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GC Nominee Likely Has Employer-Friendly NLRB Priorities

Related Attorneys

Michael J. Shoenfelt

Rebecca L. Hill

Jacob C. Semus

Related Services

Labor and Employment

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Michael Shoenfelt, Rebecca Hill and Jacob Semus — attorneys in the Vorys Columbus office and members of the labor and employment group — authored an article for *Law360* titled "GC Nominee Likely Has Employer-Friendly NLRB Priorities." The full text of the article is included below with permission from *Law360*.

GC Nominee Likely Has Employer-Friendly NLRB Priorities

In March, President Donald Trump nominated Crystal Carey for the position of National Labor Relations Board general counsel. If the U.S. Senate confirms her nomination, Carey, who is an experienced labor relations practitioner, will oversee the investigation and prosecution of alleged labor violations across the country.

Carey will also issue memoranda setting the board's agenda for changes to labor policy, as well as clarifying its enforcement priorities.

Carey is specifically likely to prioritize reversing some of the Biden-era board's most employer-adverse decisions, including by seeking changes that expand permissible employer speech, reinstate procedural steps to achieving unionization, and avoid conflict between employer obligations under federal labor law and federal anti-discrimination law.

Carey is an NLRB veteran, having joined the agency in 2009 immediately after graduating from Penn State Dickinson Law. Carey's NLRB tenure included approximately three years as a field attorney, three years working in the Office of Appeals, and three years working as senior counsel to Republican board member Philip Miscimarra, who was appointed to the NLRB by President Barack Obama in 2013.

Miscimarra joined Morgan Lewis & Bockius LLP in February 2018, and Carey followed him to the firm in April of that year. She has worked there since. Carey also serves as co-chair of the Development of the Law Under the NLRA Committee in the American Bar Association's labor and employment section.

Carey's nomination is an indicator of the Trump administration's intent to implement employer-friendly changes to the board's operations. In January, Trump fired board member Gwynne Wilcox[1] and general counsel Jennifer Abruzzo[2] — both appointed by President Biden. In Februrary, Abruzzo's temporary replacement, acting general counsel William Cowen, quickly revoked almost three dozen of Abruzzo's memoranda.[3]

Carey's Potential Priorities

Carey's advocacy on behalf of management during her time in private practice could provide some clues as to which board precedents she may aim to reverse or modify as general counsel.

In comments at an ABA panel last year, Carey posited that the board's November 2024 decisions in Amazon.com Services LLC[4] and Siren Retail Corp., doing business as Starbucks,[5] show that the Biden-era board was "looking to completely eliminate the rights of employers to have these conversations at all." Such public comments suggest that reversing or modifying the Amazon and Starbucks rulings may be toward the top of her enforcement priorities.

The Amazon ruling overturned 75 years of board precedent, established by the NLRB's 1948 ruling in Babcock & Wilcox Co.,[6] which allowed employers to conduct captive audience meetings. These are mandatory, on-the-clock meetings at which the employer shares its views on unionization.

Captive audience meetings have long been a powerful part of the employer's tool kit when facing unionization efforts. But in the Amazon ruling, the board reversed course and held that mandatory captive audience meetings are unlawfully coercive exercises of employer power that violate Section 8(a)(1) of the National Labor Relations Act.

Around the same time the board's Amazon ruling limited the avenues for employers to express their views on unionization, it also restricted the content of that same speech in the Starbucks ruling.

Since the NLRB's 1985 ruling in Tri-Cast Inc.,[7] employers have been allowed to make generalized predictions about the negative impact unionization will have on the ability of employees to communicate directly with management. But in its Starbucks ruling, the board announced that generalized predictions are not categorically protected and that employer statements will be analyzed on a case-by-case basis.

If the Starbucks ruling remains the law, employers will have to exercise increased caution when crafting campaign messages or risk drawing unfair labor practice charges.

Carey may also target the board's decisions regarding the standard applied when determining whether additional employees must be included in a petitioned-for bargaining unit. In 2017, the board in PCC Structurals Inc.[8] reversed its 2011 Specialty Healthcare & Rehabilitation Center of Mobile ruling,[9] an employee-friendly, Obama-era precedent that held that groups of employees who are argued — typically by the employer — to be wrongfully excluded from the bargaining unit must share an "overwhelming community of interest" with the already-proposed unit in order to be added to the unit.

In the PCC ruling, the board returned to the traditional standard, requiring only a "community of interest" to expand the proposed bargaining unit. While practicing at Morgan Lewis in 2020, Carey represented PCC Structurals in proceedings after the board's 2017 decision, arguing that the new standard was being misapplied.

In 2022, the Biden-era board reversed the PCC ruling with its decision in American Steel Construction Inc.,[10] and returned to the previously overturned Obama-era standard. Given Carey's familiarity with the issues, and the back-and-forth movements of the board on this topic, Carey may well seek a return to the PCC standard.

Other high-impact precedents Carey may address include the following.

Cemex Construction

In its 2023 decision in Cemex Construction Materials Pacific LLC, the board made two significant changes.[11]

First, the board reduced employers' ability to call for an election when presented with authorization cards signed by a majority of employees. Under the Cemex ruling, an employer has two weeks to either recognize the union or petition for an election.

