

THE TRUMP ADMINISTRATION 2.0: THE FIRST 100 DAYS AND IMPACT ON EMPLOYERS

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AGENDA



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AGENDA

- TRUMP 2.0 THEMES
- DEI UNDER ATTACK
- THE STATUS OF THE EEOC
- IMMIGRATION WHIRLWIND
- LABOR LIMBO

Trump Administration 2.0 - THEMES

- “Shock and Awe”
- Massive federal government overhaul.
- Unitary executive theory.
- Intend to govern through Executive Orders, not legislation
- Immediate judicial pushback with injunctions

DEI Under Attack in Trump 2.0

Executive Orders and Challenges to Them



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Executive Order 14173

- **EO 14173 - “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”**
 - The EO orders the development of **“appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI.”**
 - The order argued that employers “have adopted and actively use dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called” DEI or DEIA programs that violate civil rights laws.

Executive Order 14173

- Rescinds EO clauses pertaining to EO 11246 signed by LBJ in 1965, which prohibited employment discrimination based on race, color, religion and national origin by organizations receiving federal contracts and subcontracts and created affirmative action obligations.

Executive Order 14173

Sets new compliance requirements for federal contractors and fund recipients:

- Each agency inserts contractual term requiring federal contractors and grant recipients to agree in all respects with all “**applicable Federal anti-discrimination laws** is material to the government’s payment decisions for purposes of section 3729(b)(4) of title United States Code;” AND
- Requiring federal contractor and grant recipient to **certify** that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.

CERTIFICATION REGARDING COMPLIANCE WITH APPLICABLE FEDERAL ANTI-DISCRIMINATION LAW

The Contractor or prospective offeror certifies that -

☐ is in compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of section 31 USC 3729(b)(4) (False Claims Act);

☐ does not operate any programs promoting Diversity, Equity, and Inclusion that violate any applicable Federal anti-discrimination laws.

Contractor or Offeror Name:

.....
Authorized Representative Name and Title

.....
Authorized Representative
Signature

.....
Date

EO 14173 – Private Employers



“Private sector” employers is not defined but seemingly includes any employer subject to U.S. non-discrimination laws; can include:

Federal contractors
Federal grant recipients
Employers with no federal business (contracts or grants)



Within 120 days, the Attorney General will create strategic enforcement plans identifying targets for “illegal DEI” in private sector

May 21, 2025



Identify key sectors of concern, most “egregious” DEI practitioners in each sector, specific measures to deter “unlawful” DEI, up to 9 civil compliance investigations, and strategies to encourage ending “illegal” DEI, including litigation and regulation

Two New DEI Technical Assistance Documents

- Joint DOJ-EEOC “**What To Do If You Experience Discrimination Related to DEI at Work**” (March 19, 2025)
 - What can DEI-related discrimination look like?
 - Who can be affected by DEI-related discrimination?
 - What should I do if I encounter discrimination related to DEI at work?
- EEOC “**What You Should Know About DEI-Related Discrimination at Work**” (March 19, 2025)



**U.S. Equal Employment
Opportunity Commission**

What To Do If You Experience Discrimination Related to DEI at Work

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on protected characteristics such as race and sex. Different treatment based on race, sex, or another protected characteristic can be unlawful discrimination, **no matter which employees are harmed. Title VII's protections apply equally to all racial, ethnic, and national origin groups, as well as both sexes.**

What should I do if I encounter discrimination related to DEI at work?

If you suspect you have experienced DEI-related discrimination, contact the EEOC promptly because there are strict [time limits for filing a charge](#). The [EEOC office nearest to you](#) can be reached by phone at 1-800-669-4000 or by ASL videophone at 1-844-234-5122. For more information on how to file a charge, visit: [How to File a Charge of Employment Discrimination](#) | [U.S. Equal Employment Opportunity Commission](#).

DEI Training

- **10. Can an employer's DEI training create a hostile work environment?**
- Depending on the facts, an employee may be able to plausibly allege or prove that a diversity or other DEI-related training created a hostile work environment by pleading or showing that the training was discriminatory in content, application, or context.

DOJ Memo

- The DOJ Civil Rights Division “**will investigate, eliminate, and penalize illegal DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds.**”

Backlash to the Backlash





OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

January 9, 2025

Further, your former supplier diversity goals and efforts to ensure fair consideration of all potential partners made good business and legal sense. Your announced departure from these efforts leaves room for confusion as to why targeted efforts to reach disadvantaged suppliers are no longer necessary, and how you intend to ensure compliance with nondiscrimination requirements moving forward.

