

## Acting NLRB GC Signals New Era With Guidance Memo Purge

By **Tim Ryan**

*Law360 (February 18, 2025, 9:05 PM EST)* -- Acting National Labor Relations Board general counsel William Cowen took an expected first step toward altering the agency's trajectory when he moved to rescind some of his predecessor's highest-profile initiatives, but more lasting changes might require President Donald Trump to nominate a new general counsel and board members.

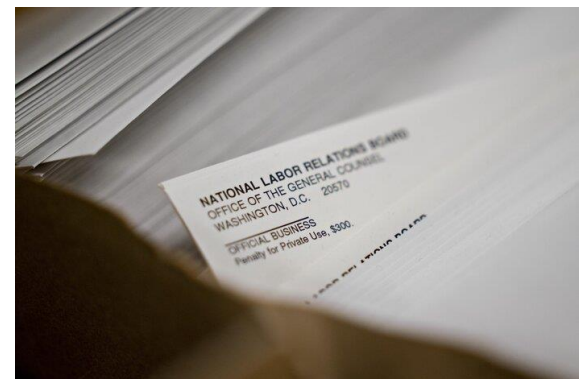
Trump tapped Cowen to serve as acting general counsel Feb. 3, soon after firing Jennifer Abruzzo — an appointee of former President Joe Biden — and her short-term replacement, Jessica Rutter. Cowen's first major act in office was to rescind a series of guidance memos Abruzzo issued during her tenure that shaped how the board operated and laid out the theories agency prosecutors pursued in cases.

Cowen's rescission of Abruzzo's memos was an anticipated step, and the particular guidance he walked back was not surprising, said Adam Lupion, who represents employers as co-chair of Proskauer Rose LLP's labor and employment law department. As for his next actions, Lupion said, acting general counsel are typically reserved in charting new directions in labor law as opposed to their Senate-confirmed counterparts, so it might take longer for bigger changes at the board to come about.

"What the acting GC is doing now is allowing whoever the next permanent GC is to operate from a clean slate without the weight of the Biden board's initiatives on his or her shoulders at the time when the GC assumes office," Lupion said.

Trump's move to fire Abruzzo was long expected after Biden became the first to fire an NLRB general counsel before the expiration of their term when he ousted Peter Robb from the position on Inauguration Day in 2021. Trump even defied most observers' expectations by not immediately firing Abruzzo upon taking office, instead waiting a week. He also fired former NLRB member Gwynne Wilcox the same day in a move that will test the limits of removal protections for officials at independent federal agencies.

The NLRB general counsel plays an instrumental role in the direction of federal labor law by presenting specific issues to the board through the legal theories the office pursues in the cases it chooses to prosecute. The general counsel oversees the regional offices that investigate and prosecute



Cowen rescinded memos instructing regions to seek expanded remedies in cases and stating former general counsel Abruzzo's view that certain severance and noncompete agreements violate workers' rights under the NLRA, among other guidance. (Andrew Harrer/Bloomberg via Getty Images)

unfair labor practice charges and conduct union representation elections.

During her three-plus years in office, Abruzzo pursued numerous legal theories that proposed union-friendly shifts to federal labor law, such as altering the standard for the board to issue bargaining orders, banning so-called captive audience meetings, and declaring that noncompete agreements and similar language violate the National Labor Relations Act. Like general counsel before her, Abruzzo often laid out new theories in memos to the regional offices instructing them on cases to pursue and how to prosecute them.

While the memos themselves did not hold the force of law, they did shape the behavior of unions and employers by signaling what types of cases prosecutors would pursue.

The guidance rescinded by Cowen includes memos instructing regions to seek expanded remedies in cases, stating Abruzzo's view that certain severance and noncompete agreements violate workers' rights under the NLRA and asserting that athletes at private universities should be considered employees with union rights.

One of the most significant memos Cowen withdrew was Abruzzo's guidance instructing regions to seek "full relief" when negotiating settlement agreements, said Daniel Pasternak, a partner at Squire Patton Boggs LLP who represents employers. Pasternak said the rescission of the memo will ease settlement negotiations, which should help reduce the backlog of cases Cowen cited when walking back Abruzzo's initiatives.

