

# Recent Developments and a Look Ahead Under the National Labor Relations Act

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## Current Board Members



Chairperson  
Lauren M.  
McFerran



John F.  
Ring



Marvin E.  
Kaplan



Gwynne A.  
Wilcox



David M.  
Prouty

President Biden named McFerran Chairperson of the Board on January 20, 2021.

On July 28, 2021, the Senate voted to approve Biden's two nominations--Gwynne Wilcox and David Prouty.

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# NLRB General Counsel Shakeup



Within hours of taking office, Biden removed General Counsel Peter Robb.

Peter Sung Ohr served briefly as Acting General Counsel.



NLRB publicly welcomed Jennifer Abruzzo as General Counsel on July 22, 2021.

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## General Counsel Abruzzo Issues Series of Memorandums

- GC 21-04: Outlined her priorities, many of which would reverse Trump-era rulings
  - Employee classification/status
  - Employer's duty to recognize and/or bargain
  - Strike and picket rights
  - Section 7 rights
- GC 21-06: Instructed Regions to request from Board the full extent of available remedies for victims of unlawful conduct
  - Potential for consequential damages
- GC 21-07: Instructed Regions to carefully craft settlement agreements to ensure effective relief

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## General Counsel Abruzzo Issues Series of Memorandums Cont'd

- GC 21-08: Stated her position that student athletes are employees under the Act
- OM 22-03: Stated her position that employers required to enforce COVID-19 policies have decisional bargaining obligations
- GC 22-04: Stated her position that captive audience meetings are not lawful under the NLRA. She plans to urge the Board to reconsider the legality of captive audience meetings.

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## Modified Standard for Offensive Outbursts

- Previously, Board applied setting-specific standards to determine whether abusive conduct was severe enough to lose the Act's protection
  - 4-factor *Atlantic Steel* test applied to workplace conversations with management:
    - (1) place of discussion; (2) subject matter of discussion; (3) nature of employee's outburst; and (4) whether outburst was provoked by employer's ULP
  - Totality of the circumstances applied to social media posts and workplace discussions with coworkers
  - "Reasonably tend to coerce or intimidate" standard of *Clear Pine Mouldings* applied to picket-line conduct
    - Abusive conduct loses Act's protection where misconduct may reasonably tend to coerce or intimidate employees in the exercise of protected rights.
- Board's *General Motors* decision established a single approach subsuming all three approaches—the *Wright Line* test

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