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36TH ANNUAL SEMINAR

Labor & Employment Relations Law

The NLRB and Labor Law Under President Trump: What Has Happened and What to Expect Next

Kris Hanson, Partner
Kevin Terry, Partner

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Today's Roadmap

1. NLRB Status and General Counsel Memoranda
2. Challenge to the Constitutionality of the NLRB
3. State Law Jurisdictional Questions
4. Current Agency Activity
5. Major ALJ Decisions
6. Expectations Once the NLRB has a Quorum

NLRB Status and General Counsel

The NLRB Still Does Not Have A Quorum

The Board currently has only **one** member.

- David Prouty, Democratic appointee, term expires August 2026

Four Vacancies

- John Ring, Republican appointee, term expired December 2022, the seat has been vacant since then
- Chair Lauren McFerran, Democratic appointee, term expired December 2024
- Gwynne Wilcox, Democratic appointee, removed by President Trump in January 2025
  - Member Wilcox has challenged the decision to remove her, which the D.C. Circuit Court agreed with and ordered her reinstatement.
  - The Supreme Court temporarily blocked Wilcox's return to the NLRB pending appeal of the D.C. court decision.
- Marvin Kaplan, Republican appointee, term expired August 2025

President Trump's Pending Appointments

- Two Board Appointments: James Murphy and Scott Mayer
  - Senate Committee approved Murphy, but Mayer's confirmation was pulled following concerns from Senators.
- New General Counsel: Crystal Carey
  - Senate Committee approved

The Senate Must Confirm **Two** Board Nominees for the Board to have a Quorum.

Recission of Previous GC's Memoranda

Acting GC William Cowen issued memoranda to rescind nearly all of GC Abruzzo's guidance memos from the Biden Administration.

- **Confidentiality and Non-Disparagement Provisions in Severance Agreements (GC Memo 23-05)**
  - Endorsed prosecuting employers that imposed on employees broadly worded severance agreements with expansive non-disparagement and confidentiality clauses.
- **Damages (GC Memo 24-04)**
  - Greatly expanded the scope of consequential damages regional offices should seek in ULP proceedings, including pursuing "make-whole" remedies for employees harmed, regardless of whether the employees are identified in a charge.
- **ULP Settlements (GC Memo 21-07)**
  - Instructed regional offices to seek no less than 100% of the backpay and benefits owed in cases that are settled, required regional offices to include front pay in settlements for cases where a discharged employee waived reinstatement to their former position.

Recission of Previous GC's Memoranda

- **Electronic Monitoring and Automated Management (GC Memo 23-02)**
  - Advocated for enforcement and Boar adoption of a new framework to protect employees from intrusive or abusive forms of electronic monitoring that interfere with protected activity.
- **"Stay-or-Pay Provisions" (GC Memo 25-01)**
  - Directed regional offices to find "stay-or-pay" provisions and employee non-solicit agreements unlawful under the NLRA.
- **Non-Competes (GC Memo 23-08)**
  - Expressed GC's opinion that the use and enforcement of non-compete provisions in employment agreements violated the NLRA.
- **10(j) Injunctions (GC Memo 24-05)**
  - Instructed regional offices to seek 10(j) injunctions in federal court against employers to protect employee rights from remedial failure due to the passage of time despite the four-part test articulated by the Supreme Court in *Starbucks v. McKinney*.

Additional Memoranda from Acting GC Cowen

- **Seeking Remedial Relief in Settlement Agreements (GC 25-06)**
  - Directs regions to not automatically pursue nonmonetary remedies but typically limit them to cases involving widespread, egregious, or severe misconduct.
- **Surreptitious Recordings of Collective Bargaining Sessions (GC 25-07)**
  - Requires regions to pursue charges against parties for secretly recording collective bargaining sessions as *per se* violations of sections 8(a)(5) and 8(b)(3) of the NLRA.
- **Investigating Salting Cases (GC 25-08)**
  - Advises regions that discriminatory hiring cases should be evaluated based on the genuine interest in the alleged discriminatee in being hired.
- **Guidance for Deferring ULP Cases (GC 25-10)**
  - Directs regions to no longer contact parties quarterly to inquire about the status of the grievance in deferred cases. Instead, charging parties must e-file deferral status reports twice a year (March and September).
- **10(j) Injunctions (GC 25-11)**
  - Advises regions to apply standard from *Starbucks v. McKinney* in determining interim injunctive relief.

