

## 3 Takeaways From Trump's NLRB Leadership Shake-Up

By Braden Campbell

*Law360 (January 28, 2025, 9:39 PM EST)* -- The firings of National Labor Relations Board member Gwynne Wilcox and general counsel Jennifer Abruzzo will disrupt the agency's operations and ignite a legal battle over the president's power to remove board members, experts say. Here, Law360 looks at these and other takeaways from these consequential personnel moves at the top of the NLRB.

### Disruption Across the NLRB

President Donald Trump's firings of Wilcox and Abruzzo overnight Monday into Tuesday will shake up operations at both components of the bifurcated agency, disabling key functions on the so-called board side and setting the table for a new posture in the Office of the General Counsel.

The general counsel's office takes in unfair labor practice charges at the agency's network of field offices. Investigators and attorneys investigate charges and bring complaints in the agency's in-house court system when they find a charge has merit and the accused party doesn't settle. Prosecutors can guide labor policy by urging the board to adopt certain theories, a power that Abruzzo, a Democrat, used to broaden the board's read of workers' rights under the National Labor Relations Act.

Investigations will proceed as normal with Abruzzo no longer at the helm, but litigation is likely to shift in a more conservative direction.

Abruzzo deputy Jessica Rutter, a former union attorney, succeeded her boss as acting general counsel but is expected to be removed or resign in short order. This would allow Trump to designate a new acting prosecutor to oversee litigation and take steps toward setting more business-friendly policy, including ending certain Abruzzo initiatives.

"There were a lot of things that the former general counsel did that far exceeded what many of us [in the management community] considered appropriate authority ... to extend the law," said Michael Lebowich, the co-head of the labor-management relations group at Proskauer Rose LLP.



NLRB litigation is likely to shift in a more conservative direction following President Donald Trump's firing of general counsel Jennifer Abruzzo, shown here in Washington, D.C. Trump also removed board member Gwynne Wilcox. (Photo by Bill O'Leary/The Washington Post via Getty Images)

Among other things, Abruzzo's Republican successor is likely to walk back efforts to set worker-friendly precedents in several areas the board did not address during her tenure, seek lighter remedies and develop vehicles for reversing Biden-era NLRB precedents, Lebowich said.

On the board side, the firing of Democratic member Wilcox will be more of an obstruction because it drops the panel below the three-member quorum it needs to finally resolve cases the general counsel's office brings. Without Wilcox on the board, Republican Chairman Marvin Kaplan and Democratic member David Prouty may continue analyzing appeals of administrative law judges' preliminary decisions, but will not be able to resolve these cases by issuing orders and petitioning federal appeals courts to enforce them. The two-person board will also be unable to affirm decisions certifying unions' representation election wins.

Former NLRB Chairman Mark Gaston Pearce said the lack of a quorum on the NLRB "magnifies the flaw in the act" that workers have no recourse to challenge labor violations without the board.

"I think what this administration is probably trying to do is that until the president gets his people in there, he doesn't want the board to be able to make any more decisions," said Pearce, the executive director of the Workers' Rights Institute at Georgetown University Law Center. "If that process is protracted, nothing can be done."

Lebowich said the lack of a quorum has the potential to give a lot of "short-term relief" to employers, delaying rulings in unfair labor practice cases and allowing — and perhaps even enticing — them to delay negotiating with new unions.

"But the longer term impacts of a complete standstill at the board are really an uncertainty that can cause a lot of difficulty in the long run," notably by delaying changes to precedents employers oppose, Lebowich said.

Wilcox's removal may continue to hamper the agency even after Trump taps new members to fill the vacancies, former NLRB member Wilma Liebman said. Parties seeking to escape orders the board issues while Wilcox's expected firing challenge is pending may argue her absence swayed the outcome, which appeals courts could find persuasive.

"You could argue ... it taints the decision-making, the fact that she unlawfully was fired and wasn't present to participate," Liebman said. "I think that's a fairly strong argument."

## **A Legal Fight Brews**

Wilcox's unprecedented firing presents a test of an evolving theory of the president's power to remove NLRB members.

