

## A Valentine for some NLRB watchers: Former General Counsel memoranda rescinded

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On February 14, the Acting General Counsel of the National Labor Relations Board issued a [Memorandum](#) announcing the rescission of many of the memoranda issued by his predecessor, General Counsel Jennifer Abruzzo. GC Abruzzo was fired by President Trump shortly after he took office.

General Counsel memoranda often provide guidance, directives, and enforcement policy statements to the many NLRB Regional Offices that do the day-to-day work of the Board in representation and other election matters, and unfair labor practice charge cases. The memoranda also provide guidance to employers, unions, and employees with some interest in NLRB proceedings. The latest “rescission by GC Memo” follows the same path used by the Acting General Counsel appointed by President Biden in 2021.

### The GC Memo

The Valentine’s Day Memorandum was issued by William B. Cowen, whom President Trump appointed as Acting General Counsel for the Board. Mr. Cowen was previously Regional Director for Region 21 in Los Angeles.

Mr. Cowen rescinded 31 memos issued by former GC Abruzzo on a variety of important subjects, some of which were her interpretations of decisions by the Board during the Biden Administration, which had a Democratic majority.

Generally, Mr. Cowen’s action pulls the Office of the General Counsel back from many policies and positions that were novel, aggressive interpretations of the National Labor Relations Act that favored organized labor, often restricted employee choice and employer free speech, and expanded the reach of Board regulatory power over employers.

Some of GC Abruzzo’s memoranda were simply rescinded, while others were rescinded pending further review. Thus, Mr. Cowen or a newly-seated General Counsel (after Senate confirmation) can be expected to provide “counter-guidance” on some of the subjects covered in the rescinded memoranda.

Here are some of the more noteworthy positions that GC Abruzzo took, which have now been rescinded:

- Pursuing broad remedies analogous to civil damages under NLRB orders and settlements in unfair labor practice cases.
- Advocating “employee” status for college athletes at private (non-public) institutions.
- Aggressively pushing the [Cemex](#) standard, which was adopted to require employers who commit unfair labor practices to bargain with unions even when no employees voted for the union.
- Aggressively pursuing unfair labor practice charge cases based on non-competition provisions, non-solicitation provisions, provisions for claw back of training and other employer expenses, and non-disparagement or confidentiality provisions in various agreements.
- Possible challenges to employer use of electronic monitoring and use of algorithms for employee control. The challenges would allege that the use of this technology interferes with employees’ Section 7 rights.
- Setting forth the policy of the Office of General Counsel on “captive audience” speeches that was largely adopted by the 2024 Board majority decision in a case involving Amazon.
- Setting forth a preference for representation elections using mail-in ballots during the COVID-19 pandemic.

### **Does the Board even have a quorum?**

When President Trump took office, the NLRB had a Democratic majority. However, in addition to firing GC Abruzzo, the President fired Board member and former Chairman Gwynne Wilcox (D), whose term was not scheduled to expire until August 2028. Ms. Wilcox is challenging her termination in court, but if the termination stands, the Board will consist of one Democrat (David Prouty), one Republican (Marvin Kaplan, who is now the Chairman), and three vacancies. In other words, the Board will lack a needed quorum of at least three Members. On the other hand, if Ms. Wilcox prevails, the Board will have a quorum and a Democratic majority until change comes, possibly through Trump nominations.

The outcome of the Wilcox lawsuit may be controlled by a case involving the firing on February 7 of Hampton Dellinger, who was Special Counsel of the U.S. Office of Special Counsel and a Democrat.

Mr. Dellinger alleges that he is legally protected from being fired, and his (alleged) protection is similar to the protections for Board members under the NLRA. On February 12, a federal court in the District of Columbia issued a Temporary Restraining Order blocking Mr. Dellinger’s termination, and the U.S. Court of Appeals for the District of Columbia Circuit affirmed. The case is now at the U.S. Supreme Court. The Trump Administration contends that the protections against termination violate the

separation of powers. In other words, the Administration argues that Congress cannot restrict Presidential executive power established under the Constitution of the United States.

### **Where things stand and may go**

In addition to these firing cases, there are lawsuits challenging the constitutionality of the Board structure, including the Member protections against termination, and the Board's expanded remedies as violative of the Seventh Amendment right to a jury trial. In a challenge brought by SpaceX that is pending at the U.S. Court of Appeals for the [Fifth Circuit](#), NLRB lawyers earlier this month [told the Court](#) that they would not address the constitutional argument regarding the Board member removal protections, apparently because of lack of a Board quorum and the appointment of Acting GC Cowen. And the President could add three or more Board members through recess appointments or Senate confirmation. With these developments, as well as the changes set forth in Acting GC Cowen's Memorandum, it is clear that big changes may be coming to the NLRB and its impact on labor relations.

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