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Challenge to the Constitutionality of the NLRB

SpaceX v. NLRB

In January 2024, SpaceX appealed a decision from the NLRB finding ULPs by the company for wrongful termination.

The Southern District of Texas granted an injunction to halt NLRB administrative proceedings until the Board's alleged constitutional defects are addressed.

Fifth Circuit Court of Appeals upheld the injunction and district court decision in August 2025.

Expected to be appealed to the Supreme Court.

Basis of Challenge

1. Board Members are unconstitutionally insulated from presidential removal due to for-cause removal protections.

2. NLRB's expanded remedies violate the Seventh Amendment by depriving employers of the right to a jury trial.

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State Law Jurisdiction

New York and California Assert Jurisdiction over Labor Disputes

New York and California Laws

- The recently-enacted laws would give state agencies jurisdiction over private-sector labor disputes.
- This would disrupt the 90-year history of private-sector labor disputes being handled by the NLRB.

Reason for New Laws

- New York and California have passed these laws due to the NLRB's ongoing lack of quorum for interpreting the requirements of the NLRA.
- The states also passed the laws due to the *SpaceX* challenge in the Fifth Circuit.

NLRB Challenge

- The NLRB has challenged both state laws in court on the grounds that they are "preempted" by federal law.

Current Agency Activity

Different Activity in Different Regions

- **NLRB Regions in 5th Circuit Currently Inactive Due to *SpaceX* Decision**
  - Parts of NLRB Regions 15 and 16
- **Other Regions are Still Active!**
  - In the first six months of 2025, the NLRB oversaw 771 union elections, 624 of which the union prevailed (80%).
- **Government Shutdown**
  - Since October 1, the federal government has been shutdown.
  - This includes federal agencies such as the NLRB and the Department of Labor.
  - When a new spending bill is signed into law, NLRB regional offices will need to work through any backlog of pending charges or ongoing cases.

Federal Mediation and Conciliation Service (FMCS)

- **Executive Order and Mass Layoffs**
  - President Trump's EO 14238 from March 2025 directed FMCS to reduce operations "to the minimum presence and function required by law."
  - Approximately 95% of FMCS staff were laid off, reducing the workforce from over 200 to fewer than 20 employees—only 5 of which are mediators.
- **Legal Challenges**
  - Over 20 states and the AFL-CIO brought lawsuits challenging the firings based on alleged violations of the Administrative Procedures Act (APA) and separations of powers arguments.
  - May 2025, the District Court of Rhode Island ordered the reinstatement of employees. Although, reinstatement remains unclear at this time.
- **FY2026 Federal Budget**
  - Allocates only $7 million to FMCS—down from its typical $50-55 million budget—intended solely for agency closure expenses.
- **Other Avenues for Mediation and Arbitration**
  - Parties will need to explore alternatives to FMCS including: JAMS, AAA, and state-based services.

Major ALJ Decisions

Major ALJ Decisions from 2025

- ***Sutter Valley Hospitals*, No. 20-CA-295261 (2/28/2025)**
  - Employees engaged in a strike, and the employer notified them that if they didn't call off the strike, there would be a five day "replacement period" where outside contractors would be brought in.
  - The union didn't call off the strike, and the employer refused to reinstate the employees until the end of the replacement period.
  - ALJ determined that the hospital was not obligated to reinstate the employees because of the contract with the temporary replacement workers.
- ***Bookholders, LLC*, No. 05-CA-303788 (3/31/2025)**
  - A non-unionized employer was found to violate the NLRA on the following grounds:
    - Terminated an employer for discussing concerns about pay with her coworkers.
    - Requiring workers to sign an arbitration agreement that prohibited them from filing charges with the NLRB.
    - Proffering a social media policy that forbade employes from forming social media groups without permission.

