

**PRESENTED AT**

30th Annual Labor and Employment Law Conference

June 1-2, 2023

Austin, Texas

## **Recent Developments Under the National Labor Relations Act**

**Rod Tanner**

**Robert E. Sheeder**

Rod Tanner  
Tanner and Associates, PC  
Fort Worth, Texas  
[rtanner@rodtannerlaw.com](mailto:rtanner@rodtannerlaw.com)  
817.377.8833

Robert E. Sheeder  
Morgan, Lewis & Bockius LLP  
Dallas, Texas  
[robert.sheeder@morganlewis.com](mailto:robert.sheeder@morganlewis.com)  
214.466.4000

## TABLE OF CONTENTS

<b>I.</b>	<b>Introduction</b> .....	1
<b>II.</b>	<b>Current Board and General Counsel</b> .....	1
	A. Board Members.....	1
	B. General Counsel’s Immediate Efforts.....	1
	C. General Counsel Memorandums.....	1
	i. General Counsel’s Memorandum On Electronic Monitoring And Algorithmic Management.....	1
	ii. Other Notable General Counsel Memorandums.....	2
<b>III.</b>	<b>Notable Board Decisions</b> .....	3
	A. Bargaining Unit Standard .....	3
	B. Rights Expanding For Contractor Employees At Client Or Customer Sites .....	5
	C. Special Disclaimer Rules for ULP Investigations and Trials .....	7
	D. Greater Protections for Concerted Activity .....	8
	E. McLaren Macomb’s Decision on Severance Agreements.....	9
	F. Expanding Make Whole Remedies.....	11
	G. Employer Uniform Policies .....	12
	H. Employer Investigations Into Unprotected Activities.....	12
	I. Backpay And Reimbursement Of Expenses As Remedies.....	13
	J. Bargaining Orders.....	13
	K. Employee Complaints To Third Parties.....	14
	L. Weingarten Rights .....	15
	M. Successor Bar Doctrine.....	15
	N. Status Quo .....	16
	O. COVID-19.....	18
	P. Joint-Employer Standard .....	18
	Q. Section 8(a)(3)/8(a)(4) Discipline and Discharges .....	19
	R. Threatening Employees .....	20
	S. Section 8(a)(2) Violations.....	21
	T. Plant Closings and Reopening Remedies .....	22
	U. Discrimination/Retaliation.....	23
	V. Contract Breach/Modification .....	24
	W. Information Requests .....	24
	X. Restitution of Bargaining Expenses.....	25
	Y. Duty to Bargain.....	25
	Z. Section 8(e) Cases.....	27
	AA. Make-Whole Remedies In Contract Bargaining.....	28
	BB. Lawsuits and Discovery Requests .....	28
	CC. Surveillance.....	29

DD.	Mass Layoffs.....	30
EE.	Direct Dealing.....	30
FF.	Effects Bargaining .....	31
GG.	Notice of Intent to Terminate Agreement.....	32
HH.	Section 10(b).....	32
II.	Wright Line and Loss of Protection.....	33
JJ.	Bargaining Relationship Governed by Section 8(f) or 9(a).....	34
KK.	Coercive Threats .....	35
LL.	Duty of Fair Representation.....	35
MM.	<i>Bad Faith Bargaining</i> .....	36

## **I. Introduction**

This paper summarizes recent developments, in the last two years, under the National Labor Relations Act (“NLRA” or the “Act”), including new Board law or reestablished guidance by the General Counsel. These updates include an employers’ use of severance agreements, the rights of employee contractors, the standard for determining bargaining units, and strike replacements’ *Weingarten* rights.

## **II. Current Board and General Counsel**

### **A. Board Members**

The current Board members are Chairperson Lauren McFerran and Members Marvin Kaplan, Gwynne Wilcox, and David Prouty. Both Kaplan and McFerran were re-confirmed by the Senate on July 29, 2020. President Biden named McFerran as Chairperson on January 20, 2021. Kaplan’s term runs through August 27, 2025, while McFerran’s term runs through December 16, 2024.

