Ogletree Deakins

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The Practical NLRB Advisor

State of the NLRB

In this Issue

In his 1975 State of the Union address, then-president Gerald Ford made the bleak observation that "the state of the union is not good." The same problematic assessment is very likely applicable to today's National Labor Relations Board (NLRB). The NLRB faces a host of existential challenges. Some of those are the result of external sources and some are the result of homegrown and self-inflicted wounds. But whatever the source, the results are patent.

On the Board level, the NLRB has functioned without a quorum since January of this year. Without a quorum, the Board has been without statutory authority to issue any decisions, and, as a result, its backlog has swelled to well more than 400 cases and growing. Although the NLRB has relied on delegations of authority to its acting general counsel and regional directors to perform certain of its functions, the legality of those delegations has been challenged in multiple instances and may result in eventual post-quorum litigation.

As of August 27, 2025, the five-member Board itself dropped to only a single member, and the NLRB still lacks a confirmed general counsel. While the Trump administration has finally sent nominations to the U.S. Senate for two of the empty Board seats and the general counsel position, it now appears that the general counsel nomination may face serious headwinds and the two Board nominees will

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BRIAN IN BRIEF

Thunderclap Newman's 1969 rock anthem "Something in the Air" begins with the lines: "Call out the instigators, because there's something in the air. We've got to get together sooner or later because the revolution's here." Though nearly sixty years old, and penned in an entirely different context, the lines may be an apt description of the current state of labor/management law.

As this issue's lead article details, the National Labor Relations Board (NLRB) faces a host of challenges both internally and externally. From a legal perspective, several of these challenges are arguably existential. However, wholly apart from the constitutional reassessment of the agency and its structure, there is an even more compelling policy debate that is asking if the agency and the statute that it enforces are misaligned and out of step with today's workplace.

The National Labor Relations Act (NLRA) is, after all, ninety years old. It was born amid significant labor unrest, when most affected workers were engaged in the kind of manual labor or factory work that predominated in the early twentieth century. Moreover, there was no comprehensive overlay of state, local, and federal law that governed wages, hours, working conditions, health and safety, and retirement programs. Such hallmarks of early turn of the century employment seem almost alien today.

Today, the nature of work itself is rapidly evolving with large swaths of the employment landscape becoming more skilled, technical, and entrepreneurial every day. Today's employees are more mobile, and their relationship with their employers is often transactional. Most employers now recognize that employees are their most valuable asset and that recruiting and retaining them simply makes good business sense. The classic tension between labor and management is being replaced by a growing realization that the relationship is far more symbiotic than it is antagonistic. Add to this the fact that both state and federal governments have assumed a major role in regulating the workplace.

Given this reality, some are questioning if the NLRA is fast becoming an anachronism, a relic of a very different industrial economy. Perhaps. But response always lags behind realization, and that is particularly true where legislation is involved. So, it is unlikely that the revolution is here, but it is undeniable that there is something in the air.

Sincerely,

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About Ogletree Deakins' *Practical NLRB Advisor*

At Ogletree Deakins, we believe that client service means keeping our clients constantly apprised of the latest developments in labor and employment law. With the whirlwind of activity taking place at the National Labor Relations Board (NLRB) in recent years—affecting both unionized and nonunion employers—a quarterly newsletter focused on the NLRB is an essential tool to that end.

Ogletree Deakins' *Practical NLRB Advisor* seeks to inform clients of the critical issues that arise under the National Labor Relations Act and to suggest practical strategies for working successfully with the Board. The firm's veteran traditional labor attorneys will update you on the critical issues in NLRB practice with practical, "how-to" insights. Assisting us in this venture are the editors of Wolters Kluwer Legal and Regulatory Solutions' *Employment Law Daily.*

The *Practical NLRB Advisor* does not provide legal advice. However, it does seek to alert employers of the myriad issues and challenges that arise in this area of practice, so that they can timely consult with their attorneys about specific legal concerns.

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not even receive a Senate hearing until the fall. Moreover, since longstanding Board tradition requires *three* affirmative votes to reverse extant precedent, even with the addition of the two new Republican nominees the Board will remain split 2-1 with the one holdover Democratic member. Thus, while the Board would have a functional quorum, it will not be issuing any reversals of existing law until such time as a third Republican nominee is selected and confirmed, or unless the new Republican members opt to depart from tradition.

In the wake of a concerted effort to reduce the size and cost of government, the Board has done little to suggest it should be spared from the budget ax.

The situation is no better in the Board's regional offices. Although they continue to function processing representation cases and elections, and investigating and prosecuting unfair labor practice claims, the morale among regional employees is reportedly poor. They are dealing with increased caseloads, diminished settlement latitude, and the lingering militancy engendered by the Board's now departed general counsel. As a result, regional case backlogs are reportedly growing and disposition times increasing. Indeed, reports of merit cases that simply "fall off the radar" for months on end are becoming commonplace.

