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The Pendulum Swings Again: Labor Law Changes Under the New Administration

Employers have become accustomed to vacillation in the interpretation and enforcement of the National Labor Relations Act (NLRA) between pro-employer and pro-employee/union depending on the political party of the President. The result from the recent change in administration has been no different and has included the swift firing of the former General Counsel of the National Labor Relations Board (NLRB or Board). In a notable shift in the NLRB's enforcement priorities, the Acting NLRB General Counsel recently appointed by the new administration, William B. Cowen, issued a memorandum on February 14 (GC 25-05), rescinding dozens of General Counsel memoranda issued between 2021 and January 2025 and shifting the NLRB's focus away from expansive enforcement.

The Acting General Counsel cited the NLRB's growing case backlog and limited bandwidth as central reasons for the rescissions, stating, "if we attempt to accomplish everything, we risk accomplishing nothing." The intent, according to the memorandum, is to streamline internal operations and enable more efficient handling of unfair labor practice cases by Regional Offices. The rescinded memoranda had, in many cases, expanded the scope of the NLRA in areas with limited precedent or evolving legal standards.

Among the rescinded memoranda, some of which are pending further guidance, are several that had significant implications for employers:

- GC 23-08 and GC-25-01 asserted that offering or enforcing non-compete agreements or "stay-or-pay" agreements, which require employees to remain employed for a certain period or face financial penalties, could violate the NLRA since such restrictions might chill employees' rights to seek or accept other work or deter employees from exercising their rights under the NLRA. The rescission of these memos suggests that the current administration's Board will not seek to prohibit employers' use of such agreements.
- GC 22-06, GC 24-04, GC 21-06 and GC-21-07 addressed procedural issues in unfair labor practice proceedings, with an eye toward enhancing remedies and strengthening enforcement. These memoranda encouraged Regional Offices to seek more comprehensive relief for affected employees – including consequential damages, expanded make-whole remedies and stricter settlement terms.
- GC 21-03 focused on strengthening Section 7 rights under the NLRA and emphasized that protected employee activity does not need to be formally organized or involve multiple workers and called on Regional Offices to submit cases involving individual or small-group action – especially about racial justice, health and safety, or working conditions – for potential reconsideration, in an effort to expand what qualifies as protected concerted activity.
- GC 21-05 and GC 22-02 discussed the employer's duty to recognize and bargain with unions, advocating for a more robust interpretation of those obligations. GC 21-05 emphasized the use of Section 10(j) injunctions to obtain interim relief in cases involving unlawful withdrawal of recognition or refusal to bargain or hire. GC 22-02 focused on securing early injunctive relief in response to threats or other coercive conduct during union organizing campaigns, urging prompt action before such conduct escalates into more severe violations.
- GC 25-04, issued right before the change in administrations, provided guidance intended to harmonize the NLRA with federal equal employment opportunity (EEO) laws and called into question the legality of workplace civility rules and

requirements for confidentiality in investigations. GC 25-04 further emphasized that employers cannot rely on EEO policies or workplace conduct rules to discipline or suppress protected concerted activity.

- GC 23-02 addressed concerns about electronic monitoring and algorithmic management in the workplace interfering with employees' ability to engage in protected concerted activity and proposed requiring employers to disclose the nature and purpose of such monitoring and to justify the necessity of that monitoring.

In addition to the rescission of the above-referenced memoranda, the new administration is expected to seek to overturn several cases decided in the past several years, including those involving:

- the test for independent contractor status (*SuperShuttle DFW, Inc.*);
- the process for voluntary recognition of a union and the related duty to bargain, including issuance of bargaining orders when employer misconduct frustrates an election process (*Cemex Construction Materials Pacific, LLC*);
- the legality of workplace rules (*Stericyle, Inc*.);
- whether employers can have captive audience meetings with employees during an organizing drive, and what employers can legally communicate to employees (A*mazon.com Services LLC* and *Amazon Labor Union*);
- limitations on employers' right to make unilateral changes (*Wendt Corporation* and *Tecnocap, LLC*);
- limitations on employers' right to require broad confidentiality and non-disparagement provisions (*McLaren McComb*);
- expansion of available remedies (*Thryv, Inc.*); and
- expansion of protected concerted activity (*Miller Plastic Products, Inc.* and *American Federation for Children*).

However, these decisions cannot be overturned unless and until the Board has a quorum, which was eviscerated with the recent firing of one of the Democrat-appointed Board members and will be remedied only with the appointment of new Board members in the coming months, and cases involving these issues are reviewed by the Board after working their way through administrative processes.

Indeed, a shift in posture is already materializing in pending litigation. On April 16, the NLRB's Acting General Counsel filed a motion to withdraw several arguments in a multi-charge Starbucks case currently before the NLRB. Specifically, the Acting General Counsel moved to withdraw arguments seeking to overturn key Board decisions favorable to employers, including *Register Guard* (which limited employees' rights to use their employer's email systems for organizing activities), *Rio All-Suites Hotel and Casino* (which upheld employers' ability to restrict nonbusiness use of their email systems, including for organizing purposes, if applied consistently), and *AT&T Mobility* (which upheld employer rules prohibiting employees from using personal devices to record workplace conversations or meetings). The Acting General Counsel also abandoned efforts to (i) expand the remedies available for an employer's unlawful maintenance of overbroad work rules by requiring the expungement of all related discipline (regardless of individual context), the retraction of legal enforcement actions (such as grievances or lawsuits) and full make-whole relief for all affected employees – an approach that would have expanded the remedial framework in *Continental Group, Inc.,* where such relief was granted only when an employer enforced an overbroad rule in a manner that specifically infringed Section 7 rights; (ii) overrule *Care One at New Milford*, and replace it with a standard that would impose a general obligation to bargain over discretionary discipline in first-contract settings, thereby substantially expanding employers' duty to bargain under Section 8(a)(5); (iii) overrule *Kroger Limited Partnership I Mid-Atlantic*, which reaffirmed that employers may prohibit union access to their property on a nondiscriminatory basis, and instead adopt a rule more permissive of union solicitation and presence on employer premises; and (iv) require employers to read notices of rights aloud to employees in group settings, in their native language(s), and with copies in hand, as a standard remedy in unfair labor practice cases.

Given the NLRB's evolving enforcement landscape, employers should monitor updates and consult with experienced labor counsel to understand their rights and to ensure compliance.

Authors



Francine Esposito
Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com



Rachel A. Gonzalez
Partner

Parsippany, NJ | (973) 966-8201

New York, NY | (212) 297-5800

rgonzalez@daypitney.com



Alexis Abuhadba
Associate

Parsippany, NJ | (973) 966-8113

aabuhadba@daypitney.com