TURN, TURN, TURN: NLRB Policy Changes in the Trump and Biden Administrations

By Dana Shilling

Donald Trump won a narrow reelection as president last fall, in part by successfully appealing to disgruntled working class voters. Most nonunion workers and two-fifths of union households put their faith in him to revive their blue-collar job and real wage prospects. How do the second Trump administration's emerging labor policies in early 2025 so far compare to those of the largely pro-employee Biden administration?

This article summarizes developments in the policies and leadership of the National Labor Relations Board (NLRB), the main federal agency overseeing labor-management relations. I also direct some attention to developments at the Equal Employment Opportunity Commission (EEOC). Leadership at these agencies generally reflects the policy priorities of the party in power. When President Biden took office, he fired the NLRB General Counsel from Trump's first administration. When President Trump resumed office in 2025, he fired the NLRB General Counsel from the Biden administration. More controversially, he also removed an NLRB board member and two EEOC commissioners.

NLRB policy directions are expressed in General Counsel memoranda, although these memoranda do not have the force of law. This article looks at the trends in GC Memos over two transitions of administration.

The removals resulted in both agencies lacking a quorum, so they have the power to engage in routine case processing of complaints—but are unable to issue formal decisions.

In effect, the General Counsel is in charge of the NLRB's prosecutorial function, by deciding whether to issue a complaint in an Unfair Labor Practices (ULP) case, and by channeling issues to the full board for decision—including cases that can break new ground or set new precedents.[1] The NLRB's General Counsel frequently addresses issues of policy, often introducing new policies, by issuing General Counsel Memoranda. These memoranda—nicknamed "GC Memos"—are identified by year and number: for example, GC 2022-3. GC Memos do not have the force of law. Like the decisions of NLRB Administrative Law Judges, GC Memos are not necessarily adopted by the members of the Board. Nevertheless, GC Memos are worth following because they can indicate the direction the NLRB will take.

Some of these memos deal with quite routine internal matters. Some GC Memos are obsolete because they deal with issues specific to the COVID-19 pandemic. Others are bold pronouncements of departures from the positions taken by the previous administration—which may mean a return to positions taken by an earlier administration (or, in the case of Trump, during the same president's previous term).

The direction the NLRB takes is very much dependent on politics. During the first Trump administration, many employer-friendly GC Memos were adopted, as well as a number of pro-employer NLRB orders. The NLRB does not have enforcement power: to carry out its orders, it must get a federal Court of Appeals to issue an enforcement order. The subject of the order (typically an employer, but it could also be a union or other entity) can also ask the Court of Appeals to review the NLRB's decision.

According to NLRB.gov, the five-member NLRB is a "quasi-judicial body" that engages in administrative proceedings to decide cases on the basis of formal records. The members are appointed by the president, subject to confirmation by the Senate. They are supposed to serve five-year terms, and one member's term expires each year. Generally, there are three members of the president's party and two members of the opposing party, although this is not a legal requirement. The General Counsel is independent of the NLRB and is appointed by the president for a four-year term.[2]

Almost as predictably as the sun rising in the East and setting in the West, when the candidate of one party wins the presidential election, he will reverse the labor policies of the predecessor. When Biden replaced Trump in 2021, he fired the person then serving as General Counsel—Peter Robb on January 20, 2021—close to the end of his four-year term. Biden replaced him first by an interim candidate, Peter Sung Ohr, and then by Jennifer Abruzzo, who took over in August 2021.[3]

One of many actions taken at the beginning of Trump's second term was firing Jennifer Abruzzo. Initially, Abruzzo was replaced by her deputy, Jessica Rutter, who served very briefly as acting General Counsel. She was fired on February 1, 2025. At that point, Trump did not designate anyone else to serve as General Counsel, but on February 3, Trump designated William Cowen as Acting General Counsel.[4]

While there is clear legal precedent that the president has the authority to fire the NLRB General Counsel, Trump also removed NLRB board member Gwynne Wilcox on January 27, 2025. This was the first time an NLRB board member has ever been removed before the end of his or her term. Wilcox had been confirmed by the Senate for a term lasting until August 2028.