Credibility under scrutiny

The NLRB faces an unprecedented number of legal actions that challenge its fundamental structure and its constitutional viability. More than thirty pending lawsuits raise serious questions as to whether the statutory restrictions on the presidential removal of Board members are unconstitutional, whether the Board's adjudicatory and remedial schemes run afoul of the U.S. Constitution, whether the housing of decisional and prosecutorial authority within a single agency is constitutional, and other existential claims. There is a serious reconsideration of the degree to which agency decision-making and rulemaking are entitled to deference by reviewing courts—a claim particularly difficult for the Board to overcome given its history of flip-flopping on central statutory doctrines. In large measure, the NLRB has become the poster child for the ongoing critical reevaluation of the so-called administrative state.

The overreach of the previous general counsel and Board majority has not escaped the attention of either the White House or the Republican-controlled U.S. House of Representatives and U.S. Senate. In the wake of a concerted effort to reduce the size and cost of government, the Board has done little to suggest it should be spared from the budget ax. Indeed, to date, many of its actions have merely added fuel to the fire.

Judicial rebukes. The NLRB, which has traditionally fared extremely well when its decisions are subject to review by federal appeals courts, has recently faced increasing skepticism and hostility from the federal bench. For example, the U.S. Court of Appeals for the First Circuit, in *Northeastern University v. National Labor Relations Board*, refused to enforce a Board order predicated on the NLRB's determination that Northeastern University's security officers were not statutory supervisors. In reaching its decision, the First Circuit held that the Board's determination was not supported by the record evidence, and that the Board had departed from its own precedent. A determination by any reviewing court that a decision is "unsupported by the record" is a singular rebuke to any agency finding.

Even more scathing was the U.S. Court of Appeals for the D.C. Circuit's recent denial to enforce a Board order in *Troy Grove v. National Labor Relations Board.* The appeals court there determined that in reaching the factual conclusion that the parties were not at impasse, the Board did not "minimally comply" with its obligation to draw reasonable inferences from the facts. The D.C. Circuit found that the Board's findings and conclusions were "irrational," "arbitrary," "capricious," and "senseless." It further noted that the Board had relied on "ridiculous propositions" and "gross evidentiary blunders."

Were these recent rebukes not enough, it certainly appears the NLRB's decisional overreach portends some equally rough appellate rides in the future. For example, many observers believe that the Board's decision in the *Cemex* bargaining order case is distinctly at odds with much extant Supreme Court of the United States jurisprudence. While the Board has been careful to apply *Cemex* only in cases in which a bargaining order likely would be sustained under

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the current *Gissel* standard, its excessively broad holding in *Cemex,* if not repudiated by a new Board, is unlikely to avoid critical judicial review forever.

The 'captive audience' debacle. Perhaps no case illustrates how the Board continues to tempt the loss of its fragile credibility with reviewing courts more so than its decision in the so-called "captive audience" case. In that decision, a Board majority took it upon itself to reverse seventy-four years of Board precedent to hold that an employer violates the National Labor Relations Act (NLRA) if it requires employees to attend a meeting at which the employer, in an otherwise lawful manner, expresses its view against unionization. The decision is a direct affront to an express mandate by the U.S. Congress that heretofore had been obeyed by the Board for seven decades.

A brief history illustrates the magnitude of the Board's nose thumbing. In 1946, the Board decided *Clark Brothers,* 70 NLRB No. 60 (1946), in which it held that, without regard to content, an employer violates the NLRA when it requires employees to attend an at-work meeting where the employer offers its views on unionization. In direct response to the decision, Congress, in 1948, added Section 8(c) to the Act as part of the Taft-Hartley Amendments. Soon thereafter, the NLRB in *Babcock & Wilcox,* 77 NLRB 577 (1948), ruled that holding a "captive audience" meeting did not violate the Act, and that, indeed, Congress's passage of Section 8(c) specifically precluded the Board from finding to the contrary. That was unequivocally the law for seventy-four years.

Given this litany of problems, it should surprise no one that there is a growing sentiment that the NLRB has run its course and that a new means of regulating labor/management relations may be needed.

Undaunted by these facts, the Biden Board ignored Congress, jettisoned more than seventy years of precedent, and reinstated the plainly improper *Clark Brothers* rubric. In a "too clever by half" attempt to shield its decision from appellate scrutiny, the Board applied its new rule prospectively. Despite its transparently self-serving claim that it did so to be "fair" to employers, the real reason may have been to claim that since no party had been adversely affected by its prospective-only decision, that no party had standing to seek review of the decision—the very position it has now taken. Whether the unsupportable reversal of *Babcock* is subjected to judicial review in the present case or a future one, its authors should recall Joe Louis's line to Billy Conn: "You can run, but you can't hide."