Finally, as you have announced that you are no longer using “DEI” in company titles or materials, it leaves open the question of whether you have engaged in corporate restructuring, terminations, or layoffs in furtherance of this decision. If you have, we are concerned about the potential that impacted employees may be disproportionately Black, Latino, or members of other historically disadvantaged protected groups.

We would welcome more information, either as you communicate your recommitment to the important values of diversity, equity, and inclusion, or as you share with our offices how you intend to ensure compliance with our states’ laws. Although a response is voluntary, we hope that you will take the opportunity to engage with us on these important topics.

“The Executive Order states what is already the law – that discrimination is illegal – but then conflates unlawful preferences in hiring and promotion with sound and lawful best practices for promoting diversity, equity, inclusion, and accessibility in the workforce. This conflation is inaccurate and misleading.

Policies and practices that promote diversity, equity, inclusion, and accessibility are not the same as preferences in individual hiring and promotion decisions that have been found to be unlawful.”


Andrea Joy Campbell
Massachusetts
Attorney General

The Commonwealth of
Massachusetts
The State of Illinois
Offices of the Attorney General

Mass.Gov/AGO
IllinoisAttorneyGeneral.Gov

February 13, 2025



Kwame Raoul
Illinois
Attorney General

Multi-State Guidance Concerning
Diversity, Equity, Inclusion, and Accessibility Employment Initiatives

The Attorneys General of Massachusetts, Illinois, Arizona, California, Connecticut, Delaware, Hawaii, Maine, Maryland, Minnesota, Nevada, New Jersey, New York, Oregon, Rhode Island, and Vermont are issuing this Guidance to help businesses, nonprofits, and other organizations operating in our respective states understand the continued viability and important role of diversity, equity, inclusion, and accessibility efforts (sometimes referred to as “DEI” or “DEIA” initiatives) in creating and maintaining legally compliant and thriving workplaces.

Our Offices have heard concerns from many in the private sector about the continued viability of diversity, equity, inclusion, and accessibility policies and programming following an Executive Order that purports to target “illegal DEI and DEIA policies” across a wide range of organizations.¹ Importantly, diversity, equity, inclusion, and accessibility best practices are not the federal government does not have the legal authority to issue an executive order that purports to target otherwise lawful activities in the private sector or mandates the wholesale removal of these policies and practices within private organizations, including those that receive federal contracts and grants. The Executive Order states what is already the law—that discrimination is illegal—but then conflates unlawful preferences in hiring and promotion with sound and lawful best practices for promoting diversity, equity, inclusion, and accessibility in the workforce. This conflation is inaccurate and misleading. Policies and practices that promote diversity, equity, inclusion, and accessibility are not the same as preferences in individual hiring and promotion decisions that have been found to be unlawful. The Executive Order cannot and does not prohibit these otherwise lawful practices and policies. As such, this Guidance aims to clarify the state of the law for businesses, nonprofits, and other organizations operating in our states.

Legal Action

- February 21, 2025: A federal judge preliminarily blocked the Trump administration from enforcing key provisions of the recent executive orders (EO) to eliminate “illegal” diversity, equity, and inclusion (DEI) programs and federal contractors, finding the provisions are unconstitutionally vague and infringe free speech.
- “Dismantle DEI Action” Act reintroduced – seeking to codify Trump’s DEI orders.
- March 14, 2025: Fourth Circuit granted the government’s request to stay the nationwide preliminary injunction. EOs are again enforceable while the court determines the EO’s lawfulness.

Next Steps for Employers

- As we've said all along:
 - **Do not** base individual employment decisions on protected class membership.
 - **Avoid** "goals" that sound like quotas.
 - **Avoid** scholarships and programs that can only benefit members of a particular protected class.
- Analyze potential state- and local-law complications.
- Use EEO approach and language, including consistent policy enforcement as to behavior in the workplace.

