

31st Annual Labor and Employment Law Conference
Austin, Texas
May 30, 2024

**Recent Developments Under The
National Labor Relations Act**

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

Rod Tanner
Tanner and Associates, PC
Fort Worth, Texas
rtanner@rodtannerlaw.com

Table of Contents

I.	Introduction.....	1
II.	Current Board and General Counsel.....	1
A.	Board Members.....	1
B.	General Counsel’s Initiatives.....	1
C.	Notable General Counsel Memoranda.....	1
i.	GC 24-01: <i>Guidance in Response to Inquiries About the Board’s Decision in Cemex</i> (Nov. 2, 2023).....	1
ii.	GC 24-02: <i>Guidance Memorandum on 2023 Updated Representation Case Procedures</i> (Dec. 8, 2023).....	2
iii.	GC Memorandum 24-03: <i>Report on the Midwinter Meeting of the Practice and Procedure Under the National Labor Relations Act Committee of the American Bar Association Labor and Employment Law Section</i> (March 4, 2024).....	2
iv.	GC 23-04: <i>Status Update on Advice Submissions Pursuant to GC Memo</i> (Mar. 20, 2023).....	3
v.	GC Memorandum 23-05: <i>Guidance in Response to Inquiries about the McLaren Macomb Decision</i> (March 22, 2023).....	5
vi.	GC Memorandum 23-08: <i>Non-Compete Agreements that Violate the National Labor Relations Act</i> (May 30, 2023).....	7
vii.	GC Memorandum 22-04: <i>The Right to Refrain from Captive Audience and Other Mandatory Meetings</i> (Apr. 7, 2022).....	9
D.	Challenges to the Constitutionality of the NLRB.....	10
III.	Notable Board Decisions.....	11
A.	Union Strike Expenses.....	11
B.	Protected Concerted Activity.....	12
C.	Deference to Joint Grievance Panel Decisions.....	15
D.	Status Quo and Past Practice.....	16
E.	Union Recognition and Bargaining Orders.....	18
F.	The <i>Wright Line</i> Standard and Remedy.....	19
G.	Employer Handbook Rules.....	20
H.	Independent Contractor Status.....	22
I.	Potential Remedies for Repeated or Egregious Labor Violations.....	22
J.	Severance Agreements.....	24
K.	Off-Duty Workplace Access for Employees of Contractors.....	24
L.	Employee Participation in Unfair Labor Practice Investigations.....	25
M.	Standard for Determining Appropriate Bargaining Unit.....	26
N.	Consequential Damages.....	26

O.	Make-Whole Remedy in First Contract Bargaining Case	27
P.	Post Expiration Dues Checkoff.....	27
Q.	Decisional Bargaining.....	28
R.	Waiver of Post-Expiration Status Quo.....	29
S.	Dress Code and Uniform Policies.....	29
IV.	Other Developments	30
A.	NLRB Region 1 Rules That Dartmouth Basketball Players Should be Considered University Employees and Thus Eligible to Hold a Union Election (February 5, 2024)	30
B.	Regional Director Files Complaint Alleging That Misclassification of Employees Is a Section 8(a)(1) Violation	31
C.	NLRB and OSHA Announce New MOU to Strengthen Health and Safety Protections for Workers	31
D.	NLRB’s Newly Issued Final Rule on Joint-Employer Status Is Vacated.....	32
E.	<i>Starbucks Corp. v. NLRB</i> , U.S. Supreme Court -- Section 10(j) Injunction Standard	33
F.	<i>Glacier Northwest v. Teamsters</i> , U.S. Supreme Court -- NLRA Preemption	34
G.	NLRB Issues Final Rule Amending Its Procedures Governing Representation Elections.....	34
H.	NLRB Issues Notice of Proposed Rulemaking on Fair Choice and Employee Voice.....	35
I.	NLRB General Counsel Asks Board to Reinstate <i>Purple Communications</i>	36
J.	The General Counsel Requests Reinstatement of Mandatory Card-Check Recognition Under <i>Joy Silk</i>	36

I. Introduction

This paper summarizes recent developments under the National Labor Relations Act (“NLRA” or the “Act”), including new Board decisions and guidance by the General Counsel. These updates include certain updates to mandatory Division of Advice submissions, confidentiality and non-disparagement restrictions in severance agreements, the enforceability of non-compete agreements, an overhaul of the Board’s long-established union recognition procedure, and the availability of union strike expenses as a remedy.