The proposed alternatives

Given this litany of problems, it should surprise no one that there is a growing sentiment that the NLRB has run its course and that a new means of regulating labor/management relations may be needed. This sentiment is likely to be accelerated if, as many expect, the Supreme Court eventually uses the pending *Wilcox* case (discussed further here) to overrule *Humphrey's Executor v. Unites States*, 295 U.S. 602 (1935), and allow future presidents to terminate any sitting Board member with or without cause. Such a decision, while likely mandated by the U.S. Constitution's separation of powers, will, nonetheless, exacerbate the NLRB's existing structural problems. For example, the often complained of flip-flopping will only become more frequent and more pronounced if Board members are terminable at will.

Among the proposals currently being discussed to replace the NLRB, two of them are of particular interest. One proposal has its roots in Article I of the Constitution, and the other is grounded in Article III. Article I of the Constitution allows Congress to establish "administrative courts." These are distinguishable from the system of judicial courts—federal district courts, federal appeals courts, and the Supreme Court—that have been created under Article III. Article I courts include the U.S. Tax Court, the U.S. Court of Claims, the U.S. Bankruptcy Court, and others. The chief difference between Article I and Article III courts is the tenure of their respective judges. Judges in Article III courts enjoy lifetime tenure, and their salaries cannot be reduced. Judges in Article I courts do not enjoy these protections. Article III courts have very broad subject matter jurisdiction, whereas Article I courts have narrow and specialized jurisdiction.

Article I courts. There are currently several proposals to eliminate the NLRB and replace it with an Article I court

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that would decide the Board's current unfair labor practice cases. The Board's representation case functions, including the conduct of elections, would be transferred to the U.S. Department of Labor (DOL) or one of its sub-agencies. The Article I court would be composed of equal numbers of union, management, and neutral judges, all of whom would have significantly longer tenure than current NLRB members. Extant precedent could only be overturned by a majority of judges, including at least one from each of the three groups.

While the Article I proposals certainly may have some merit, they also leave open several questions. For example, since extant precedent would be difficult if not impossible to change, what would be the starting point? Would the law simply be "frozen" as is, once the court is created? That could have the effect of enshrining some very problematic decisions. Thus, for example, if such a court were created tomorrow, would the court be bound by the extant rule that "captive audience meetings" are unlawful?

The composition of the court may likewise be difficult to achieve. From where, for example, would the "neutral" members come? The only likely sources are academia or the ranks of current arbitrators, and both potential cohorts are objectionable to many practitioners on varying grounds. As a general proposition neither has the practical, "on-the-ground" experience that is vital to a grasp of labor/management relations.

An additional problem is that while an Article I court might be able to replace the adjudicatory function of the NLRB, it would not be agile enough to replace its policymaking function. It bears noting that the NLRB as presently structured has a unique statutory architecture. The agency does function like a court system, but it is also responsible for effectuating "national labor policy." Some argue that the Board's policymaking function should, indeed, reflect the policy views of the administration in power. That would be almost impossible with a lengthy-tenured Article I court that is effectively "locked in" to virtually all labor policies.

Lastly, although the Article I judges would nominally have longer tenure than NLRB members, it is certainly conceivable that they too would be subject to summary removal by the president. This may well depend on what the Supreme Court eventually does with the *Wilcox* case and with the existing precedent of *Humphrey's Executor.* However, the tension between decision-makers' "independence" and their "political accountability" is unlikely to go away any time soon. And if, as many believe, the Constitution allows the president to remove Board members at will, then why not Article I judges who do not enjoy the constitutional protection of lifetime tenure?

Complete elimination. The alternative to all of this, of course, is to eliminate the NLRB, transfer its election functions to another administrative agency, and make its unfair labor practice provisions subject to adjudication in the Article III federal courts. Thus, an employee, union, or employer that believes its rights under the NLRA have been violated would file a civil complaint to that effect in the appropriate federal district court that would adjudicate the claim. Its decision would then be subject to appellate review in the normal course.

This alternative has certain attractions. First, it would eliminate the overtly politicized NLRB, and it would place decision-making in the hands of seasoned adjudicators who enjoy lifetime tenure. Second, it would create a natural barrier to the host of strategic unfair labor practice charges that are the unfortunate grist of most of the NLRB's case load. Every claim that is currently filed at the NLRB is "free." The Board investigates, prepares, and prosecutes every action; parties need do little or nothing. On the other hand, few parties will go to the expense of filing a civil suit over a handbook provision that has never been enforced, file specious "blocking charges" merely to obtain administrative delay, or pursue claims predicated on an overly expansive view of "protected concerted activity." Third, while Article III judges may not be specialists in labor/management relations, they are not without experience in dealing with workplace disputes. For example, they already deal with employment discrimination matters, wage and hour suits, wrongful discharge claims, and the like.

