the NLRA:

“Any 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.**”

Board designed to be an *independent* panel of experts.

■ The General Counsel

No removal protection under the NLRA.



The Biden Board as of November 2024



- **Lauren McFarren** – Democrat. Former Chair of NLRB. Was on the Board under Obama.



- **Gwynne Wilcox** - Democrat. Former union-side labor attorney with a law firm. Was deputy General Counsel of SEIU Local 1199. Reconfirmed in 2023 - Term expires Aug. 2028.



- **David Prouty** – Democrat. Former UNITE-HERE GC, former MLBPA GC, and most recently GC of SEIU Local 32-BJ. Term expires August 2026.

The Biden Board



- **Marvin Kaplan** – Republican. Current Chair of the Board. Term ends August 2025. Worked on Capitol Hill and OSHA.



The Trump Board



- **Lauren McFarren** – Democrat. Former Chair of NLRB. Was on the Board under Obama. Term **expired Dec. 2024**.



- **Gwynne Wilcox** - Democrat. Former union-side labor attorney with a law firm. Was deputy General Counsel of SEIU Local 1199. Reconfirmed in 2023 - Term expires Aug. 2028.



- **David Prouty** – Democrat. Former UNITE-HERE GC, former MLBPA GC, and most recently GC of SEIU Local 32-BJ. Term expires August 2026.



The Biden Board



- **Lauren McFarren** – Democrat. Former Chair of NLRB. Was on the Board under Obama. Term **expired Dec. 2024**.



- **Gwynne Wilcox** - Democrat. Former union-side labor attorney with a law firm. Was deputy General Counsel of SEIU Local 1199. Reconfirmed in 2023 - Term expires Aug. 2028. **TRUMP FIRED**



- **David Prouty** – Democrat. Former UNITE-HERE GC, former MLBPA GC, and most recently GC of SEIU Local 32-BJ. Term expires August 2026. **Only Dem on the Board**

The Biden Board



- **Marvin Kaplan** – Republican. Current Chair of the Board. Term ends **August 2025**. Worked on Capitol Hill and OSHA.

The NLRB General Counsel



Jennifer Abruzzo

- Began work on July 22, 2021.
- Previously worked for the NLRB for over two decades
- Aggressive advocate of employee and union rights under the NLRA

The NLRB General Counsel



Jennifer Abruzzo

- Began work on July 22, 2021.
- Previously worked for the NLRB for over two decades
- **Trump Fired**

The NLRB General Counsel



Acting General Counsel – Bill Cowan

Appointed Acting GC February 3, 2025

Long history with the Board – Recess appointment to the Board from January 2002 to November 2002; Regional Director of the Los Angeles Office since 2016

The NLRB General Counsel



Nominated for General Counsel – Crystal Carey

Nominated March 25, 2025.

Management-side lawyer at Morgan Lewis.

Morgan Lewis represents Amazon, SpaceX, Apple, and Tesla.

Morgan Lewis is pursuing the legal challenge that the NLRB is unconstitutional.



Firing of Gwynn Wilcox

- Gwynn Wilcox's term not scheduled to expire until August 2028.
- On January 27, 2025, Trump fired Wilcox.
- First time in NLRB's 90-year history that a President fired a sitting NLRB member.
- Trump did not claim that Wilcox was fired for "neglect of duty or malfeasance in office," but instead because she did not share the objectives of the President.
- Trump claims the limitations in the NLRA on the ability to remove a member of the NLRB are unconstitutional.



Wilcox v. Trump

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- Trump's claim:
 - Unitary Executive Theory
 - Article II, Section 1 of the U.S. Constitution: "The executive Power shall be vested in a President of the United States of America."
 - Supreme Court has held that "the entire 'executive Power' belongs to the President alone
 - But



Wilcox v. Trump

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- Since 1935, the Supreme Court has held that it is Constitutional for an agency with a multi-member board to be ***independent*** -- President can only remove members for cause.
 - Examples:
 - NLRB
 - Federal Reserve
 - Federal Trade Commission
 - FERC
 - Nuclear Regulatory Commission
 - National Transportation Safety Board
 - Consumer Product Safety Commission
 - Federal Communications Commission
 - Federal Election Commission



Wilcox v. Trump

- March 6, 2025: District Court rules for Wilcox and orders her to be reinstated immediately.
- March 7, 2025: Trump asks District Court to stay order pending appeal.
- March 8, 2025: District Court denies motion to stay order.
- March 28, 2025: 3-judge panel of Court of Appeals grants motion to stay order – Wilcox leaves office.
- April 7, 2025: In a 7-4 decision, full D.C. Circuit Court of Appeals denies motion to stay – Wilcox back in office.



Wilcox v. Trump

- April 9, 2025 – Trump appeals stay motion to Supreme Court.
- April 9, 2025 – Justice Roberts grants administrative stay. Wilcox leaves again.
- May 16 – D.C. Circuit Court of Appeals heard appeal of March 6 ruling.
- May 22 – Supreme Court continues administrative stay
- Case is heading to U.S. Supreme Court on the merits.
- Importance is far beyond the NLRB.