Second, the Cemex ruling significantly lowered the threshold for issuing a bargaining order as a remedy for an employer's unfair labor practices during a union campaign. Under the old standard set out by the U.S. Supreme Court in NLRB v. Gissel Packing Co. in 1969,[12] bargaining orders were reserved for egregious violations that made a free and fair election impossible.

The typical remedy was to rerun the election. Now, the board may order employers to bargain with the union after committing a single unfair labor practice, rather than rerunning the election.

Carey notably criticized the Cemex ruling in a 2023 blog post she co-authored with former Republican board members Miscimarra and John Ring. They wrote, "[e]mployers and employees will find the new rules in Cemex to be dramatic changes that will result in mandatory union recognition in a large number of cases with no employee voting in NLRB-conducted secret ballot elections" and called Cemex "a watershed moment in US labor-management relations law."

Carey's comments indicate that she views Cemex as a sea change in several fundamental aspects of labor law, suggesting that she will seek a return to the previous standards. Cemex was among the most high-profile of the Biden-era board's decisions, so whether and how quickly Carey targets it as ripe for reversal could be a litmus test for just how employer-friendly this board will be.

Lion Elastomers

In Lion Elastomers LLC in 2023, the board reversed a short-lived precedent,[13] 2020's General Motors LLC,[14] and returned to a standard that insulates employees from discipline if they engage in abusive, profane, discriminatory, harassing, or otherwise inappropriate speech or behaviors in the course of engaging in concerted activity. The board has dismissed possible contradictions between behavior allowed by the Lion Elastomers ruling and employers' obligations to implement and enforce policies necessary to

maintain harassment-free workplaces required by federal anti-discrimination law.

Carey was likewise critical of the Lion Elastomers ruling in a blog post she co-authored with former members Harry Johnson and Ring, highlighting the tension between employers' need to maintain civil workplaces free of illegal harassment and the board's allowance of abusive conduct by employees when engaging in concerted activity protected by the NLRA. These observations suggest Carey disagrees with the former board's allowance of abusive conduct and will look to bring cases that either limit or outright overturn the Lion Elastomers ruling.

McLaren Macomb

In 2023, the board in McLaren Macomb held that severance agreements that limit the use of common confidentiality and nondisparagement provisions violate the NLRA.[15] The decision resulted in so much confusion for employers that Abruzzo quickly issued a memorandum explaining the decision and providing guidance to employers.

Although the memorandum explaining the decision was rescinded by Cowen in February, the board's decision in McLaren Macomb remains good law and binding board precedent. Carey tracked this case extensively, writing multiple blog posts about it, as well as the general counsel memoranda providing related guidance.

In one 2023 blog post, Carey noted under the McLaren Macomb ruling an employer violates the NLRA if it "merely proffers employees a severance agreement with terms that would restrict employees' rights to … communicate with others about their employment." Thus, it is possible Carey will focus on the McLaren Macomb precedent again during her tenure as general counsel.

Back to Basics?

We can also expect Carey to refocus the board's field offices toward completing the NLRB's nuts-and-bolts tasks of conducting elections and investigating unfair labor practice charges. Cowen framed his decision to revoke Abruzzo's memos as part of a return to the basics, noting in his memo that the board's backlog of cases is "no longer sustainable" in light of an "ever-increasing workload."

The board's own statistics bear out his point. 2024 saw a 12% increase[16] in election petitions filed by unions and a massive 688% increase[17] in election petitions filed by employers, compared to 2023. Carey will likely continue Cowen's efforts to conduct the NLRB's basic business in a timely fashion.

Assuming Carey is confirmed by the Senate, we can expect her to identify and prosecute cases with the aim of expanding permitted employer speech, reducing incentives for employers to recognize unions without an election, and alleviating potential conflict between employers' obligations under the NLRA and federal antidiscrimination and antiharassment laws.

[1] https://laborblog.vorys.com/the-nlrb-saga-continues-gwynne-wilcox-re-reinstated-as-nlrb-member-then-reinstatement-stayed-by-scotus.

[2] https://laborblog.vorys.com/president-trump-fires-acting-nlrb-general-counsel-and-names-william-cowen-as-replacement.

[3] https://laborblog.vorys.com/ushering-in-a-new-era-nlrb-acting-general-counsel-revokes-memos-from-predecessor.

[4] Amazon.com Services LLC , 373 NLRB No. 136 (2024).

[5] Siren Retail Corp. , 373 NLRB No. 135 (2024).

[6] Babcock & Wilcox Co. , 77 NLRB 577 (1948).

[7] Tri-Cast Inc. , 274 NLRB 377 (1985).

[8] PCC Structurals Inc. , 365 NLRB No. 160 (2017).

[9] Specialty Healthcare & Rehabilitation Center of Mobile , 357 NLRB 934 (2011).

[10] American Steel Construction Inc. , 372 NLRB No. 23 (2022).

[11] Cemex Construction Materials Pacific LLC , 372 NLRB No. 130 (2023).

[12] NLRB v. Gissel Packing Co. , 395 U.S. 575 (1969).

[13] Lion Elastomers LLC , 372 NLRB No. 83 (2023).

[14] General Motors LLC , 369 NLRB No. 127 (2020).

[15] McLaren Macomb , 372 NLRB No. 58 (2023).

[16] https://www.nlrb.gov/reports/nlrb-case-activity-reports/representation-cases/intake/representation-petitions-rc.

[17] https://www.nlrb.gov/reports/nlrb-case-activity-reports/representation-cases/intake/employer-filed-petitions-rm.

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