To be sure, however, the transfer of NLRA cases to Article III courts would not be without drawbacks. First, the district court dockets are already packed in most jurisdictions, and adding another distinct set of claims would only increase

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that case burden. Second, moving to a "private attorneys' general" model in which the parties are responsible for maintaining the claims may be objectionable to those who believe that the law should be subject to government enforcement. Third, to the extent that policymaking remains a key objective of the law, Article III courts lack the flexibility and immediacy of administrative agencies. ■

Stay tuned…

While there is no solution that does not have some potential problems, many observers argue that such problems are minor compared to the present system. There is a palpable sense of distrust and disaffection with the so-called administrative state and well-grounded criticism of the NLRB. The constitutional concerns over the accountability of administrative actors are real and growing. Growing too is the realization that a ninety-year-old statute is too outdated and inadequate to address labor/management relations in the modern workplace.

The prospect, however, of any immediate or significant change in the law or enforcement structure for labor/management relations nonetheless remains remote. The subject continues to have a low priority among legislators, and its economic impact remains marginal given the low degree of private sector union density. However, there are growing voices for reform. Those voices have been amplified by the Board's own oscillating decision-making as well as judicial and popular pushback against bureaucracy. These may be enough to push the impetus for change past the tipping point.

Changes in Board leadership

On August 27, 2025, the term for then-current National Labor Relations Board (NLRB) chairman Marvin Kaplan came to an end. Kaplan opted not to accept renomination and returned to private life. With his departure, only David M. Prouty, a Democrat and Biden nominee, remained on the five-member Board. The other Democrat on the Board, Gwynne Wilcox, was fired by President Donald Trump in January. Although she has sued over the firing, she has not been reinstated.

Most legal experts believe that she will remain sidelined until her case is finally resolved by the Supreme Court of the United States and that she will not be reinstated, even temporarily, during the pendency of her litigation. The prevailing view is that the Supreme Court will eventually affirm the president's right to terminate officials such as Wilcox with or without cause. (A detailed discussion of the current state of the Wilcox litigation can be found here.)

No quorum. Even without counting Wilcox's absence, there are currently three other Board vacancies. On July 17, 2025, the White House finally announced nominees for two of those slots. The nominees are James Murphy and Scott Mayer. Murphy is a long-time NLRB employee who has served in a host of capacities, most significantly as chief counsel to former Republican Board members Brian E. Hayes, Harry I. Johnson, III, and Marvin E. Kaplan. Mayer is currently a labor counsel at a company and has served in a similar capacity for other corporations, as well as having had a stint in private practice.

As of this writing, the two nominees have not yet had their nomination hearings before the U.S. Senate Committee on Health, Education, Labor and Pensions (HELP). Although the Republicans have a one-seat majority on the HELP Committee, some of those Republican members have not supported the president's nominees, as discussed below. However, if there is a favorable committee vote, the two will move forward for consideration by the full Senate. The HELP Committee hearing will be held at some point after the congressional summer recess is over, and a floor vote should follow shortly thereafter.

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If both Murphy and Mayer are confirmed, it would restore the required three-member quorum on the Board. However, pursuant to long-standing NLRB tradition, any change in extant law would require at least three affirmative votes. Since Prouty voted in favor of all the controversial and problematic decisions that are now law, Mayer and Murphy would not be able to reverse those decisions unless they were prepared to jettison the three affirmative vote tradition.

Top prosecutor in flux. Meanwhile on the other side of the agency, the general counsel position remains in flux. In March, the White House announced the nomination of Crystal Carey to be the Board's new general counsel. Carey, a former NLRB attorney, is currently employed in private practice. On July 16, 2025, the HELP Committee held a hearing on Carey's nomination. During questioning by the committee Senator Josh Hawley (Missouri), a Republican, appeared to be opposed to the nomination fueling speculation that he might cast a vote against the nominee in the committee. This speculation was furthered when Carey's nomination was not placed on the agenda for the committee's Executive Session in which those votes are typically cast. Thus, except for the hearing itself, the HELP Committee took no further action on the Carey nomination before the Senate's summer recess. It is presently unclear what action the HELP Committee will take once the Senate reconvenes.

While the Carey nomination remains in limbo, William B. Cowen, a long-time Board employee, remains in the post of *acting* general counsel. Cowen has inherited a host of very problematic policies and positions established by his predecessor, who has been described by some as the most radical general counsel in Board history. While Cowen has managed to make some modest changes and to reorient the posture of the general counsel's office, the kind of sweeping changes hoped for by the management community are more difficult to effectuate and almost impossible to put in place for someone in only an *acting* capacity. ■

Fifth Circuit approves injunctions against the NLRB

On August 19, 2025, the U.S. Court of Appeals for the Fifth Circuit affirmed preliminary injunctions that halted National Labor Relations Board (NLRB) unfair labor practice (ULP) proceedings against three employers, ruling that the structure of the NLRB is likely unconstitutional. The decision keeps the injunctions in effect while the employers continue to pursue their arguments that the NLRB is unconstitutional.