DEI and Law Firms

- March 17, 2025, EEOC sent letters to 20 law firms asking for information about their DEI-related employment practices
- Also established an email where whistleblowers can submit information to the EEOC about potentially unlawful DEI practices at law firms: lawfirmDEI@eeoc.gov.
- The letter can be found at https://www.eeoc.gov/sites/default/files/2025-03/Law_Firm_Letters_-_03.17.2025.pdf

DEI and Law Firms

- 37 questions
- Since 2019, fully identify all times you provided the race or sex of your employees staffed on a matter to a client, including:
 - a. The client
 - b. The date of disclosure
 - c. The client's response
 - d. Whether the disclosure was client mandated/requested

DEI and Law Firms

- For each year since 2019, please provide the following data for lawyers in your firm who
- applied or were recruited as potential lateral partners:
 - a. Name
 - b. Sex
 - c. Race
 - d. Phone number
 - e. Email address
 - f. Office location
 - g. Member of a firm affinity group (Y/N)
 - h. Name of affinity group(s) in which attorney participates / participated
 - i. Previously participated in LCLD program (Y/N)
 - j. Previously was SEO Fellow (Y/N)
 - k. Previously participated in a firm diversity internship or fellowship (Y/N)
 - l. Hired as lateral partner (Y/N)
 - m. Equity or non-equity partner (Equity / Non-Equity)

Status of the EEOC



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The “No Quorum” EEOC

- January 27, 2025, the President removed Commissioner Charlotte Burrows, whose term was to expire July 2028
- Also removed Commissioner Jocelyn Samuels, whose term was to expire in July 2026
- Also fired EEOC General Counsel Karla Gilbride, whose term was to end in 2027
- Left 2 out of 5 commissioners, which is not a working quorum

Equal Employment Opportunity Commission



**Commissioner
Jocelyn Samuels**



**Commissioner
Charlotte Burrows**



**Commissioner
Kalpana Kotagal**



**Acting Chair
Andrea Lucas**



**Acting GC
Andrew Rogers**



**General Counsel
Karla Gilbride**

Acting Chair Andrea R. Lucas

- L&E Attorney at Gibson Dunn in Washington, D.C.
- Appointed to EEOC in 2020.
- “reject identity politics”
- “prioritizes evenhanded enforcement of civil rights laws for all Americans, including by rooting out ...
 - unlawful DEI-motivated race and sex discrimination;
 - protecting American workers from anti-American national origin discrimination;
 - defending the biological and binary reality of sex and related rights, including women’s rights to single-sex spaces;
 - protecting workers from religious bias and harassment; and ...
 - remedying other areas that have been historically under-enforced by the agency.”



DEI

- On February 19, 2025, Lucas announced the EEOC plans to target employers that “illegally prefer non-American workers,” as well as “staffing agencies and other agents that unlawfully comply with client companies’ illegal preferences against American workers” through increased enforcement of Title VII’s national origin protections.



EEOC Subject Matter Priorities

Eliminating Barriers in Recruitment and Hiring

The EEOC will focus on recruitment and hiring practices and policies that discriminate on any basis unlawful under the statutes EEOC enforces, including sex, race, national origin, color, religion, age, and disability. These include ...

- The use of technology, including artificial intelligence and machine learning, to target job advertisements, recruit applicants, or make or assist in hiring decisions where such systems intentionally exclude or adversely impact protected groups.
- The use of screening tools or requirements that disproportionately impact workers on a protected basis, including those facilitated by artificial intelligence or other automated systems, pre-employment tests, and background checks.



Single Sex Facilities

- Prioritize compliance, investigations, and litigation “to defend the biological and binary reality of sex and related rights, including women’s rights to single-sex spaces at work.”
- See April 29, 2024 two-page objection to the EEOC’s Harassment Guidelines: “It is neither harassment nor discrimination for a business to draw distinctions between the sexes in providing single-sex bathrooms or other similar facilities which implicate these significant privacy and safety interests.”

Religious Harassment

- Priority is “protecting workers from religious bias and harassment”.
 - Antisemitism is particular focus.
 - EEOC investigation and enforcement actions likely to be in this space.
- Expect pro religion view to extend to employers:
 - Potential extension of exemption allowing religious corporations, associations, educational institutions, or societies to be exempt from certain religious discrimination provisions.

The Immigration Whirlwind



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Ending Birthright Citizenship (EO 14160)

- The executive order asserts that children born in the United States on or after February 19, 2025, who do not have at least one lawful permanent resident or U.S. citizen parent, will not have a claim to birthright citizenship.
- Multiple lawsuits filed. Several district court judges have issued nationwide preliminary injunctions blocking the EO. These orders have been appealed. The EO is not currently being implemented as a result of the legal challenges and injunctions.