There is no clear legal authority for a president to remove an NLRB member except for cause. The National Labor Relations Act (NLRA) §3(a) requires notice and hearing for the president to remove a Board member for "neglect of duty or malfeasance in office"; "no other cause" for removal is permitted. Commentators expected the Trump administration to argue that the "take-care" clause of Article II of the Constitution, requiring the president to "take care that the laws be faithfully executed" gives the president power of removal at will.

Wilcox filed a suit, *Wilcox v. Trump*, No. 1:25-cv-0034-BAH in the District Court for the District of Columbia on February 5, 2025, seeking a declaratory judgment that firing her was illegal, and asking for an order that NLRB chair Marvin Kaplan reinstate her to her position. The case was assigned to Judge Beryl Howell, an Obama appointee. Another possibility is assertion of the "unitary executive" theory, which holds that notwithstanding laws passed by Congress, Article II of the Constitution grants the president direct control of all executive branch officials, so he can remove them at will.[5]

On January 21, 2025, Trump appointed Marvin E. Kaplan as chairman of the NLRB. Kaplan has been an NLRB member since August 10, 2017, and served as chairman from December 21, 2017 to April 15, 2018. His term of office ends August 27, 2025.[6]

Under the NLRA, a quorum of three members is required for the Board itself to take action. The NLRB announced on February 1, 2025 that, when the agency does not have a quorum, it can continue to process representation cases (requests for certification of a union) and can process representation and unfair labor practices cases.[7] In effect, without at least three chefs in the kitchen, the line cooks can do the prep work … but the dishes won't be cooked and sent out to the diners.

EEOC Parallel

A similar situation occurred at the EEOC. Also on January 27, Trump removed two EEOC commissioners, Charlotte A. Burrows and Jocelyn Samuels, while their five-year terms were still in effect. Burrows' term was scheduled to expire July 1, 2028. Samuels (a Trump appointee who survived into the Biden administration)'s term was scheduled to expire July 1, 2026. The firings left the EEOC with only two of the five commissioners expected under the governing statute: Andrea R. Lucas, a Republican named by Trump as acting chair of the EEOC, and Democrat Kalpana Kotagal, a Biden appointee whose term runs until July 1, 2027. Keith Sonderling had served as commissioner until July 1, 2024, when his term expired. Trump has nominated Sonderling to become Deputy Secretary of Labor. Trump also fired the EEOC's general counsel, Karla Gilbride, a Biden appointee who was confirmed by the Senate for a four-year term ending in 2027. When Biden took office, heremoved the EEOC general counsel, but not commissioners. This was the first time any president had ever removed any EEOC commissioner. In the past, new presidential administrations have permitted EEOC commissioner to finish their terms before appointing a new commissioner from their own party. Andrea Lucas became acting chair of the EEOC. She issued a statement on January 21, 2025 that the EEOC will protect women against workplace discrimination and harassment by rolling back Biden-era gender identity pronouncements. However, because there is no quorum, she is unable to modify Biden-era documents, and cannot rescind existing guidance inconsistent with Trump's EO 14166 on gender identity.[8]

Trump 1.0 GC Memos

Links to the full text of all GC Memos can be found at https://www.nlrb.gov/guidance/memos-research/general-counsel-memos. The memos marked with an asterisk were rescinded during the Biden Administration, by GC 21-02. Dates are included because the memo numbers do notalways conform to chronological order.

GC Robb issued only three memos in 2017:

NUMBER	DATE	SUBJECT
17-01	1/3/17	University students
17-02	3/10/17	Summary of American Bar Association (ABA) meeting
17-03	6/30/17	Report on back pay awarded to employees

There were six memos in 2018:

NUMBER	DATE	SUBJECT
18-01	10/19/17	Delegating functions to the Division of Legal Counsel
18-02	12/1/17	When cases must be submitted to the General Counsel for advice
18-03	3/14/18	ABA meeting
*18-04	6/6/18	Which employee handbook rules are lawful
18-05	6/20/18	Injunctions under NLRA §10(j)
*18-06	8/1/18	Who can intervene in a suit to decertify a union

In 2019, there were also six memos:

NUMBER	DATE	SUBJECT
*19-01	10/24/18	Cases alleging breach of a union's duty of fair representation
19-02	12/7/18	Speeding up case processing
*19-03	12/28/18	Deferral of ULP charges to arbitration
*19-04	2/22/19	Notice requirements about dues
*19-05	3/26/19	Duty of fair representation
*19-06	4/29/19	Disclosures to workers who object to paying union dues

Activity increased in 2020, with 14 memos:

NUMBER	DATE	SUBJECT
20-01	10/21/19	Electronic filing of documents
20-02	11/12/19	Submission of W-2 forms to Regional Director
20-03	11/15/19	Guidance on issuing decisions electronically
20-04	3/27/20	Effect of emergencies on duty to bargain
20-05	4/2/20	Specifications for electronic issuance of complaints
20-06	5/20/20	Requirements for posting NLRB notices
20-07	6/1/20	Changed procedures in representation cases
*20-08	6/1/20	Changed procedures for investigations
*20-09	6/26/20	Make-whole remedies in duty of fair representation cases
20-10	5/15/23	New procedures for "blocking charge" representation cases; this Memo was rescinded, but not by GC 21-02
20-11	7/30/20	New procedures for blocking charges, the voluntary recognition bar, and construction industry agreements
20-12	8/25/20	Holding ULP hearings by videoconference during the COVID pandemic
*20-13	9/4/20	Treatment of employer assistance to union organizing
20-14	9/18/20	Summary of decisions about COVID issues

Biden-Era GC Memos

GC 21-01 was issued November 10, 2020 by GC Robb, dealing with the propriety of mail-ballot elections during the pandemic. As noted above, many of the Trump 1.0-era memos were abrogated on February 1, 2021 by GC 21-02. And, as noted below, there was something of a St. Valentine's Day Massacre in 2025 when Acting General Counsel William Cowen issued GC 25-05, rescinding most of the Biden-era memos (marked with a double asterisk). There were two categories of rescinded memos. For the ones marked with an exclamation point, Cowen indicated that the Trump 2.0 administration might provide further guidance on the underlying issues.

Eight GC Memos were issued in 2021:

NUMBER	DATE	SUBJECT
**21-01	11/10/20	Mail ballot elections during the pandemic
**21-02	2/1/21	Rescission of previous memos
**21-03	3/31/21	Vigorous enforcement to protect concerted activity
**21-04	8/12/21	Mandatory submissions to advice
**! 21-05	8/19/21	Increased applications for injunctions under NLRA §10(j)
**! 21-06	9/8/21	Expanding remedies NLRB would seek
**! 21-07	9/15/21	Requiring additional remedies to settle cases
**21-08	9/29/21	Status of student-athletes as NLRB "employees"

There were only six memos in 2022:

NUMBER	DATE	SUBJECT
**! 22-01	11/8/21	Immigrants' rights
**! 22-02	2/1/22	Injunctions against threats and coercion during organizing campaigns
**! 22-03	2/10/22	Interagency cooperation
**22-04	4/7/22	Ban on captive audience meetings
**! 22-05		Goals for initial investigations of ULP charges
**22-06	6/23/22	Update on settlement remedies, including "novel" remedies

Eight memos were issued in 2023:

NUMBER	DATE	SUBJECT
**! 23-01	10/20/22	Injunctions in cases calling for interim relief
**23-02	10/31/22	Employers' AI and algorithm usage and NLRA §7 rights
**23-03	11/9/22	Record requests from other federal agencies
**23-04	3/20/23	Topics that do not require advice submissions
**23-05	3/22/23	Limits on noncompete agreements
23-06	4/12/23	Report on ABA meeting
**! 23-07	5/22/23	Procedures for enforcing NLRB orders
**23-08	5/30/23	When noncompete agreements violate the NLRA

The number of memos fell to six in 2024:

NUMBER	DATE	SUBJECT
**! 24-01	4/29/24	Certification and bargaining orders without an NLRB-certified election
24-02	12/8/23	Changes in election procedures
24-03	3/4/24	ABA conference report
**24-04	4/8/24	Expanded remedies such as reinstatement
**24-05	7/16/24	Standards for granting preliminary injunctions
**24-06	8/6/24	Privacy and disclosure obligations for colleges

Abruzzo issued four memos with a "25" prefix, although three of them were issued in calendar 2024. Three were issued after the November 2024 election:

NUMBER	DATE	SUBJECT
**25-01	8/7/24	Remedies for improper noncompete and "stay or pay" provisions
**25-02	11/26/24	Mandate that settlement agreements vindicate public rights
**! 25-03	1/6/25	Improving efficiency and transparency of case handling
**! 25-04	1/16/25	Interface between the NLRA and Equal Employment Opportunity laws

Significant GC Memos from Trump 1.0

GC Memo 18-04 says that work rules in employee handbooks should be analyzed as to whether they actually affected protected activity—not just whether it was possible there might be such an effect. GC Memo 19-04 explains unions' obligation to disclose to employees when they are not obligated to pay dues, and that they can cancel dues checkoff (deduction of union dues from their paychecks) when their Collective Bargaining Agreement expires. GC Memo 19-06 requires unions to give the NLRB detailed explanations about its policies for members who object to paying agency fees, and clarifies that unions cannot require fee objectors to contribute to the union's lobbying expenses.

Significant Biden-Era GC Memos

Acting General Counsel Peter Sung Ohr issued GC 21-03 on March 31, 2021, holding that NLRA §7 protects not just union activity and labor organizing, but also "fundamental precursor actions" like talking about working conditions, as well as political and social justice activity that directly involves workplace issues. The memo's examples are a "solo strike" to attend a demonstration, and protests against crackdowns on immigrants.

Jennifer Abruzzo's GC 21-07 supplements the traditional back pay remedy in NLRB cases with "full remedies" such as future pay, consequential damages, and reimbursement of employee expenses. In certification cases, employers might have to reimburse the union for additional organizing expenses caused by the employer's recalcitrance. In refusal to bargain cases, a minimum bargaining schedule might be imposed. Abruzzo returned to the subject of remedies in GC 24-04 and 25-01.

Abruzzo's GC 22-01 sets up a protocol for immigrants involved in labor law cases, reiterating that immigration status is irrelevant to determining whether there was a violation of the NLRA. The protocol allows a charging party or witness to seek immigration relief while assisting with the investigation.[9]

GC 22-04 bans captive audience meetings, which Abruzzo believed implied a threat of reprisal. GC 23-05 provides guidance about the critically important *McLaren Macomb* decision[10], which says that it violates the NLRA to offer a severance agreement that subjects the employee who is leaving to broad confidentiality and nondisparagement requirements. While Abruzzo did not characterize all noncompete agreements as inherently unlawful, she said they must not be overbroad to the point that they prevent employees from engaging in protected concerted activity.

A 2023 NLRB decision, *Cemex Construction Materials Pacific, LLC*, 382 NLRB No. 130 (2023), made it much easier for unions to be certified as bargaining representatives without an NLRB-certified election. In some cases, even without an election, a bargaining order could be issued based on the employer's unfair labor practices during the organizing process. GC 24-01 is Abruzzo's response to this ruling. In 2024, the Supreme Court ruled that an NLRB request for a preliminary injunction under NLRA §10(j) in an Unfair Labor Practices case is decided using the

same standards as other requests for injunctions; the NLRB does not get special deference: *Starbucks v. McKinney*, 144 S.Ct. 1570 (U.S. 2024). The upshot is that the NLRB became less likely to apply for preliminary injunctions.

GC 25-04 addresses the extent to which discriminatory conduct loses protection as NLRA §7 concerted activity: for example, racial or ethnic slurs or sexist terms directed by a striker at an employee crossing a picket line. It is truly heart-warming to find a context in which employers eagerly embraced Wokeness. GC 25-04 says that it is possible to design "carefully crafted" rules that prevent harassment while also permitting employees to engage in protected concerted activity. She said that civility rules are unlawful if they target activity that is not severe or prolonged enough to constitute discrimination. But a rule against harassment based on a protected characteristic such as age or sex could be acceptable. She directed the NLRB to consider the totality of the circumstances surrounding the conduct. GC 25-04 further provides that employers can mandate confidentiality of investigations—as long as employees remain free to file NLRB charges.[11]

Trump 2.0 GC Memo

On February 14, 2025, Acting General Counsel Cowen rescinded multiple Biden-era memos. Cowen said that he might issue new guidance on some of those topics, but other topics are likely simply to be abandoned by the NLRB. Some of the rescissions signal a change in labor policy, such as memos about student athletes as employees, severance and noncompete agreements, and the scope of remedies the NLRB will order. However, GC Memo 21-01, which deals with mail ballot elections, was simply considered obsolete because the COVID-19 public health emergency ended.[12]

What Happens Next?