The decision notes that the limits on removing administrative law judges (ALJs) are likely unconstitutional because ALJs are afforded "at least two layers of for-cause protection." Thus, ALJs may be removed only for "good cause" as determined by the Merit Systems Protection Board (MSPB), whose members themselves are only removable for cause. Such a dual-layer removal protection is unconstitutional, the panel wrote.

Further, while acknowledging that the constitutionality of removal protections for NLRB members is a "closer call," the panel found that the for-cause protections enjoyed by NLRB members also likely violate the U.S. Constitution. Under the National Labor Relations Act (NLRA), the president may remove NLRB members "for neglect of duty or malfeasance in office, but for no other cause."

In particular, the panel rejected the argument that such a restriction is constitutional under the Supreme Court of the United States' decision in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which upheld restrictions on the president's authority to remove officers of certain types of independent agencies—in that case, a commissioner of the Federal Trade Commission (FTC). The panel said courts "have been reluctant to extend" that decision to agencies that are "not a 'mirror image'" of the FTC. Additionally, the panel pointed to the Supreme Court's recent stay of lower court orders that would have reinstated former NLRB member Gwynne Wilcox and former MSPB member Cathy Harris to their respective boards while they challenge their removal by President Donald Trump earlier this year.

The Fifth Circuit's decision deals with only the propriety of the injunctions, not the underlying claim that the ALJ and

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Board member removal restrictions are unconstitutional. For injunctive purposes, the court merely needed to find that the employers were *likely* to eventually win on their claims of unconstitutionality. Its finding that such a likelihood exists was not entirely unexpected. The one area of dispute centered on whether the employers demonstrated that they were "harmed" by the removal restrictions. The existence of immediate "harm" is a typical prerequisite to injunctive relief. A majority of the circuit panel held that the prospect of having to go through the NLRB's adjudicatory process—which was likely tainted by constitutional infirmity—was sufficiently harmful to warrant injunctive relief.

Practical consequences

The court's ruling applies within the Fifth Circuit, which covers the states of Louisiana, Mississippi, and Texas. Thus, employers in those states may now be able to obtain injunctions blocking ULP litigation and potentially other NLRB proceedings by filing the appropriate constitutional challenges and petitioning for injunctive relief.

More broadly, the ruling is another piece in the ongoing battle over the constitutionality of the NLRB and other independent federal agencies and the continuing viability of the "administrative state." The constitutionality of the NLRB's structure will very likely be decided by the Supreme Court, perhaps as early as the 2025-2026 term. While it is always difficult to predict how the Supreme Court will rule, its recent rulings may signal that the Court is prepared to hold that removal protections for NLRB members violate the separation of powers.

However, of greatest practical importance is what happens if the Supreme Court ultimately holds that the statutory removal restrictions are unconstitutional. In such cases, the prevailing doctrine in federal law is to remove or "sever" the constitutional impediment and leave the remainder of the statute in place. Indeed, the NLRA itself appears to provide for precisely this type of approach since Section 16 of the Act provides: "If any provision of this Act [subchapter], or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act [subchapter], or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby." Thus, the remedy to any constitutional defect in the NLRB's structure would likely be merely "writing out" of the statute its removal limitations and making NLRB members and ALJs terminable at will by the president.

That said, there is a countervailing argument that if the U.S. Congress deemed such removal protections, and the "independence" they guarantee, to be central or essential to the NLRA itself, then arguably the entire statute could fall. That bar, however, would be very high. In essence, it would require a finding that in the absence of the statutory removal protections, Congress never would have passed the NLRA in the first place. Unlikely as that result might be, the unfolding constitutional debate demands continuing attention. ■

Acting GC issues slew of consequential memoranda

On February 14, 2025, National Labor Relations Board (NLRB) Acting General Counsel (AGC) William B. Cowen rescinded a series of memoranda issued by his predecessor. As reported in Issue 28 of the *Practical NLRB Advisor*, the move effectively reshaped federal labor law at the prosecutorial level and signaled a new policy direction for the NLRB under the Trump administration. In the months that followed, the AGC issued several new consequential memoranda further effectuating the administration's policy goals.

New standards for remedies in settlements

On May 16, 2025, the AGC released a memorandum that clarifies the discretion NLRB regional directors can use to select remedies in settlement agreements related to allegations of unfair labor practices. In Memorandum GC 25-06, which took effect immediately, the AGC loosened the standards for applying remedies in settlement agreements—a shift

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that might make it easier and faster for employers to reach settlements with employees and unions.