Tightening Deportation/Exclusion Practices/Policies

- Using “Alien Enemies Act” to deport individuals
- Utilizing advanced vetting techniques for all individuals encountered or apprehended by the U.S. Department of Homeland Security (DHS)
- Searching social media (student visas)

Best Practices

- Determine if your company is an at-risk employer for I-9 audits or raids
- Develop Standard Operating Procedures if ICE shows up at your door
 - Identify person who will interact with ICE
 - Know the Company's rights (do not have to let ICE roam around the worksite just because it says it wants to)
 - Know your union/collective bargaining obligations

Labor Law Limbo

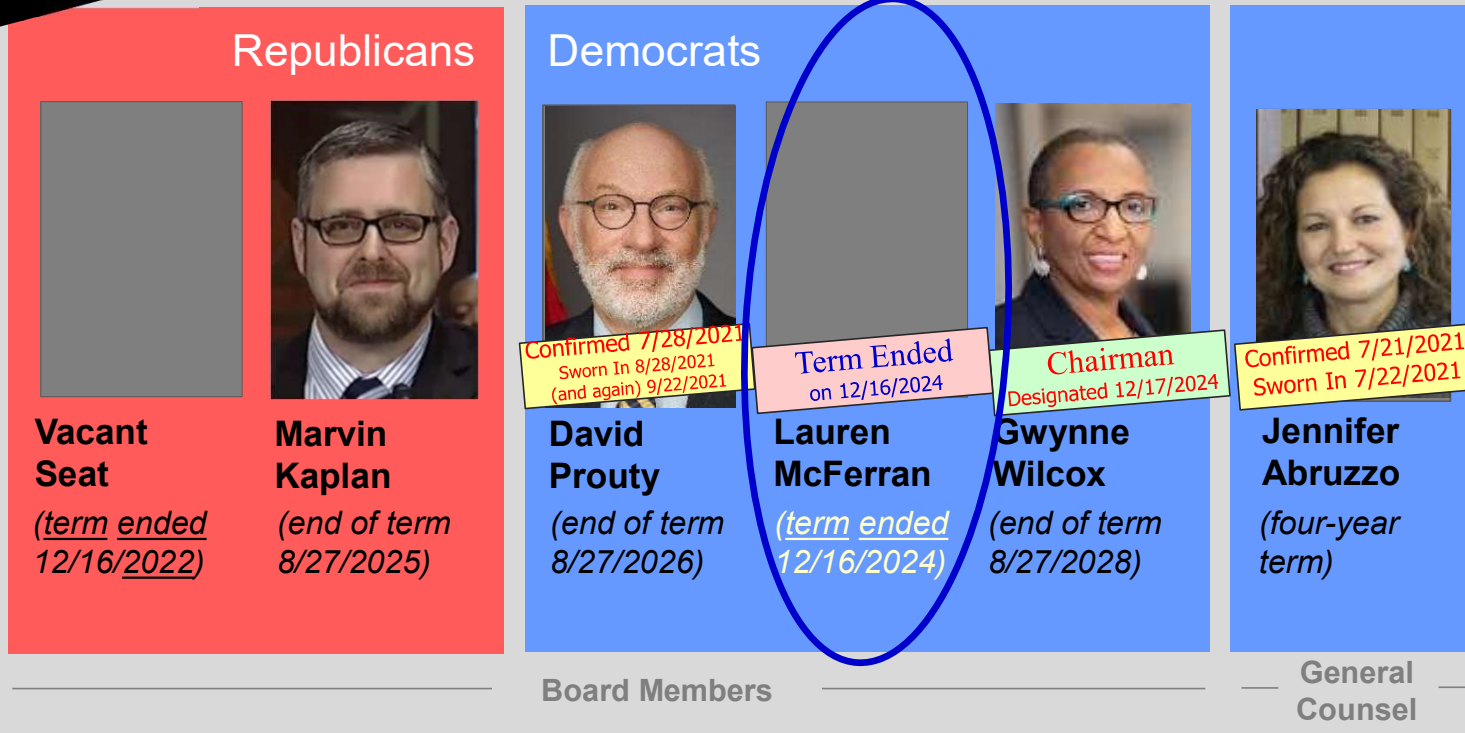


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The Past Three Months: the NLRB in Transition



