



# NLRB Updates

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MEMBERSHIP DEVELOPMENT  
CONFERENCE  
CHICAGO, IL  
AUGUST 27, 2025

SHERMAN DUNN, P.C.

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# Overview

## ■ The NLRB Board

- ❑ Current members
  - ❑ Challenges to foundational structure of the NLRB
  - ❑ Significant Decisions since MD 2024
  - ❑ Using the Board with No Quorum
  - ❑ NLRB Acting General Counsel Policy Memos
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# 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 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. **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 Trump 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 for employee and union rights under the NLRA

# The NLRB General Counsel



**Jennifer Abruzzo**

- 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 Board Member Nominees

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## **Scott Mayer – Nominated to Fill McFerran's Seat on the Board**

Nominated July 17, 2025

Chief labor counsel for Boeing (the Boeing that opened facilities to South Carolina to avoid unions)

Not well known

# The NLRB Board Member Nominees

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## **James Murphy – Nominated to fill John Ring's Seat on the Board**

Nominated July 17, 2025

Career NLRB employee

Worked as chief counsel for Republican  
Board members Kaplan, Johnson, Hayes,  
and Schaumber

# 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.

# The NLRB General Counsel Nominee



## Nominated for General Counsel – Crystal Carey

Confirmation hearing was July 16

Josh Hawley may vote against her nomination



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# Challenges to the NLRB's Structure

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# Firing of Gwynn Wilcox

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- 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

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- 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

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- 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

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- 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

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- 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

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- 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.
- **On August 19, the Court of Appeals for the Fifth Circuit ruled in favor SpaceX and other employers that ALJ removal protections are unconstitutional – barred the NLRB from proceeding with a hearing before an ALJ in the cases.**
- This issue is also likely to reach the Supreme Court.



# Damage Claims and Right to Jury

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- 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.



# Separation of Powers

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- 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.



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# **Notable NLRB Decisions**



# Captive Audience Meetings

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- **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.**



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# **Using the NLRB with No Quorum**



# Representation Proceedings

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## Regional Offices Still Processing Representation Case Petitions

- File petition with showing of interest; Negotiate stipulated election agreement; Campaign; and Win!
- **More important than ever to try to avoid going to a hearing on unit composition;**
  - Hearing will happen on normal timeline, but due to staff shortages DDEs taking months to issue after the hearing.
  - If employer appeals substantive determination following election, Board cannot take action.





# ULP Proceedings

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## Regional Offices Still Investigating ULPs

- Staffing shortages are causing delays in processing some cases
  - Slow to take affidavits and to issue complaints in some regions;
  - Slow to schedule a hearing once complaint issues.
- If receive favorable decision from ALJ and employer files exceptions with the Board, the Board cannot take action on the case and it will sit until there is a quorum.
- Will see an increase in employers seeking injunctions to stop proceedings at Regional level – have not seen in IBEW cases.



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# **Acting General Counsel Memos**



# Seeking Remedial Relief in ULP Settlements

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## GC 25-05

- Returns discretion over certain issues to Regional Directors when approving settlement agreements;
- Eliminates requirement that settlement agreements include “default” language;
- Allows for settlement agreements to include non-admissions clauses;
- Allows RDs to approval unilateral settlements over charging party/union’s objection;
- Allows RDs to approve settlements that provide for less than 100% of what the worker is owed by the employer.



# Maximizing Deferral of ULP Charges

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## GC 25-10

- Due to “decreasing staffing levels and a steady case intake,” Regional Offices are to refocus on deferring ULP charges to arbitration under the CBA whenever possible;
- Makes it more difficult to progress a ULP charge when the employer and union are parties to a CBA.
  - Only certain issues will not be deferred.



# Questions?

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