In February 2025, Cowen rescinded memoranda from the former NLRB general counsel that called for regional directors to attach controversial make-whole remedies when settling certain types of unfair labor practice cases. Cowen's memo, however, notes: "We should be mindful of not allowing our remedial enthusiasm to distract us from achieving a prompt and fair resolution of disputed matters."

While regional directors will maintain the discretion to tailor remedies to the circumstances of each case, it is not necessary to automatically seek all possible nonmonetary remedies. Rather, those should be sought only in "cases involving widespread, egregious, or severe misconduct," Cowen wrote in Memo GC 25-06. "In drafting Settlements, the scope of the remedial relief sought should typically be consistent with the remedy that would be ordered by the Board in a case involving similar facts and violations."

Memo GC 25-06 provides the following instructions aimed to remove barriers that may have precluded some settlements in the past:

- Regional directors may approve unilateral settlement agreements without prior authorization.
- Settlements should strive to make sure employees are made whole for losses they incurred as a result of unlawful actions, but regional directors may approve settlements that provide for "less than 100 percent of the total amount that could be recovered if the region fully prevailed on all allegations in the case." When doing so, regional directors should consider the nature of the violations alleged, the weight of the evidence, the inherent risks of litigation, and the "extent to which a prompt resolution of a contentious dispute will promote labor peace."
- Nonadmissions language may be considered in certain settlement agreements, but should not be included in settlement agreements involving employers with a history of repeated violations.
- Default language, which permits prosecutors to quickly bring a case to the Board if the charged party does not comply with the settlement terms, is not required in every settlement agreement, but it can be used in initial proposed settlement agreements "where appropriate."

The latest memo also addresses a 2022 NLRB decision that expanded the remedies recoverable by a successful charging party in unfair labor practice cases. It concluded that the NLRB's make-whole remedy includes compensating employees for all direct or foreseeable harms or losses suffered as a consequence of labor violations.

To narrow this application, the memo instructs regional directors to "focus on addressing foreseeable harms that are clearly caused by the unfair labor practice."

Next steps. Going forward, Cowen's new memo indicates the NLRB intends to take a more flexible approach to the types of remedies it will seek in settlements between employers and their employees or unions.

If more cases are settled, that could help clear the backlog of NLRB cases in the regional offices. Notably, the NLRB's regional offices can approve settlements without a Board quorum.

Surreptitious recording of negotiations

On June 25, 2025, the AGC issued a memorandum regarding the surreptitious recording of collective bargaining negotiations, Memorandum GC 25-07. Noting both the technological advances that make recording easier, as well as the notion that recording of any kind typically inhibits free discussion, Cowen has instructed the regions to find that any surreptitious recording of contract negotiating sessions is a *per se* violation of the National Labor Relations Act (NLRA). The memo notes that if parties do not know if they are being recorded, it would interfere with the candor and free flow of dialogue that is necessary for effective negotiation.

The AGC's view is grounded in current precedent that makes any *agreement* between the parties to record their sessions a *permissive* subject of negotiation, meaning that neither party may insist to impasse on having recorded negotiations. The AGC's memo notes that: "It would be incongruous indeed if one could avoid the illegality of insisting on recording bargaining sessions simply by secretly recording the same sessions. Not only is the deceptive nature of this conduct incompatible with the good faith required in the context of collective bargaining, the brazen disregard for the reasonable expectations of professional behavior shows a disdain for the collective bargaining process itself."

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Unanswered questions. While making clear that a surreptitious recording of a bargaining session would violate Section 8(a)(5) of the Act when done by an employer and would violate Section 8(b)(3) when done by a union, the memo does not address several other important issues. First, does the rule apply only to contract negotiations? What about grievance meetings or other union/management discussions to which the rationale would seem to apply equally? It seems as if the prohibition *should* extend to such interactions, but the memo does not say so explicitly.

Second, and most significantly, beyond posting, is there any additional sanction? Would a surreptitious recording be allowed into evidence in a subsequent Board proceeding or in an arbitration proceeding? Again, the memo is silent on these practical concerns. Third, what if the recording is made by an employee who is deemed not to be an "agent" of either party? Finally, what is the relationship between the rule and the law in certain states that expressly permits one-party consent for recordings?

These and other questions will no doubt be addressed in subsequent litigation. Employers should monitor those developments, in particular those which govern the use and admissibility of surreptitiously recorded evidence.

Streamlining the deferral process

On August 7, 2025, the AGC published a memorandum for all regional offices re-emphasizing and streamlining the deferral process for unfair labor practice charges (ULPs). Deferral applies in situations where the parties have a collective bargaining agreement containing binding grievance arbitration machinery and the substance of the ULP is susceptible to resolution under that process.