"It's just going to be easier now to resolve charges through settlement than it previously had been because the region is not going to insist upon full remedy," Pasternak said. "Now the parties can negotiate a reasonable compromise as opposed to having to capitulate on the charge as a condition of settlement."

David Pryzbylski, a partner at Barnes & Thornburg LLP who represents employers, said rescinding Abruzzo's guidance on remedies in settlements will return negotiations to where they were before the Biden board took shape, which will make settlement negotiations move more smoothly and quickly.

"I think by him rescinding those, it's opening the door to the resolution of cases that were frequently resolved in years prior to those memos being issued and in the years since very few, if any were settled," Pryzbylski said.

Lupion of Proskauer said Cowen rescinding Abruzzo's memos, including those laying out theories for how noncompete and other restrictive covenants violate the NLRA, will narrow the scope of enforcement priorities that prosecutors have, meaning lighter workloads for the agency's field offices.

"This should result in fewer prosecutions at the regional level because, according to the current administration, there are less actions that would be deemed violative of the National Labor Relations Act, especially as it pertains to nonunion workplaces," Lupion said.

Despite taking over the general counsel's role during an uncertain time, Cowen is coming into office with a precedent to follow. After Biden fired Robb in 2021, he appointed longtime board official Peter Sung Ohr as acting general counsel, and Ohr moved quickly to rescind the memos Robb issued while in office. Ohr also went a step further and issued a memo to regional directors in March 2021 stating his view that the NLRA protects workers who raise concerns about race discrimination and social justice.

Cowen is a longtime agency veteran, having worked at the board for six years after law school before returning in 2002 when then-President George W. Bush picked him to serve briefly on the NLRB. Cowen most recently served as director of the board's Los Angeles regional office.

Jerry Hunter, a senior counsel at Bryan Cave Leighton Paisner LLP and a former NLRB general counsel, said that how free Cowen feels to act will depend on guidance he received from the White House. There is nothing that inherently limits the acting general counsel's powers as compared to a Senate-confirmed counterpart, Hunter said, and Cowen has lengthy experience at the agency that would make him capable of pursuing initiatives if he sees fit.

"I think it's going to be based on what his understanding was with the White House when he was appointed," Hunter said.

Hunter also said Trump's eventual nominee to serve as general counsel might not have an easy time getting through the Senate, and Cowen might exercise more power if he is in line for a long tenure as acting general counsel.

Allyson Belovin, a partner at Levy Ratner PC who represents unions, said she hopes that Cowen takes a cautious approach as he serves without Senate confirmation and does not take actions that would push the agency's direction too dramatically.

"The acting general counsel has spent many years working for the NLRB in various capacities, and I would hope that because of that experience he cares about the agency and believes in the mission of the agency and takes actions that are consistent with that," Belovin said.

Hunter said he would expect Cowen to review outstanding cases on which his predecessor gave advice and decide whether to continue pursuing those matters. Cowen can withdraw complaints issued before he took office, especially if they have not gone to a hearing before an administrative law judge, and might choose to do so in cases concerning some of Abruzzo's more controversial initiatives, Hunter said.

Trump's decision to fire Wilcox does stand out as a major limiting factor over Cowen's time in office, however. With only two members on the panel, the board lacks a quorum and cannot issue decisions under the U.S. Supreme Court's 2010 decision in *New Process Steel LP v. NLRB*.

Cowen will oversee the regional offices, which still have power to prosecute cases, and administrative law judges can still hear and decide cases, though none of the decisions will become final without a functioning board. Regional offices can still conduct union representation elections, though that power is currently being challenged.

Without a quorum, the board cannot overrule Biden-era precedent, which Belovin said might put more of Cowen's focus on processing cases at the regional level rather than looking at precedent changes before the board.

"If the GC's plan is to bring cases that are going to change the law, that's not going to happen without a quorum at the board," Belovin said. "Unless and until there's a quorum at the board, the law is going to stay what it is."

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