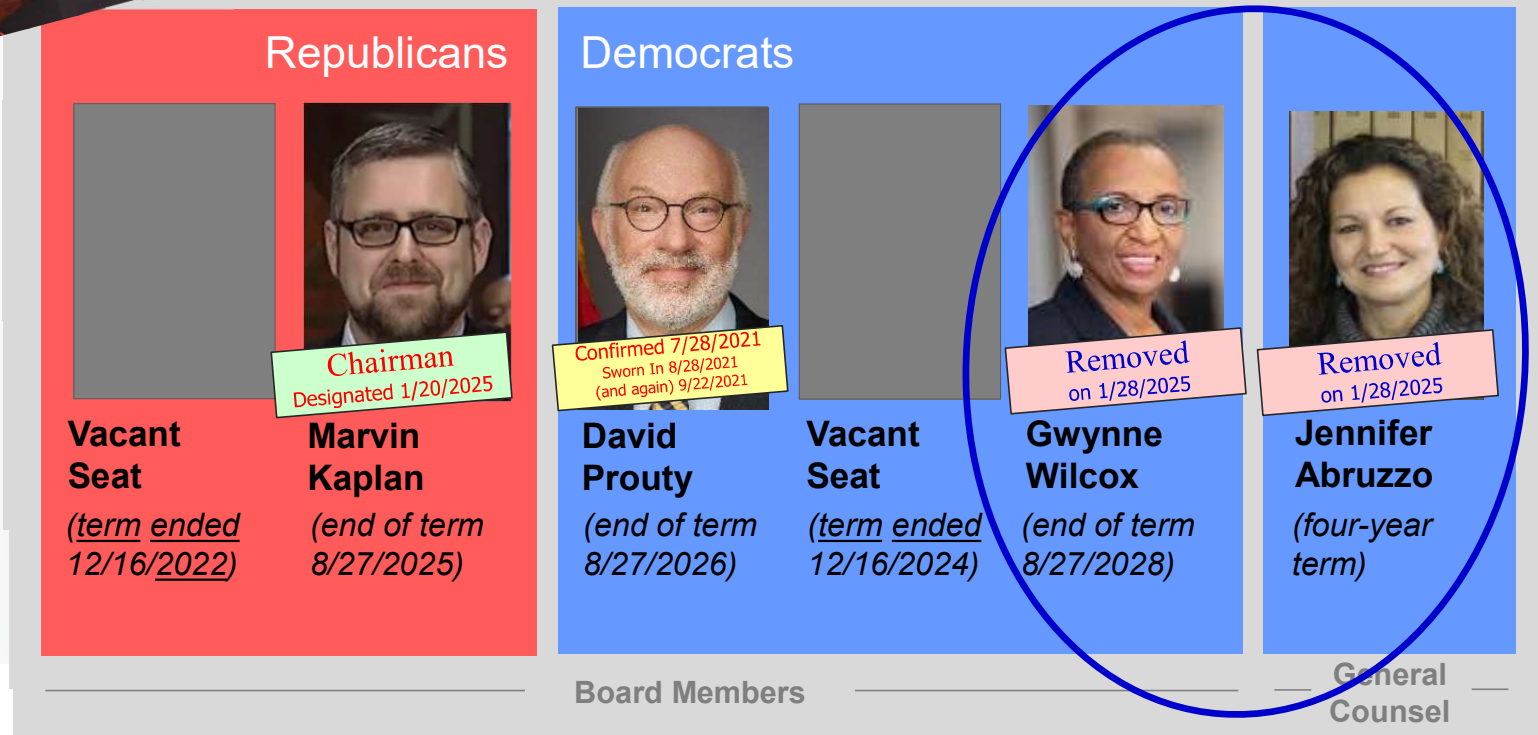
The Democratic Majority – December 17, 2024