Memorandum GC 25-10 requires NLRB regions to assess the deferral question at the outset of any ULP filing involving parties that are signatory to a collective bargaining agreement and to defer if warranted under either the *Dubo* or *Collyer* standards.

Two different standards. In its basic form, deferral under *Dubo Manufacturing Corp.,* 142 NLRB 431 (1963), applies to instances where the subject matter of the ULP has already been submitted to the contractual grievance and arbitration process. Under *Dubo,* the Board retains jurisdiction over the ULP. *Dubo* deferral is always considered first. Deferral under *Collyer Insulated Wire,* 192 NLRB 837 (1971), applies whenever it is determined that the ULP *can* be adequately resolved under the agreed-upon contractual process, regardless of whether it has already been invoked. Unlike *Dubo*, a regional decision to defer under *Collyer* is appealable, and again unlike *Dubo* deferral, a "Collyerized" case typically results in the dismissal of the ULP.

Under prior practice, regional offices were required to make quarterly inquiries to the parties to determine the status of deferred cases. Under the new guidance, the burden is on the parties to provide biannual status reports to the regions. Cowen noted that the re-emphasis on deferral and the change in reporting requirements were designed to address the limited resources of the NLRB. ■

New guidance on investigation of 'salting' cases

On July 24, 2025, NLRB Acting General Counsel William B. Cowen issued an updated guidance to regional offices on how they should investigate cases involving union salts (professional union organizers who seek to obtain employment with the sole intention of organizing a workplace). While job applicants are protected under the National Labor Relations Act (NLRA), they may lose that protection if they are not genuinely interested in seeking to establish an employment relationship with the employer.

In particular, Memorandum GC 25-08 provides guidance as to how regions can determine whether a genuine interest in employment is present. "[T]he employer may contest the genuineness of the application through evidence including, but not limited to the following: evidence that the individual **refused similar employment** with the respondent employer in the recent past; incorporated **belligerent or offensive comments** on his or her application; engaged in **disruptive, insulting, or antagonistic behavior** during the application process; or engaged in **other conduct inconsistent with a genuine interest** in employment." (Emphasis in the original.)

Other NLRB Developments

Circuit Court decisions

D.C. Cir.: NLRB failed to show parties did not reach 'impasse.' The U.S. Court of Appeals for the D.C. Circuit held that substantial evidence did not support a National Labor Relations Board (NLRB) decision finding that an employer bargained in bad faith by threatening to end its contributions to a union pension fund after the parties reached an impasse in negotiations. The court disagreed with the Board's premise that the parties were not at an "impasse" since "[t]he 'bargaining history' in this case strongly supported the company's judgment that the parties had reached a negotiating impasse by 2021." Accordingly, the appeals court granted the employer's petition for review and vacated the Board's decision and order that held the employer had violated Sections 8(a)(5) and (1) of the National Labor Relations Act (NLRA) when it threatened to cease contributions to the pension fund (*Troy Grove v. National Labor Relations Board*, June 13, 2025).

1st Cir.: Sergeants were supervisors improperly included in bargaining unit. The U.S. Court of Appeals for the First Circuit rejected the NLRB's determination that sergeants and detective sergeants employed by a university's campus police department were not statutory supervisors. In so holding, the court denied the NLRB's application for enforcement of its order finding that the employer committed unfair labor practices by refusing to bargain with a unit including them. According to the appeals court, the record showed that sergeants and sergeant detectives have authority to assign subordinates, exercise independent judgment while doing so, and hold that authority for the benefit of the university. Thus, the Board's conclusion that sergeants and detective sergeants were not supervisors "deviated from its own precedent without adequate explanation" and "ignored material, uncontested evidence" (*Northeastern University v. National Labor Relations Board*, May 23, 2025).

4th Cir.: Employer statement suggested wage increases tied to union activities. The U.S. Court of Appeals for the Fourth Circuit held the NLRB was warranted in finding that a trucking company violated Section 8(a)(1) by suggesting, on an internal message board and in response to a union flyer, that "[a]s a matter of fact if it wasn't for [the union] trying to steal money out of your paychecks you would already have your raises." Although "employers are constitutionally and statutorily entitled to give their noncoercive opinion on union activities, especially in the midst of organizing campaigns," and the larger part of the employer message here served lawful purposes, the evidence showed that this specific employer statement regarding pay raises "attempted to secure a particular course of employee action not by mere persuasion, but by intimidation and coercion," stated the court (*Garten Trucking LC v. National Labor Relations Board*, June 2, 2025).