Major ALJ Decisions from 2025

- ***Costco Wholesale Corp.*, No. 10-CA-316194 (5/5/25)**
  - The employer maintained a policy that required employees to remain silent about internal sexual harassment complaints and required employees to sign confidentiality agreements when they accused a coworker of sexual harassment.
  - The ALJ found that the policy and confidentiality agreement were unlawful under the NLRB's 2023 *Stericycle Inc.* decision.
- ***YAPP USA Automotive Systems*, No. 07-CA-320369 (6/11/25)**
  - ALJ ruled that the employer committed several work rule and union election violations.
  - Acting GC Cowen successfully removed charges regarding illegal restrictions on employees working for other businesses due to rescinding former GC Abruzzo's memo regarding such limitations.
- ***Pittsburgh Post-Gazette*, No. 06-CA-311136 (7/15/25)**
  - Employees have been engaged in strike activities since October 2022.
  - ALJ ruled that the employer's practice of giving out yearly wage increases and merit bonuses was lawful because the employer had established a past practice back to 2016.
  - However, the "newspaper of the year" bonuses were a new unilateral practice, and the ALJ determined that the new bonuses violated the NLRA.

Major ALJ Decisions from 2025

- ***GE Appliances*, No. 09-CA-332521 (8/12/25)**
  - Employer terminated an employee for yelling and causing a disruption after being asked to work overtime.
  - NLRB attorney argued that the conduct was protected under the *Interboro* doctrine, but the ALJ held that the conduct was unprotected because there was no evidence to support that mandatory overtime violated the CBA between the parties.
- ***Brynn Marr Hospital Inc.*, No. 10-CA-328533 (8/27/25)**
  - Employee complained to management about alleged harassment and retaliation against her and her husband, another employee. After the employer failed to act on the complaint, the employee posted about it on social media and was terminated.
  - The ALJ ruled that the posts were protected activity because they were made while off-duty and only to her immediate connections on the website.
- ***Futurewei Tech., Inc.*, No. 19-CA-318158 (9/18/2025)**
  - ALJ ruled that the confidentiality provision in a severance agreement was of an “unlimited scope” and lacked any effort to “narrowly tailor” its breadth to preserve ongoing protected discussions.
  - The ALJ explained that such a broad provision is expressly barred under *McLaren Macomb*.

Major ALJ Decisions from 2025

- ***Starbucks Corp.*, No. 18-CA-295458 (9/22/2025) (MADISON, WI)**
  - The employer terminated employees after they stayed in the store after closing while engaged in an organizing meeting with a union representative.
  - ALJ determined that the firings were discriminatory and ordered reinstatement and backpay.
- ***InfraSource Services LLC*, No. 19-CA-343407 (9/29/2025)**
  - ALJ ruled that employer violated the NLRA by installing surveillance cameras without bargaining with the union.
  - Employer attempted to assert its management rights clause, but the ALJ responded that the provision didn't clearly and explicitly mention video or audio monitoring of employees.

Major ALJ Decisions from 2025: *Cemex* Bargaining Orders

- ***Mattos Hospitality, LLC and Tourbillon1, LLC,* No. 02-CA-312392 (4/30/25)**
  - During the leadup to a union election, the employer committed several NLRA violations, including soliciting complaints and offering to resolve them, and comments by an outside labor consultant that he was aware of their group chat message about him.
  - The ALJ found that these were unlawful practices but declined to find that they rose to the level of a *Cemex* bargaining order or to require that a new election be conducted.
- ***RCL Mechanical, Inc.*, No. 01-CA-336276 (5/7/25)**
  - During the leadup to a union election, the employer committed the following actions: interrogating employees, threats of reprisal, discriminatory discipline, and promises of rewards for not supporting the union.
  - The ALJ held that a *Cemex* bargaining order was warranted due to the numerous, serious violations.