The Past Three Months: the NLRB in Transition



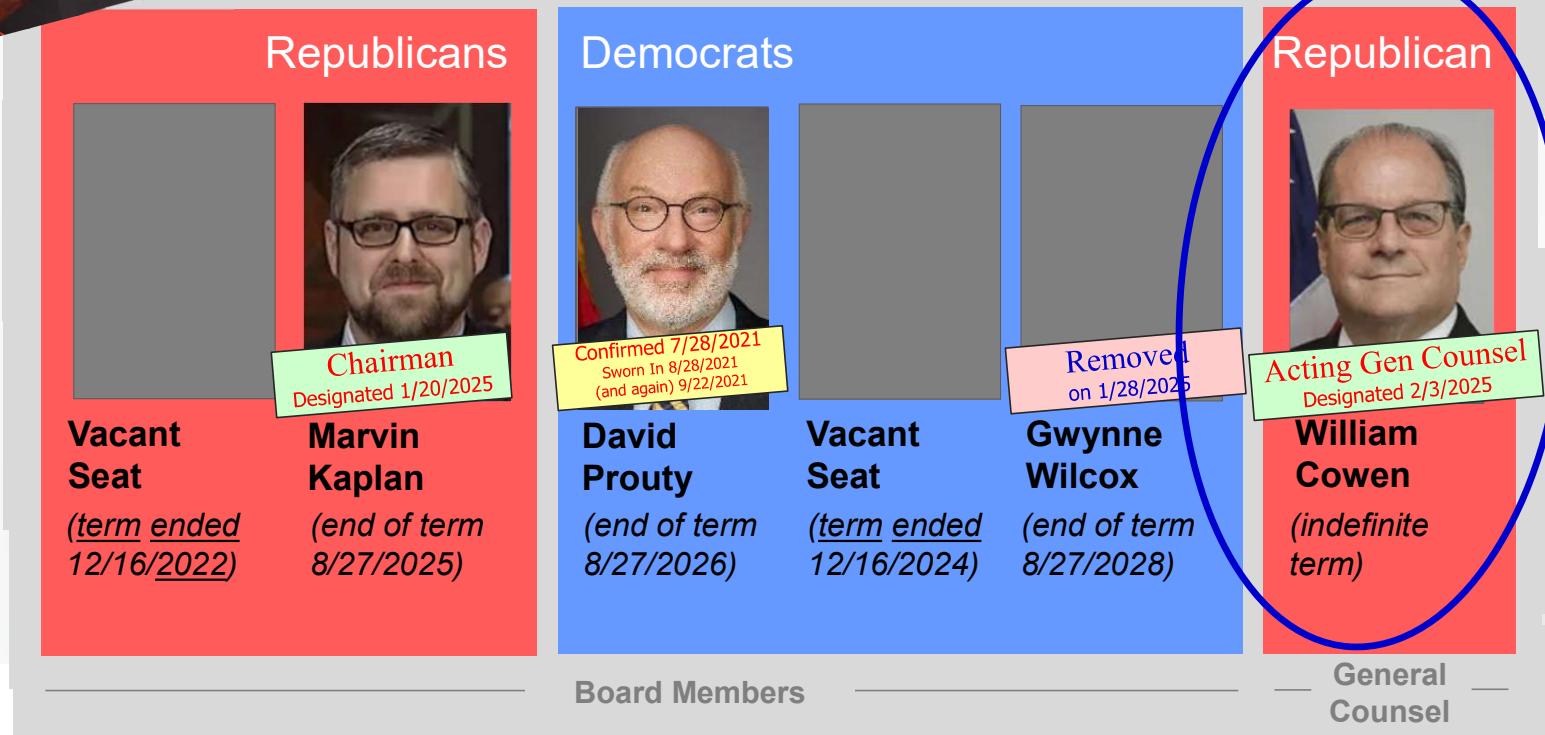
Two Big Changes – January 28, 2025



The Past Three Months: the NLRB in Transition



New Acting General Counsel – February 3, 2025



Two Removals: NLRB Chairman and General Counsel

From: Morse, Trent M. EOP/WHO
Sent: 1/28/2025 3:38:24 AM
To: jennifer.abruzzo@nlrg.gov; gwynne.wilcox@nlrb.gov

* * *

Gwynne and Jennifer,

On behalf of President Donald J. Trump, please see the letter below.

* * *

Article II of the U.S. Constitution vests the entire executive power in a single President, who alone is accountable to the people. Pursuant to my constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, §3, I must ensure that those who wield executive power on my behalf are held accountable. Of particular importance, heads of agencies within the Executive Branch must share the objectives of my administration and its commitment to serving the will of the American people.

