

Shake up at the NLRB: What Employers Can Expect Under Trump's Second Administration

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Out with the. . .

General Counsel Jennifer Abruzzo

- Sworn in July 22, 2021
- Expansive and aggressive approach to the position
- Over 30 GC Memos issued
- Novel theories
 - “Make whole” remedies
 - Attack on restrictive covenants
 - Expansion of “employee” status
- This just means lots to overturn...

Chair Lauren McFerran

- Just finished second term
- Had been waiting for a floor vote since August
- Could have had another five years
- Instead, term ended in December

In with the...?

- Two membership slots open now
 - 5-year terms;
 - Opportunity for the first Republican majority since 2021;
 - Current two Democrats will be up in August 2026 & August 2028 (also both during Trump's tenure)
- New General Counsel
 - Happens every time there is a change in the administration but...

But does any of it even matter?

- Constitutional challenges?
 - “Removal powers”
 - Separation of powers doctrine
- Budget cuts?
- No new appointments to the Board at all?
 - Must have three members to lawfully act
 - But a lot to overturn...
 - More than 20 precedent-setting decisions issued by the Board during the Biden administration

Likely Changes in NLRB Priorities

- Expect new General Counsel to rescind Abruzzo's GC Memos
- GC Memos 21-04 and 23-04
 - Challenges to employee handbook policies
 - Limits on confidentiality & non-disparagement provisions
 - Expansion of what constitutes "protected activity"
 - Reducing GC's *prima facie* burden in ULP cases
 - Raising bar for independent contractor classification
 - Increasing union rights to access employer property
 - Expansion of employer's duty to bargain
 - Broadening NLRB remedies

Likely Changes in NLRB Priorities

- GC Memos 21-06, 21-07, and 24-04
 - Pushing for broad consequential damages beyond back pay, such as:
 - Costs associated with discharged employee loans/cash advances
 - Healthcare expenses following unlawful termination
 - Job search costs
 - Relocation/moving expenses
 - Child care costs
 - Late fees for rent/mortgages
- Instructing Regions to seek “full remedies” in all settlement negotiations
 - 100% of back pay and lost benefits
 - Reinstatement or front pay
 - All possible consequential damages

Likely Changes in NLRB Priorities

- GC Memos 23-08 and 25-01
 - Challenges to enforceability of non-compete and “stay-or-pay” agreements
 - Urging NLRB to adopt rule under which majority of non-compete agreements would be unenforceable
 - “Make-whole” remedies for enforcing or even proffering such agreements

Likely Changes in NLRB Priorities

- Efforts to expand the “joint employer” standard
 - 2023 NLRB Final Rule on Joint Employer Standard
 - Vacated by Texas federal district court
 - NLRB withdrew its appeal
- Further efforts expand joint employer test unlikely under new administration

Likely Changes in NLRB Enforcement Action

- Less emphasis on enforcement by NLRB generally
 - Backlog of ULP cases
- Potential withdrawal of NLRB complaints/appeals on key issues
- Expect new General Counsel to issue memos outlining new priorities
 - Cases to be submitted to NLRB Division of Advice
 - Guidance for Regions on enforcement priorities and shifts in position

Are Speedy Elections a Thing of the Past?

The Past

- *April 2015*: Speedy election rule goes into effect
 - Focuses on the period between the union filing a petition for election and the election itself
- *April 2020*: NLRB walks back some of the rush

Are Speedy Elections a Thing of the Past?

The Present

December 2023

- Elections can be held less than 3 weeks after the petition was filed
- Permits electronic petition filing
- Requires employers to provide email addresses and phone numbers for faster communications with voters
- Defers “non-essential” issues until after the election, and only if the results would be impacted by such a decision

Are Speedy Elections a Thing of the Past?

The Future

- The new Board, appointed by the Trump administration, is expected to reverse Biden's quickie election rules
- What will this do?
 - More pre-election resolutions
 - Paves the way for an employer to challenge the validity of the petition or scope of bargaining unit
 - Allows the employer to launch a more robust campaign
 - Permits employees to educate themselves on the issue

Voluntary Recognition and Election Conduct Under *Cemex*

Changes to Voluntary Recognition Procedures

- An employer violates the Act when it **refuses to recognize, upon a request**, a union that has been designated as a representative by the majority of employees in an appropriate unit **unless the employer promptly files a petition.**
- Employer's 3 Options Under *Cemex* and GC Memo 24-01:
 1. Immediately recognize the union.
 2. File an election petition within 2 weeks.
 3. Take no action and defend a refusal to bargain ULP.

Voluntary Recognition and Election Conduct Under *Cemex*

Cemex Bargaining Order

After a petition is filed, if an employer “commits an unfair labor practice that requires setting aside the election, the petition will be dismissed, and the employer will be **subject to a remedial bargaining order.**”

Current and Future Challenges to *Cemex*

- Current Challenges:

- Appeal in the Ninth Circuit
 - Notable Takeaways:
 - (1) whether a bargaining order could have been issued under *Gissel* alone, potentially obviating the need for a new standard; and
 - (2) whether the Board had the authority to implement this new standard.

- Likely Future Challenges:

- General Counsel Memorandum (“GC Memo”) to nullify *Cemex*
- Board Decision(s) Returning to *Linden Lumbers* and *Gissel*