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Changes on the Horizon for the National Labor Relations Board

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A period of inactivity at the top adjudicative level of the National Labor Relations Board (NLRB) may soon be over with the potential appointment of two new Board members. Last week, the President nominated Scott Mayer and James Murphy for appointment to the Board. If Mayer and/or Murphy are confirmed by the Senate, their addition would reestablish a quorum, empowering the Board to issue binding decisions once again.

Although the prosecutorial arm of the agency has continued to function under the leadership of Acting General Counsel William Cowen, progress at the Board level has stalled since earlier this year. This stagnation arose from a lack of a quorum necessary to issue decisions following the removal of former Board member Gwen Wilcox. The Board comprises five members appointed by the President with Senate confirmation. It had been operating with three members, led by a liberal, union-friendly majority including veteran union lawyers Wilcox and David Prouty. However, Wilcox's removal left only two members: Chairman Marvin Kaplan and member Prouty, which rendered the Board unable to fulfill its primary function—setting federal labor law and policy through adjudicative decision-making.

About the New Board Nominees

Regardless of politics and political affiliations, it is undeniable that both nominees bring substantial traditional labor experience to the Board. Mayer, currently Chief Labor Counsel at a major global enterprise, could introduce a much-needed practical, business perspective to the interpretation and application of the National Labor Relations Act. This is especially desired following years of abstract, ideological decisions disregarding valid business interests and practical workplace realities. Murphy, a career NLRB attorney who has served as chief counsel to Chairman Kaplan, could contribute deep institutional knowledge to the Board's case law, practice, and procedures.

Status of Former Member Wilcox

Meanwhile, former Board member Gwen Wilcox remains sidelined after the Supreme Court stayed a court order reinstating her appointment following her removal by the current President. Wilcox continues to challenge the legality of her removal.

Anticipated Changes with a New Board

Several cases are ripe for reversal, with the hope of protecting important business interests and restoring key employer rights, including:

- **Employer rights to prohibit social justice and political insignia in the workplace** by overruling *Home Depot USA, Inc.*, 373 NLRB No. 25 (2024), where the Board protected employees public display of political and social causes on their clothing in the workplace as long as tied to some workplace issue. This dramatically limited employers' ability to regulate political/protest insignia in the workplace that can often be a distraction.
- **Employer rights to discipline or discharge employees for misconduct in the course of otherwise protected activity** by overruling *Lion Elastomers*, 372 NLRB No. 83 (2023), where the Board returned to the setting-specific standards which largely shields employees from disciplinary action for misconduct (e.g., profane, racially inappropriate, and/or sexually inappropriate comments) in the course of protected concerted activity and/or union activity. To many, this ruling significantly impairs employers' ability to maintain respectful, safe, and collegial workplaces even during workplace disagreements or disputes.
- **Employers' interest in setting workplace rules handbook rules** by overruling *Stericycle, Inc.,* 372 NLRB No. 113 (2023), where the Board adopted a strict standard for evaluating the lawfulness of workplace rules. Under that standard, facially neutral work rules that may be reasonably interpreted to restrict Section 7 activity are presumptively unlawful. The Board interprets these rules "from the perspective of an employee who is subject to the rule, economically dependent on the employer, and contemplates engaging in protected concerted activity."
- **Employers' interests in including confidentiality and non-disparagement provisions in severance agreements** by overruling *McLaren Macomb*, 372 NLRB No. 58 (2023), where the Board invalidated severance agreements that contain broad confidentiality and non-disparagement provisions on the guise that such agreements interfere with employees' rights under Section 7 of the NLRA.
- **Employers' right to ensure employees have self-determination** by overruling *Cemex Constr. Materials Pac., L.L.C.,* 372 NLRB No. 130 (2023), which in some cases compels employers to recognize and bargain with unions without a representation election where employees exercise self-determination.
- **Employer speech protections and campaign rights** by overruling Amazon.com, 373 NLRB No. 136 (2024) which outlaws mandatory "captive audience" meetings, and *Siren Retail Corp. dba Starbucks*, 373 NLRB No. 135 (2024), which restricts employers' ability to honestly communicate the practical reality of the impact of unionization on direct employer-employee relationships. Together, those cases attempt to muzzle employers during union organizing campaigns while apparently leaving unions free to say what they want, when they want, and how they want despite the impact on employers, their operations, and their relationships with their employees.

Status of the NLRB's Prosecutorial Arm

The agency continues under Acting General Counsel Cowen while the President's nominee for the agency's lead prosecutor role, management-side attorney and former NLRB attorney Crystal Carey, undergoes Senate confirmation. Carey is expected to pursue an employer-friendly agenda. Meanwhile, in addition to rescinding a plethora of GC memoranda issued by former GC Jennifer Abruzzo, Acting GC Cowen recently issued GC Memorandum 25-05: *Surreptitious Recordings of Collective-Bargaining Sessions as a Per Se Violation of the NLRA*, which is a welcome breath of fresh air to ensure integrity and good faith in the bargaining process.

Four Steps Employers Can Take Now

1. **Comply with Existing Law:** Although many of the decisions issued by the previous Board disregard or minimize important business interests and are biased in favor of unions, those decisions are still the law of the land until they are overturned.
2. **Consult Experienced Labor Counsel:** Engaging experienced labor counsel can help your organization stay updated on legal changes, assess risks, and determine effective strategies for protecting your interests.
3. **Stay Vigilant:** Stay informed and dialed into your organization. Keep the lines of communication open with your employees and continue to explore opportunities to continue to be an employer of choice.
4. **Train Supervisors and Managers:** Ensure they understand the NLRA, protected concerted activity, union activity, and best practices with respect to each. Consider training programs like **CMC's Labor Relations/Collective-Bargaining Masterclass** to keep your leadership teams informed and prepared.