In a statement on her last day in office, Abruzzo said that during her tenure, workers were empowered to collectively seek better wages and working conditions: "There's no putting that genie back in the bottle." She anticipated that, if the NLRB does not continue to "fully effectuate its Congressional mandate" as it did during Abruzzo's tenure, then "workers with assistance from their advocates will take matters into their own hands" to secure dignity, respect, and a fair share of value they add to their employers' operations.[13]

It was widely expected that the NLRB would veer away from Abruzzo's highly pro-employee stance; labor enforcement would be less stringent; and penalties imposed on employers would be reduced. It was also expected that the Trump 2.0 NLRB would characterize more workers as independent contractors (i.e., they would have fewer rights and remedies than employees). Business groups considered this a good idea, because they would gain greater flexibility in managing their workforce. Commentators also anticipated that the number of Unfair Labor Practices complaints would drop, and Regional Offices would settle with employers more quickly and on less onerous terms than during Abruzzo's tenure. Eventually, when the NLRB has a quorum once again, it is anticipated that the full NLRB will reverse a number of controversial pro-employee decisions rendered during the Biden era.[14]

Wilcox's removal from the Board means that "the president has essentially shut down the federal labor relations policy-making board until he chooses to make his appointments." That is a mixed bag for employers. Without a quorum, the NLRB cannot get rid of pro-employee Biden-era precedents, but possible worker-friendly rulings are also on pause. One theory as to why Trump did not retain Wilcox and appoint two Republicans to the vacant positions is that the White House expected its negotiating power would increase if the appointments were delayed. The opportunity to have a strong Republican majority on the NLRB could permit Trump to induce union leaders to enter into a partnership with the Republican party.[15]

In cases where the Biden-era NLRB rendered pro-employee decisions, and employers have challenged those rulings in court, it is likely that the Trump 2.0-era NLRB will not defend those decisions in court. But Trump may find that firing Wilcox, Burrows, and Samuels, even if the dismissals are found to be lawful, may delay implementation of his policy agenda. Without a quorum, complaints can be submitted, and routine case processing can continue, but neither the NLRB nor the EEOC can issue any regulations, decisions, or do anything else that would require approval of a quorum of the full agency management. The agencies are limited in their ability to initiate new actions and change policy. including actions and policies favored by Trump. Neither agency can officially do away with Biden-era policies until more NLRB board members and EEOC commissioners are nominated—and confirmed.[16]

It remains to be seen whether Trump overreached himself and frustrated his own labor policy objectives.

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NOTES

1 Pasternak, Daniel, "Anticipated Shift at National Labor Relations Board Begins With Rescission of General Counsel Memoranda," Squire Patton Boggs (Feb. 17, 2025), https://www.employmentlawworldview.com/anticipated-shift-at-national-labor-relations-board-begins-with-rescission-of-general-counsel-memoranda-us/. Pasternak notes that, in his rescission memorandum, Cowen said "if we attempt to do everything, we risk accomplishing nothing," implying that Abruzzo's aggressive enforcement agenda and pursuit of novel theories were responsible for creating the huge case backlog at the NLRB.

2 NLRB.gov, "About NLRB," https://www.nlrb.gov/about-nlrb.

3 In 2024, the Sixth Circuit upheld the lawfulness of Robb's termination:

Rieth-Riley Construction Co. v. NLRB, 114 F.4th 519 (6th Cir. 2024). See Ripple, Gregory, Sparks, Kenneth, and Demith, Peyton, "Trump Tests Limits of Authority to Shape National Labor Relations Board," Vedder Price PC (Jan. 29, 2025), https://www.vedderworks.com/2025/01/trump-tests-limits-of-authority-to-shape-national-labor-relations-board. An earlier case, *Goonan v. Amerinox Processing, Inc.*, 2021 WL 2948052 (D.N.J. 2021) also upheld the president's authority to fire the General Counsel.

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