The aims and purposes of the Administration with respect to the work on the Board can be carried out most effectively with personnel of my own selection. To that end, effective as of this date, Gwynne A. Wilcox and Jennifer Abruzzo are hereby removed from the office of Members of the National Labor Relations Board [1]

"The aims and purposes of the Administration with respect to the work on the Board can be carried out most effectively with personnel of my own selection. To that end, effective as of this date, **Gwynne A. Wilcox and Jennifer Abruzzo are hereby removed from the office of Members of the National Labor Relations Board.**"

"... **these two Board Members** have not, in my judgment, been operating in a manner consistent with the objectives of my administration. In my judgment, **Members Wilcox and General Counsel Abruzzo have adopted a host of decisions** that have improperly cabined employers' rights to speak on the subject of unionization, raising serious First Amendment concerns about the censorship of important speech.... They have also issued decisions that, in my judgment, have vastly exceeded the bounds of the National Labor Relations Act. To take just one example, they supported a **new joint employer rule....**"

"Viewing their record collectively, I lack confidence that **Commissioners Wilcox and General Counsel Abruzzo** can fairly evaluate matters before them...."

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Two Removals: NLRB Chairman and General Counsel

**Member Wilcox's firing
tees up a constitutional
challenge to the NLRA's
Member removal
protections.**

'While the National Labor Relations Act purports to limit removal of Board members to 'neglect of duty or malfeasance in office, but for no other cause,' this limitation is inconsistent with the vesting of the executive power in the President and his constitutional duty to take care that the laws are faithfully executed and thus does not operate as a restriction on my ability to remove Board members.'

- Letter to Member Wilcox from President Trump, 1/28/25

Lack of Quorum: Impact on NLRB Cases

- The Board **lacks a quorum** and cannot issue decisions
 - Board cannot act until there are at least three members
 - Presidential nominations to the Board are likely months away
- **Constitutional and legal challenges** to removals will create **uncertainty**
- Acting General Counsel has authority (based on prior delegation) initiate and pursue **court litigation** that would otherwise require Board authorization
- **Motions** for default judgment, dismissal and summary judgment, and **special permission** to appeal, may be decided by the **Chief Administrative Law Judge**

NLRB Rollbacks

On February 14, 2025, NLRB Acting General Counsel Cowen rescinded numerous prior NLRB GC memoranda.

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 25-05

February 14, 2025

TO: Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: William B. Cowen, Acting General Counsel

SUBJECT: Rescission of Certain General Counsel Memoranda

Over the past few years, our dedicated and talented staff have worked diligently to process an ever-increasing workload. Notwithstanding these efforts, we have seen a backlog of cases grow to the point where it is no longer sustainable. The unfortunate truth is that if we attempt to accomplish everything, we risk accomplishing nothing.

Since assuming the role of Acting General Counsel, working with experienced field and headquarters professionals, I have conducted a comprehensive review of active General Counsel Memoranda and determined that the following actions are warranted.

OUT: Non-Compete Policy

- On February 14, 2025, NLRB Acting General Counsel rescinded prior NLRB GC memoranda, including 23-08 and 25-01.
- These two memoranda had deemed as violations of the NLRA two categories of restrictive covenant agreements with non-supervisory or non-management employees:
 - Non-compete agreements in employment contracts and severance agreements.
 - Stay-or-pay agreements (i.e., employee must repay employer bonus or other benefit if they separate employment before defined stay period).

OUT: Electronic Monitoring and Algorithmic Management of Employees

- GC 23–02 Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights.
 - This memorandum addressed electronic monitoring, including tracking movements, recording conversations, and monitoring computer activity.
 - An employer has presumptively violated the Act where an employer's surveillance and management practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act.

