

NLRB Lacks Quorum to Exercise its Authority Following President Trump's Removal of Member; The President Also Dismissed NLRB General Counsel Abruzzo

Alert

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By Grant Mulkey, Ben Parker and Joe Santucci

Late on the evening of January 27, 2025, President Donald Trump removed National Labor Relations Board (NLRB or Board) General Counsel Jennifer Abruzzo from her position, a move that was widely anticipated after former President Joe Biden terminated then General Counsel Peter Robb on the day he was inaugurated. President Trump also removed NLRB Member Gwynne Wilcox from the Board, a move that was not anticipated and which likely will result in a court challenge to the President's removal powers.

It was expected that President Trump would remove General Counsel Abruzzo. Federal appeals courts have upheld the President's authority to remove the NLRB General Counsel prior to the expiration of their term. NLRB Deputy General Counsel Jessica Rutter has been named Acting General Counsel, but it is highly likely that she will be removed in the near future and replaced by an Acting General Counsel appointed by President Trump.

President Trump's removal of Board Member Wilcox was much less expected, even though his transition team previously had suggested (before he took office) that he might consider removing the NLRB's Democratic members. Section 3 of the National Labor Relations Act provides that a member "may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause." Despite this language, President Trump took the unprecedented action of removing Member Wilcox.

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As a result, the Board now has only two members—Chairman Marvin Kaplan and Member David Prouty—and it lacks a quorum to exercise its authority. In *New Process Steel v. NLRB*, 560 U.S. 674 (2010), the U.S. Supreme Court held that the Board must have at least three members to constitute a quorum. Because it lacks a three-member quorum, the Board cannot take any actions, including issuing decisions regarding contested representation elections and adjudicating complaints stemming from the filing of unfair labor practice charges.

WHAT THIS MEANS FOR EMPLOYERS

Employers should continue to adhere to NLRB decisions that remain in effect. There are numerous decisions that the NLRB issued during the Biden administration that employers will seek to have overturned in the coming months and years. The Board cannot overturn any of those decisions until it regains a quorum. And even then, the validity of the Board's actions may be in question if Member Wilcox's removal from the Board is found to be unlawful.

For employers facing a union organizing effort or defending against an unfair labor practice charge or complaint, proceedings before the NLRB Regional Offices and NLRB Administrative Law Judges will continue. The Regional Offices will continue to process representation petitions and investigate unfair labor practice charges, and the Administrative Law Judges will continue to conduct hearings and issue decisions. Parties who receive adverse decisions can still file requests for review or exceptions with the Board, but those requests will not be acted upon until the Board has a third member.

WHAT HAPPENS NEXT

The Board already had two vacancies that President Trump was expected to fill prior to Member Wilcox's removal. President Trump is likely to nominate individuals to fill those vacancies in the coming days and weeks, but those appointments still require Senate confirmation. When at least one of those vacancies is filled, the Board could begin issuing decisions and taking actions again. However, if President Trump nominates a third individual to fill the vacancy caused by Member Wilcox's removal, and her removal was found to be unlawful, then any decisions in which her replacement participated would likely be invalidated.

Member Wilcox has already stated that she will pursue "all legal avenues" to challenge her removal. Any legal action certainly would raise the question of the continued validity of *Humphrey's Executor*, a 90-year-old case in which the Supreme Court upheld a limitation on the president's authority to remove a Federal Trade Commission commissioner from office only for "inefficiency, neglect of duty, or malfeasance in office." The NLRB has previously relied on *Humphrey's Executor* in support of the job protections afforded to NLRB members, pointing to the similarities between the National Labor Relations Act and the Federal

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Trade Commission Act. However, the Supreme Court in recent years has limited *Humphrey's Executor* in both *Seila Law v. Consumer Financial Protection Bureau* (holding that the Consumer Financial Protection Bureau's director does not have constitutional removal protections) and *Collins v. Yellen* (holding that the Federal Housing Finance Agency director does not have constitutional removal protections). Were the Supreme Court to uphold Member Wilcox's removal, it could effectively—if not explicitly—overrule *Humphrey's Executor*. Such a decision could have far-reaching implications across many federal administrative agencies.

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CONTACTS

Grant E. Mulkey

R. Benjamin (Ben) Parker

Joseph E. Santucci, Jr.

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