A number of employers have brought suits over the last year-plus alleging that the NLRB is unconstitutional in various ways, including that language allowing presidents to fire NLRB members only "upon notice and hearing, for neglect of duty or malfeasance in office" infringes on the president's power to remove executive officials. This claim rests on the so-called unitary executive theory, which argues that the Constitution gives the president unfettered control over executive branch appointees.

Wilcox has pledged to challenge her firing in court, and unions and progressive advocates may join her.

Alexander MacDonald, a shareholder at management-side firm Littler Mendelson PC and member of the firm's Workplace Policy Institute, said those suits will likely come in district court and seek orders returning Wilcox to her job on the theory that her firing violated the NLRA.

These cases will implicate two questions: Can the president point to "neglect of duty or malfeasance in office" justifying Wilcox's firing, and if not, is this removal standard constitutional? Each question is convoluted for different reasons, MacDonald said.

"This [firing of a sitting NLRB member] has not happened before, and so we don't have good guidance from the court on what these different statutory phrases mean," MacDonald said. For example, judges will be treading new ground when they decide how much evidence the president must muster to prove malfeasance or what constitutes valid notice, he said.

The answer to the constitutionality question appears to be "yes" — for now. In a case with direct application to the NLRB, the U.S. Supreme Court held in 1935 that language limiting the president's power to remove members of the Federal Trade Commission was constitutional. But the court's ruling in *Humphrey's Executor v. United States*, where the justices found that Congress can shield members of multimember independent agencies that boast a mix of legislative and judicial powers, may be in danger 90 years later.

MacDonald likened *Humphrey's Executor* to Chevron deference, a doctrine for interpreting agency rules that the Supreme Court ditched last year. Like the ruling in *Chevron v. Natural Resources Defense Council*, *Humphrey's Executor* has drawn criticism among some academics for shaky reasoning, and some courts of appeal have echoed them while deferring to the Supreme Court. But so far, the high court hasn't taken the issue back up.

"Now we have a case where a principal officer who is a member of a multimember independent agency [intends to challenge their firing], ... which means this is probably the best or the most clearly this issue has been teed up," MacDonald said.

### **Chaos May Loom**

Wilcox's unprecedented firing may signal a broader disregard for NLRB norms within the second Trump administration that may persist past the immediate future.

"Their aim is, I assume, more to cause chaos and frustrate the board's operation rather than to be able to successfully change the law in businesses' favor," Liebman said.

Presidents typically make their mark on federal labor policy by filling vacancies with members of their own party, who can shift case law in precedential decisions once they make up the majority. Often, changes in NLRB control lag behind changes in presidential administrations because incumbents' terms don't immediately expire.

This was not the case for Trump, who could have formed a new majority by seating Republicans in the board's two Inauguration Day vacancies. Given this dynamic, Wilcox's removal suggests the president may have acted not to influence the board, but to stymie its operation, Lebowich said.

"In the Obama administration, the board lost its quorum for different reasons, and that created a very

long backlog and it created significant uncertainty, and I think that is perhaps what they're looking to do," Lebowich said.

If the administration takes its time seating new members, that will confirm the disruption was its goal, Liebman said.

Wilcox's removal may bode poorly for another long-held norm: the practice of allocating board seats between the parties. While the NLRA does not call for a partisan split, presidents and Congress have followed a practice of appointing three members of the president's party to the NLRB and two members of the party out of power.

"I strongly suspect that if [Trump] is not going to honor the language of the statute, he is not going to honor the practice that has existed for close to 90 years of a 3-2 board," Pearce said.

And to the extent Wilcox's firing is upheld, the president's move will have established a precedent for future administrations to oust incumbent NLRB members at will, Lebowich said. This could expedite the partisan policy swings that typically follow changes in presidential administrations, or it could simply set a new cadence by changing the existing dynamic, Lebowich said.

For example, the board typically puts out a spate of major decisions when one of its members' staggered terms is about to expire. Tying board members' terms to those of the presidents who appointed them could remove this pressure to act, Lebowich said.

"That's going to create its own dynamic that we're all going to have to get used to," Lebowich said.

--Editing by Abbie Sarfo and Nick Petruncio.