Other Constitutional Challenges to the NLRB

- SpaceX, Amazon, Starbucks, Trader Joe's, and others are actively attacking the NLRB. They argue:
 - NLRB is unconstitutional because the President does not have the authority to remove Board members and/or ALJs;
 - NLRB is unconstitutional because it penalizes charged parties without a jury trial in violation of the Seventh Amendment;
 - NLRB's structure violates the separation of powers because it exercises executive, legislative, and judicial functions.



Removal Protections of Board Members

- The NLRA's provisions on the Constitutionality of removal protections for **Board members** will reach the Supreme Court quickly in Wilcox's challenge to her removal.



ALJ Removal Protections

- Two federal district courts have ruled that the NLRA's provisions protecting **ALJ's** from removal are unconstitutional, but one district court has held those protections are constitutional.
- The parties have appealed those decisions, and this issue is also likely to reach the Supreme Court.



Damage Claims and Right to Jury

- In *Thryv*, the NLRB approved remedies for ULPs that include “direct and foreseeable” damages.
- Employers claim such damages can only be awarded by a jury trial under the Seventh Amendment.
- Supreme Court rejected similar claim in 1937, but some lower courts are revisiting the question. May also reach the Supreme Court.



NLRB's Power

- A district court in Michigan has rejected the argument that the NLRB is unconstitutional because it exercises executive, legislative, and judicial functions.
- Weakest of the current challenges to the NLRB's structure.



Notable NLRB Decisions



Captive Audience Meetings

- **Captive Audience Meetings are Unlawful** – *Amazon.com Services LLC*, 373 NLRB No. 136 (Nov. 2024)
 - An employer violates Section 8(a)(1) when it compels employees to attend captive audience meetings.
 - Board explained that employees have a right under Section 7 to support, or not, a union. That right includes the right to choose who to listen to during an organizing campaign.
 - When an employer compels employees to attend, it restrains and coerces employees in their decision on whether to support the union or not.



Employer Statements During Organizing

What can an employer lawfully say to employees about the consequences of organizing on the relationship between the employer and individual workers?

Old Rule:

- **Tri-Cast, Inc.**, 274 NLRB 377 (1985)
 - “[t]here is no threat, either explicit or implicit, in a statement which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before”
 - Okay for employers to say:
 - Things will be more formal after union;
 - We’ll have to run things “by the book”
 - Employer can no longer handle personal requests
 - Etc.

Biden Board:

- ***Siren Retail Corp.***, 372 N.L.R.B. No. 95 (June 13, 2024)
 - Overrules *Tri-Cast*.
 - Board will treat predictions concerning the consequences of unionization on the relationship between the employer and workers the same as any other statements concerning the consequences of organizing.
 - **All employer predictions must be grounded in objective fact.**



Unilateral Changes

When can an employer unilaterally implement changes to mandatory subjects of bargaining during CBA?

Old Rule:

- **MV Transportation**, 368 NLRB No. 66 (2019)
 - An employer may make unilateral changes to terms and conditions of employment if it determines that the changes are within the “compass or scope of contractual language granting the employer the right to act unilaterally.” Called the “contract coverage” standard.
 - Broad management rights clause would give employer right to make changes to terms and conditions not otherwise addressed in the CBA.

Biden Board:

- **Endurance Environmental Solutions**, 373 N.L.R.B. No. 141 (December 10, 2024)
 - Overrules *MV Transportation*
 - Returns to “clear and unmistakable waiver” standard.
 - **Bars employers from making unilateral changes unless the CBA clearly and unmistakably waives the right to bargain over a particular subject.**



FMCS

FMCS



FMCS

FEDERAL MEDIATION &
CONCILIATION SERVICE

- Created by Congress in 1947 - Two Primary Functions in the Private Sector
 - ❑ Collective Bargaining Mediation
 - ❑ Maintaining a list and process for labor and management to select arbitrators to hear grievances.

FMCS



FMCS

FEDERAL MEDIATION &
CONCILIATION SERVICE

- In FY 2024 – conducted 5,400 mediation sessions and provided more than 10,000 arbitration panels
- Had 220 employees and a \$55 million budget - .0014% of the federal budget

FMCS



FMCS

FEDERAL MEDIATION &
CONCILIATION SERVICE

- Trump issued Executive Order in March targeting FMCS and other small agencies for massive reductions.
- Cut employment to about 12 people.
- FMCS has ceased offering mediation services, except in very limited circumstances.
- Still providing arbitration panels in simple cases, but unclear for how long.

FMCS



FMCS

FEDERAL MEDIATION &
CONCILIATION SERVICE

- 21 States filed a lawsuit in Rhode Island challenging the dismantling of FMCS and other agencies
- AFL-CIO has filed a similar lawsuit in New York
- In May, Rhode Island court issued preliminary injunction barring the Administration from continuing efforts to dismantle the FMCS



Questions?

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