5th Cir.: Employer defeated NLRB's bid to enforce timeworn order. The U.S. Court of Appeals for the Fifth Circuit denied the NLRB's motion for summary enforcement of a 2013 order that found a plumbing company violated Sections 8(a)(1), (3), and (4) of the NLRA. The court concluded that the Board failed to meet its burden of showing that enforcement would be equitable, and also had "unclean hands" in seeking injunctive relief. In particular, the court found that the Board negligently allowed the case to sit, undisturbed, for eight years. Such "extraordinary delay" was inexcusable and vitiated any claim to injunctive relief. The court also granted the employer's cross-petition for review of the order because the Board lacked substantial evidence to attribute a supervisor's anti-union activities to the company and to find the company's pre-election layoffs were related to protected union activity. Judge James L. Dennis dissented (*AllService Plumbing and Maintenance, Inc. v. National Labor Relations Board*, May 23, 2025).

5th Cir.: GC's prosecutorial discretion persists post-*Chevron*. The Fifth Circuit held that an employer was not entitled to review of former NLRB General Counsel (GC) Peter Ohr's decision to withdraw unfair labor practice charges that his predecessor had issued against two Teamsters locals, despite the Supreme Court of the United States' decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). Finding that "this issue is unaffected by the overruling of *Chevron*," the appeals court observed that the NLRA's statutory division of agency responsibilities "supports the conclusion that the General Counsel retains

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OTHER NLRB DEVELOPMENTS continued from page 11

the prosecutorial authority to dismiss a complaint prior to the scheduled hearing, when the Board is set to begin adjudication." The court further held that Ohr was validly appointed after "President Biden lawfully removed former-General Counsel Robb without cause." Judge Andrew S. Oldham dissented (*United Natural Foods, Inc. v. National Labor Relations Board*, May 28, 2025).

8th Cir.: NLRB applied wrong standard in interrogation case. A divided three-member panel of the U.S. Court of Appeals for the Eighth Circuit held that the NLRB erred in affirming an administrative law judge's (ALJ) finding that an employer violated Section 8(a)(1) of the NLRA by making unlawful threats of economic reprisals and engaging in coercive interrogations about union activities during a store manager's twenty-minute meeting with a shift supervisor. The court held that the ALJ applied the improper legal standard by disclaiming as "immaterial" the shift supervisor's subjective impressions of the meeting, including that it was "calm" and that the manager was "venting." Dissenting, Judge Bobby E. Shepherd believed that the Board and the ALJ had applied the correct objective standard, and that the majority's "quasi-subjective standard" was out of line with Eighth Circuit precedent (*Starbucks Corp. v. National Labor Relations Board*, June 17, 2025).

9th Cir.: Work-preservation defense available in pure jurisdictional disputes. The U.S. Court of Appeals for the Ninth Circuit vacated an NLRB order directing the International Longshore and Warehouse Union (ILWU) to cease and desist from pursuing maintenance work for SSA Terminals at the Port of Seattle, concluding the Board erred when it determined that the work-preservation defense was not available in pure jurisdictional disputes, like this one, where multiple unions have valid contractual entitlements to the disputed work directly with the employer. The Ninth Circuit held that the Board's position was foreclosed by a 2020 decision in which the court found a valid work-preservation objective provides a complete defense against alleged violations of NLRA Sections 8(b)(4)(D) and 10(k). Accordingly, the court vacated the Board's order and remanded for the Board to evaluate the merits of the defense in the first instance (*International Longshore and Warehouse Union v. National Labor Relations Board*, June 18, 2025). ■

Acting GC tells states: "Stay in your lane"

The National Labor Relations Board (NLRB) has been without a three-member quorum since President Donald Trump fired Board Member Gwynne Wilcox on January 27, 2025. It has thus lacked statutory authority to issue decisions and even some of its delegated authorities are being questioned due to the lack of a quorum.

As a result of the current "vacuum" at the federal level, some states have been considering adopting laws that would take over the functions of the NLRB within their respective states whenever the NLRB is unable to function. The New York State Legislature passed such a bill, and Governor Kathy Hochul signed it into law on September 5, 2025. Other states, including California and Massachusetts, are considering similar legislation.

Most legal scholars, however, view such state efforts as dead on arrival because of federal preemption. In 1959, in *San Diego Building Trades v. Garmon,* the Supreme Court of the United States held that states *may not* regulate conduct that is even arguably protected under the National Labor Relations Act (NLRA). Federal preemption has subsequently been held on several occasions to preclude states from regulating matters within the purview of the NLRB.

On August 15, 2025, NLRB Acting General Counsel William B. Cowen pushed back against states contemplating such legislation by publicly reminding them that such laws would very likely be preempted and thus void. Cowen also refuted the narrative that the absence of a Board quorum meant the NLRB is not functioning. He pointed out that more than 95 percent of the Board's annual caseload is processed *without* the need for any Board action or decision.

True to Cowen's word, on September 12, 2025, the NLRB filed suit in the Northern District of New York against the State of New York and the Public Employment Review Board, contending the recently enacted New York statute unlawfully conflicts with the NLRA.

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