Former Member, John Ring, served until December 16, 2022, when his term expired. John Ring was nominated to the Board in April 2018 and served as Board Chairman, leading the Board through January 2021. As of January 2021, Former Member Ring was a Board Member until the end of his term. Former Member Ring was a part of the Republican minority on the Board. With Former Member Ring’s departure, the Board ended a 15-month stretch with all five seats filled. Member Kaplan is now the only Republican on the Board. However, due to the nature of the Board being controlled by Democrats since Biden’s appointment this is unlikely to change the direction of the Board, as it continues to issue employee/Union friendly Board law.

### **B. General Counsel’s Immediate Efforts**

Jennifer Abruzzo is the current General Counsel of the Board. She was nominated on February 17, 2021 and was confirmed by the Senate on July 13, 2021. General Counsel Abruzzo began her four-year term on July 22, 2021. Prior to her appointment she served as Special Counsel for Strategic Initiatives for the Communications Workers of America. So far, she has upheld the promise set forth by President Biden that he would be “the most pro-union president you’ve ever seen.” Immediately upon assuming her role as General Counsel, she churned out several memos to quickly establish her priorities, which demonstrated that she is focused on speeding up the union process, pushing back against “captive audience” meetings, and returning to Board precedent that favors workers. Not only is she on a mission to overturn the Trump administration rulings and turn toward the Obama era’s precedents, but she also has been urging the Board to challenge longstanding practices.

### **C. General Counsel Memorandums**

#### **i. General Counsel’s Memorandum On Electronic Monitoring And Algorithmic Management**

In her memorandum, *GC 23-0*, published on October 31, 2022, General Counsel Abruzzo urged the Board to make decisions ensuring that electronic surveillance and automated management practices are not used in a way that is intrusive and/or abusive in the workplace such that these

activities unlawfully interfere with, restrain, and/or coerce employees in exercising their Section 7 rights.

She noted that electronic surveillance and the breakneck pace of work set by automated systems may limit employees from protecting conversations about unionizing or discussing the terms and conditions of their employment. Furthermore, surveillance has the potential to impact opportunities for solicitation or distribution of union literature during nonworking time, if such surveillance is used during break times or monitors nonwork areas. Due to the advanced technology now deployed by employers, surveillance has the potential to extend beyond the workplace. This new technological world has the potential to prevent employees from exercising their Section 7 rights anywhere, by continuing to monitor employees even after they have left their work environment.

Abruzzo also noted that employers may in fact have legitimate business reasons for using electronic monitoring and automated management. However, an employer's interests must be balanced against the employees' rights under the NLRA. If the Board finds that an employer's interests are outweighed by their employees' Section 7 rights, Abruzzo believes that the employer should be required to disclose to the Board the technologies it uses, its reasons for doing so, its management of the technologies, and how it uses the information the technology obtains. Exceptions to this new guidance are allowed where an employer can show that special circumstances require "covert use of the technology."

She indicated that employers will also violate Section 8(a)(1) if their surveillance and management practices as a whole would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act.

## **ii. Other Notable General Counsel Memorandums**

- In *GC 23-03*, published on November 9, 2022, in an effort to enhance cooperation between the NLRB and other federal, state, and local agencies, Abruzzo returned discretionary authority to Regional Directors to answer information requests from such agencies that protect worker and consumer rights. Depending on the scope of the request, Regional Directors may now either negotiate an information-sharing agreement with other agencies and/or make a discretionary release under Section 102.118 of the Board's Rules and Regulations.
- In *GC 23-01*, in an effort to advocate for settlements and the efficiency in settling cases, Abruzzo's October 20, 2022 memorandum, set out guidance to Regions on seeking interim settlements. Abruzzo instructed Regions to attempt to obtain full interim relief for Section 10(j) portions of a charging party's case. If parties cannot successfully settle the entire administrative case, charging parties can voluntarily agree to an interim settlement, in cases where Section 10(j) relief is appropriate. Abruzzo provided examples of cases in which this form of relief is appropriate. Examples include cases concerning discharges during an organizing campaign, violations during initial contract bargaining, and cases where the Board's final order is threatened by a charged party's unlawful conduct. However, if a charged party breaches the terms of the interim settlement, Regions are instructed to recommend initiation of Section 10(j) proceedings.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

## Title search: Recent Developments Under the National Labor Relations Act

Also available as part of the eCourse

[2023 Labor and Employment Law eConference](#)

First appeared as part of the conference materials for the 30<sup>th</sup> Annual Labor and Employment Law Conference session "NLRB Update"