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. Members 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. Ring was nominated to the Board in April 2018 and served as Board Chairman, leading the Board through January 2021. Former Member Ring was a part of the Republican minority on the Board. With Ring’s departure, the Board ended a 15-month period with all five seats filled. Member Kaplan is currently the only Republican on the Board.

B. General Counsel’s Initiatives

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. Upon assuming her role as General Counsel, she issued several official memoranda to establish her priorities. She has urged the current Board to overturn a number of Trump Board rulings and to challenge certain longstanding practices.

C. Notable General Counsel Memoranda

i. GC 24-01: *Guidance in Response to Inquiries About the Board’s Decision in Cemex* (Nov. 2, 2023)

On November 2, 2023, NLRB General Counsel Abruzzo issued a memorandum seeking to provide further guidance on the Board’s groundbreaking decision in *Cemex*. The memorandum notes that unfair labor practices that occur after a union’s demand for recognition, but before a petition is filed, will be considered when determining whether the election should be invalidated, and a bargaining order should be issued.

The memo states that the union’s demand for recognition can be made to any person who is acting as an agent of the employer, such as a supervisor or manager. Additionally, a demand for recognition can take many forms, such as filing an RC petition, if the union checks the request for recognition box in line 7a of the NLRB petition form and also notes in that same section that the petition serves as its demand.

The memorandum clarifies that while an employer is permitted to ask for proof of majority support, the union is not then *required* to provide it.

The memorandum states that an employer’s RM petition should reference the union’s claimed unit and state the employer’s position regarding the appropriateness of the union’s claimed unit and should provide a description of what the employer believes would constitute an appropriate unit.

The memorandum also addresses situations not covered by the *Cemex* decision, such as situations where an employer has potentially forfeited its right to seek a Board-conducted election. This may occur when an employer has reneged on a prior agreement to bargain based on a showing of majority support, or where the employer had independent knowledge of the union’s majority support but refuses to recognize and bargain with the union. The memorandum states that these types of cases should be submitted to the Division of Advice for analysis.

ii. GC 24-02: Guidance Memorandum on 2023 Updated Representation Case Procedures (Dec. 8, 2023)

On December 8, 2023, GC Abruzzo issued a memorandum outlining the most significant procedural changes ushered in by the Board’s adoption of their 2023 Election Rule that went into effect on December 26, 2023. She explains that the 2023 Election Rule will “meaningfully reduce the time from petition filing to election and expedite the resolution of any post-election litigation thereby achieving the goal of fairly, efficiently, and expeditiously resolving questions concerning representation.”

Relatedly, the NLRB has also published a fact sheet (www.nlr.gov/sites/default/files/attachments/pages/node-9421/2023-r-case-rule-fact-sheet.pdf) and chart (www.nlr.gov/sites/default/files/attachments/pages/node-9421/2023-r-case-rule-chart-comparing-prior-and-new-2023-r-case-procedures.pdf) summarizing the major changes in the election rule.

iii. GC Memorandum 24-03: Report on the Midwinter Meeting of the Practice and Procedure Under the National Labor Relations Act Committee of the American Bar Association Labor and Employment Law Section (March 4, 2024)

The annual midwinter meeting of the ABA Labor and Employment Law Section was held in late February 2024, with its primary purpose being “to discuss and respond to the P&P Committee’s concerns and questions about Agency casehandling processes.” GC-2403 at 1. GC Memorandum 24-03 included the P&P Committee’s written questions and the NLRB’s written responses as prior General Counsels have done. *Id.*

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

[2024 Labor and Employment Law eConference](#)

First appeared as part of the conference materials for the
31st Annual Labor and Employment Law Conference session

"Major Developments Under the NLRA Amid the Resurgence of Organized Labor"