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Light at the End of the Tunnel: Five NLRB Changes Employers Can Anticipate in 2025 and Beyond!

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I have come to know and believe the adage that: *the only thing constant is change*. In less than 30 days, we will bid farewell to 2024. As we usher in 2025 with great expectations, we know that change is on the horizon. And in the context of labor and employment law (and perhaps even labor-management dynamics), sweeping change. Whether you are hoping for change or begrudgingly accepting its imminence, it will occur, and the best way to face it is to be prepared. It is in this spirit that I share five notable changes we can anticipate with the National Labor Relations Board in 2025 and the next four years.

1. **Change of Lead Prosecutor and Prosecutorial Direction**

It would not be surprising if General Counsel ("GC") Abruzzo is removed from her post before we have taken down our holiday lights and decoration. "*Can the incoming President immediately fire the General Counsel? "* you ask. Absolutely, according to the Fifth Circuit. On his first day in office, President Biden fired then General Counsel Peter Robb without cause ten months prior to the end of his term. On challenge in an unrelated unfair labor practice case, *Exela Enter. Sols., Inc. v. Natl. Lab. Rel. Bd.*, 32 F.4th 436 (5th Cir. 2022), the President's authority to remove a GC without cause was affirmed by the Fifth Circuit. Examining the text of the National Labor Relations Act, the Court noted, "no provision of the NLRA protects the General Counsel of the NLRB from removal. Whereas Congress clearly and unequivocally provided removal protections to the Board Members, it did not grant those same protections to the General Counsel. . . the NLRA creates the position of the General Counsel, who 'shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years.' The provision is silent as to any tenure protections. And no other provision in the NLRA limits the removal of the General Counsel."

Biden's removal of then GC Peter Robb was the first time that an NLRB GC had been fired or removed from their post. But, like my grandmother used to tell me, "Do on to others as you would have them do on to you." While firing Abruzzo may seem unfair to some, President Biden opened the door to removal. Therefore, so we can expect the incoming President to skip merrily through that door with his choice of GC in tow while waving the Fifth Circuit's opinion.

Replacing current GC Abruzzo with an employer-friendly, or even more moderate, leader would likely result in the recission or modification of the most sweeping GC memoranda as well as a change in prosecutorial priorities and direction.

There is little doubt that there are some GC memoranda that are so unbalanced they almost beg to be rescinded or significantly modified by an employer-friendly or even-handed administrator. A few notable targets include GC Memoranda 25-02, 24-04, 21-07, and 21-06 regarding remedies and settlement agreements; GC Memorandum 23-02 re Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights; GC Memorandum 23-05 re Guidance in Response to Inquiries about the McLaren Macomb Decision; GC Memorandum 23-08 re Non-Compete Agreements that Violate the National Labor Relations Act; and GC Memorandum 25-01 re Remedying the Harmful Effects of Non-Compete and "Stay-or-Pay" Provisions that Violate the National Labor Relations Act.

The NLRA provides that the General Counsel is responsible for "investigation of charges," "issuance of complaints," and "prosecution of such complaints." Accordingly, we can expect a new GC to reprioritize which cases shall be prosecuted. As is customary for GCs, an Abruzzo replacement will likely announce a new set of business-oriented GC initiatives.

2. **Change in the Board's Composition**

With the Senate recently failing to end the debate on NLRB chairperson Lauren McFarren's nomination and confirm her for another 5-year term, employers have greater hope that the Board's makeup may shift toward a conservative majority, which many believe could benefit businesses. However, hold off on any celebrations just yet. There remains a slim chance that her nomination is still confirmed. If McFarren is not confirmed, her term will end in less than a week, on December 16. This would allow the incoming President to appoint someone to her position as well as to the currently vacant seat. Many anticipate that these appointments will likely lean conservative, which – alongside member Kaplan – could restore a business-friendly majority on the Board. Some also speculate that Kaplan may be appointed Acting chairperson, which has occurred before. In the interim, we may witness a surge of Board decisions in the coming days, particularly in light of McFarren's uncertain confirmation.

3. **Restoration of Employee Self-Determination**

A reconstituted Board will certainly have its set of priorities, which will likely include overruling *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023), which made it easier for unions to gain representational rights without employees' self-determination exercised in a secret ballot election. A new GC could also rescind or modify GC Memorandum 24-01 regarding Guidance in Response to Inquiries about the Board's Decision in Cemex Construction Materials Pacific, LLC.

4. **Restoration of Employer Speech Protections and Campaign Rights**

We can also expect a newly constituted Board to overrule Amazon.com, 373 NLRB No. 136 (2024) which outlawed 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.

5. **Restoration of Agreements with Broad Confidentiality and Non-disparagement Provisions**

Good-bye *McLaren Macomb*. Hello freedom of contract. In *McLaren Macomb*, 372 NLRB No. 58 (2022), 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. The Board's decision, which seems to overlook several valid safety and business justifications for such provisions, weakened the ability of parties to negotiate terms that benefit both sides, especially when significant consideration is exchanged. While there are fundamental rights that should not be forfeited through contracts—regardless of how favorable the financial terms may seem — *McLaren Macomb* failed to adequately consider, discuss, and protect legitimate business interests. Specifically, it did not give enough weight to the employer's right to condition the receipt of a generous severance package on mutually beneficial non-disparagement provisions or agreements that prevent actions potentially harmful to the safety, security, and well-being of employees and employer property. A new GC could revise the existing memoranda that followed *McLaren Macomb*, carefully select cases for prosecution, and position a strong case for the Board to reconsider the scope and application of *McLaren Macomb's* ruling.

In the Meantime

While the changes to come may not occur overnight, they are sure to arrive. Employers should continue to comply with existing law and seek experienced Labor counsel to determine which matters are worth challenging to change the law. However, knowing what is coming should be empowering to businesses as they enter 2025 with confidence that their business interests and relationship with their employees will be appropriately valued and respected.

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