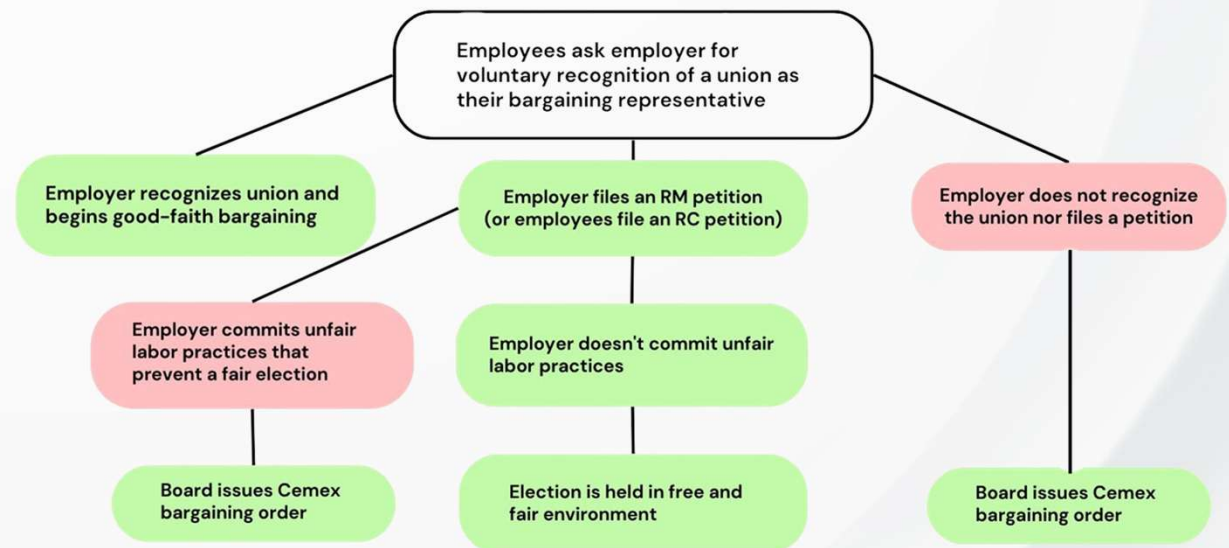
Potential Reversals Under Second Trump Term

- **Cemex**
 - Shedding the informal process of employees holding representation election.
- **Stericycle / McLaren Macomb**
 - Less scrutiny on employer handbooks and separation agreements.
- **Captive Audience Limitations**
 - Prohibiting mandatory meetings about unions.

Demand for Recognition

- *Cemex Construction Materials Pacific, LLC* (August 25, 2023)
- If Union demands recognition claiming majority support ...
 - Employer must recognize and bargain; or ...
 - File RM Petition typically within 14 days.
- If employer commits unfair labor practices (ULPs) during critical period, election cancelled (or set aside) and bargaining order will issue.

Cemex Bargaining Orders



The Stericycle Test

- The NLRB General Counsel has the burden to establish that the work rule or policy could reasonably be interpreted to chill employees' Section 7 activity.
 - Burden will be satisfied even if a contrary, noncoercive interpretation of the rule is also reasonable.
 - The NLRB “will interpret the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer.”
- If the NLRB General Counsel meets her burden, the rule or policy is presumptively unlawful.
- The employer may rebut by proving ...
 - That the rule advances a legitimate and substantial business interest; and ...
 - That the employer is unable to advance that interest with a more narrowly tailored rule.

Captive Audience Limitations

- Decision issued November 13, 2024.
- “Captive audience” meetings violate the NLRA because they have a tendency to interfere with and coerce employees.
- What is a “captive audience meeting”? A meeting where employees are required, on pain of discipline or discharge, to listen to the employer’s views about labor unions. Thus, voluntary meetings, held in the workplace on work time, do not violate the Act.
- Decision is prospective only.

Captive Audience Meetings: Safe Harbor

- Safe harbor from liability: If, “reasonably in advance of a meeting” [phrase not defined], the employer gives employees certain assurances ...
 - The employer intends to express its views on unionization at a meeting at which attendance is voluntary;
 - Employees will not be subject to discipline, discharge, or other adverse consequences for failing to attend the meeting or for leaving the meeting; and ...
 - The employer will not keep records of which employees attend, or leave, the meeting.

Current Legal Landscape

Multiple states have captive audience laws, including ...

California	<u>January 1, 2025</u>
Connecticut	<u>July 1, 2022</u>
Maine	<u>September 19, 2023</u>
Minnesota	<u>August 1, 2023</u>
New York	<u>September 6, 2023</u>
Oregon	<u>July 1, 2024</u>
Washington	<u>June 6, 2024</u>
Illinois	<u>January 1, 2025</u>

Federal Mediation and Conciliation Services

- Congress established FMCS in 1947
- Works to prevent and resolve work stoppages and disputes in the public and private sector
- March 14, 2025 EO named 7 agencies to be dismantled, including FMCS

Thank You!

Charles Thompson
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