

PRESENTED AT

29th Annual Labor and Employment Law Conference

May 5-6, 2022
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
817.377.8833

Robert E. Sheeder
Morgan, Lewis & Bockius LLP
Dallas, Texas
robert.sheeder@morganlewis.com
214.466.4000

Table of Contents

I.	Introduction.....	1
II.	Current Board and General Counsel.....	1
	A. Board Members.....	1
	B. General Counsel Shakeup.....	1
	C. Rescission of Former General Counsel Robb’s Memoranda.....	2
	D. General Counsel Abruzzo’s First Memorandum.....	5
	E. Other Notable Memoranda.....	7
III.	Protected Concerted Activity.....	9
	A. <i>Wright Line</i> Establishes the Causation Standard for Abusive Conduct.....	9
	B. Onsite Contractor’s Access to Employer Property.....	12
	C. Employee Speech.....	13
	D. Work Rules Affecting Section 7 Activity.....	14
	1. Social Media.....	14
	2. Work Appearance and Apparel Guidelines.....	15
	3. No-Recording Rules.....	16
IV.	Coverage of Statutory Employees.....	17
	A. Adjunct Professors.....	17
	B. Private University Students.....	17
V.	Picketing and Coercive Conduct.....	18
	A. Bannering and Displays of “Scabby the Rat”.....	18
	B. Secondary Picketing.....	19
VI.	Duty to Bargain.....	20
	A. Union Recognition.....	20
	B. Board’s New Remedy for Certification-Testing.....	22
VII.	Duty to Provide Information.....	22
VIII.	Representation Matters.....	23
	A. Composition of the Voting Group.....	23
	B. Hiring Hall Operations.....	24
IX.	Rulemaking.....	25
	A. Retroactive Application of New Mail Ballot Solicitation Rule.....	25

I. Introduction

This paper summarizes recent developments under the National Labor Relations Act, including new guidance addressing employers' bargaining obligations over vaccine mandates, a new standard for work rules, student workers' classification as employees, and approval of Scabby the Rat.¹

II. Current Board and General Counsel

A. Board Members

The current Board members are Chairperson Lauren McFerran and Members John Ring, 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 new term runs through August 27, 2025, while McFerran's term runs through December 16, 2024.

President Biden made two recent confirmed nominations to fill vacancies on the Board. On May 26, 2021, Biden nominated longtime SEIU attorney Gwynne Wilcox. Wilcox has a long history of advocating for progressive policies with respect to labor and employment matters. In late June 2021, President Biden then nominated David Prouty to fill the seat of Republican William Emanuel's Prouty is an attorney who has spent his career representing labor unions, recently serving as General Counsel for a SEIU local union in New York City. On July 28, 2021, the Senate voted to confirm Gwynne Wilcox by 52-47 and David Prouty by a vote of 53-46.

Chairperson McFerran and Members Wilcox and Prouty are Democrats. Members Ring and Kaplan are Republicans. The trajectory of the Board's decisions and rulemaking may change significantly with the addition of Members Wilcox and Prouty, as the Board has a Democratic majority for the first time since 2017.

B. General Counsel Shakeup

As expected, the Presidential election in November 2020 marked a shift in the priorities and views of the NLRB majority. On the campaign trail, President Biden vowed to be the most "pro-union" president in U.S. history. He issued his support for the recently introduced Protecting the Right to Organize Act (PRO Act) and his platform contains numerous union-friendly policies, including promises to enact financial penalties on companies that interfere with organizing efforts and to provide public sector employees a federal guarantee to organize.

Within hours of taking office, President Biden fired Trump-appointed General Counsel Peter Robb after Mr. Robb refused the administration's call for him to resign. The General Counsel investigates unfair labor practice charges, brings administrative complaints before the Board, and represents the agency before federal courts.

Robb had less than ten months left in his four-year term, but unions had been urging President Biden to break with precedent by forcing him out immediately. Under Robb's management-oriented leadership, the Board had rendered countless aggressively pro-business decisions and memorandums. Robb is the first Board General Counsel to be forced out in more than half a century—and the first to be fired in Board history.

¹ The author gratefully acknowledges the contributions to this paper of Aarika Johnson, Associate Attorney at Tanner and Associates, PC.

Deputy General Counsel Alice Stock briefly assumed the role of acting General Counsel the following day, but she was also terminated at the end of the day. President Biden then named Peter Sung Ohr, a career employee of the Board, as Acting General Counsel.

President Biden announced in February 2021 that he would nominate Jennifer Abruzzo, a lawyer for Communication Workers of America, to serve as permanent General Counsel for the Board. Abruzzo previously served as Deputy General Counsel and Acting General Counsel at the Board. Her nomination was sent to the Senate on February 17, and on July 13, the Senate voted largely along party lines to advance her nomination. This came after the Senate Health, Education, Labor and Pensions Committee in May deadlocked 11-11 on whether to approve her for the post. The NLRB publicly welcomed Abruzzo as General Counsel on July 22, 2021, noting it “marks the first time in NLRB history women are serving as both Chairman and General Counsel.”

C. Rescission of Former General Counsel Robb’s Memoranda

On February 1 and 2, 2021, Acting General Counsel Peter Sung Ohr swiftly rescinded ten General Counsel Memorandums and two Operations-Management Memoranda issued by former General Counsel Peter Robb.

In Memorandum GC 21-02², AGC Ohr emphasized that the policy of the Act is to encourage collective bargaining and protect workers’ rights. Thus, he determined “that a number of outstanding General Counsel Memoranda are either inconsistent with the above-described policies and/or Board law or are no longer necessary.”

The memoranda rescinded by GC 21-02 are as follows:

- *GC 18-04, Guidance on Handbook Rules Post-Boeing* (June 6, 2018)

Instructed Regions on the placement of various types of employer rules into the three categories set out in *The Boeing Company*, 365 NLRB No. 154 (December 14, 2017).

Rescinded as no longer necessary, which some commentators contended was a first step by Ohr to advocate overturning *Boeing*.

- *GC 18-06, Responding to Motions to Intervene by Decertification Petitioners and Employees* (August 1, 2018)

Required Regions to no longer oppose intervention in ULP hearings by proposed Intervenors who have filed a decertification petition or circulated a document upon which the employer has unlawfully withdrawn recognition based on assertion that the union has lost majority support.

Rescinded as inconsistent with prior practice.

² Available at: www.nlr.gov/guidance/memos-research/general-counsel-memos.

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

[2022 Labor and Employment Law eConference](#)

First appeared as part of the conference materials for the 29th Annual Labor and Employment Law Conference session "NLRB Update"