Major ALJ Decisions from 2025: *Cemex* Bargaining Orders

- ***Sportsman's Warehouse, Inc.*, No. 28-CA-308079 (7/22/25)**
  - During a representation election, the employer committed several NLRA violations, including threats to close the location if the employees there voted to unionize.
  - Two thirds of employees signed authorization cards, but the union lost the election 18-5.
  - The ALJ issued a bargaining order under both *Cemex* and the Supreme Court decision in *Gissel*.
- ***Starbucks Corp.*, No. 14-CA-334485 (3/17/2025)**
  - Employer illegally prohibited workers from recording conversations about unionization efforts, and the union subsequently lost its representation election in January 2024.
  - Then-GC Abruzzo argued that the employer should be subject to a *Cemex* bargaining order, but the ALJ decided that the violations were too "isolated and minimal" to change the outcome of the election.

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Expected Changes Once the NLRB has a Quorum

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Biden-Era Board Decisions Ripe for Review

Cemex Construction Materials Pacific, 372 NLRB No. 130 (2023)

- If an employer commits **any** unfair labor practices during a union election, the election will be set aside and the employer will be subject to a remedial bargaining order.
- This decision overturned the *Linden Lumber* standard which permitted employers to reject authorization card demands and required an election without bargaining orders for minor unfair labor practices.
- **Warning**: even if the *Cemex* decision is overturned by the NLRB or federal courts, employers may still be subjected to a bargaining order under the Supreme Court decision in *Gissel*.

Stericycle Inc., 272 NLRB No. 113 (2023)

- An employer may be in violation of the NLRA for furnishing rules or policies that have a "reasonable tendency to chill" employees from exercising their rights under the Act.
- This is assessed from the perspective of a reasonable employee who is economically dependent on the employer and may interpret ambiguous rules as restricting protected activity.
- This decision overturned the *Boeing* decision from 2017 that established work rules are evaluated based on (1) the nature and extent of the potential impact on NLRA rights from the employee's perspective, and (2) the legitimate business justifications associated with the rule.

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Biden-Era Board Decisions Ripe for Review

McLaren Macomb, 372 NLRB No. 58 (2023)

- The Board held that severance agreements containing confidentiality and non-disparagement provisions unlawfully restrict employee rights under the NLRA – even if signed voluntarily and with consideration.
- This decision overturned earlier Board precedent that allowed such provisions if they did not explicitly infringe on employee rights under the Act.

Thryv, Inc., 372 NLRB No. 22 (2022)

- The Board expanded its "make-whole" remedies to include compensation for all "direct or foreseeable pecuniary harms" suffered by employees due to an employer ULP.
- These can include: out-of-pocket medical expenses, credit card late fees, rent payments, or even the loss of a home or car.
- The decision overturned the Board's prior approach which limited remedies to direct losses (e.g., backpay).
- In 2024, the Fifth Circuit vacated and remanded the *Thryv* decision, creating an avenue for the Board to reevaluate the decision.

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Biden-Era Board Decisions Ripe for Review

Amazon.com Services LLC, 373 NLRB No. 136 (2024)

- The Board held that captive audience meetings are unlawful under the NLRA.
- This decision overturned the *Babcock & Wilcox Co*. decision from 1948 that allowed such meetings.
- **Warning:** the following states have laws that prohibit captive audience meetings: Alaska, California, Connecticut, Hawaii, Illinois, Maine, Minnesota, New Jersey, New York, Oregon, Vermont, and Washington.

Endurance Environmental Solutions, 373 NLRB No. 141 (2024)

- The Board ruled that an employer may only raise a union's waiver as a defense against a ULP charge for unilateral changes if the union gave a "clear and unmistakable waiver."
- General management-rights clauses or broadly worded provisions are insufficient to constitute a waiver of the duty to bargain.
- The decision overturned the *MV Transportation, Inc.* decision which permitted such defenses based on a plain reading of the CBA.

Questions? Feel Free to Reach Out

Kris Hanson
Partner
Kris.Hanson@michaelbest.com
T. 414.223.2503

Kevin Terry
Partner
Kterry@michaelbest.com
T. 414.270.2734