

Harris or Trump? Labor law could change dramatically, depending on the outcome.

by [Colin Finnegan](#)
[Kansas City Office](#)

10.30.2024

We are less than one week from Election Day. Regardless of the outcome, the winner is likely to have considerable impact on the National Labor Relations Board and its rules and regulations. Interpretation and enforcement of the National Labor Relations Act, and other labor and employment laws and regulations, can dramatically shift based on the political alignment of the Presidential administration.

NLRB in the balance

The Board when filled has five Members, each requiring Senate confirmation, one designated by Presidential appointment as Chairman. Board seats have varying five-year terms, with historical protocol giving three seats and the Chairmanship to the political party of the President and two seats to the minority party.

Three of the current Members, including the Chairman, are Democrats, and one is a Republican. One seat that's been slotted for a Republican has been left open without a nomination since 2022. Chairman Lauren McFerran's term ends in roughly six weeks, on December 16. It is not clear whether President Biden would attempt to nominate a successor before his own term ends. Thus, regardless of who is elected, the next President may be able to nominate a successor. Whether that nominee is confirmed by the Senate is an open question.

The Board's prosecutor for violations of the Act, called the General Counsel, has a four-year term, but the courts have found that the General Counsel serves at the pleasure of the President. So the newly-elected President will be free to keep or remove current General Counsel Jennifer A. Abruzzo. (President Biden fired Peter Robb, the General Counsel during most of the Trump Administration, almost immediately after taking office in 2021.)

With the "political" composition of the Board pending the results of the 2024 Presidential election, here is a non-partisan view of what employers can expect after January 21, 2025.

Outcome 1: Harris-Walz Administration

President Biden campaigned on being the most “pro-union” president. He has kept that promise throughout his administration. The NLRB under President Biden, in alliance with GC Abruzzo, transformed interpretation of the Act through a series of Board actions and decisions that were adverse to employer interests, established rules that favored organized labor, and fostered and fast-tracked a surge in union organizing activity across the country.

The most notable Biden-era changes include decisions such as [Cemex](#), which puts the burden on the employer to request an election when faced with a demand for recognition; [Stericycle](#), which loosened the standard for whether workplace rules violate Section 7 of the National Labor Relations Act; and rules that significantly shorten the time from representation petition to election, thus giving employees a very short time to hear any of the countervailing message from employers in campaigns. The Board also expanded its reach by prohibiting a broad range of non-disparagement and non-disclosure/confidentiality provisions and policies, while expanding the scope of what is considered to be “protected concerted activity.”

We would expect a President Kamala Harris to retain current GC Abruzzo, who has made clear the direction she would take. For example, [GC Memorandum 25-01](#), issued on October 7, 2024, indicates that the General Counsel will ask the Board not only to find noncompete provisions unlawful, but also to provide additional remedies for employees, including financial “make-whole” remedies for employees subjected to noncompete enforcement. She has also asserted that “stay-or pay” provisions violate Section 7 and 8(a)(1) of the NLRA because they unlawfully restrain employee mobility. GC Abruzzo defines stay or pay as “any contract under which an employee must pay their employer [for example, reimbursing the employer’s costs for training or certifications] if they separate from employment, whether voluntarily or involuntarily, within a certain timeframe.” Although the Board has not yet adopted her approach, her position on this issue provides insight into what we can expect during a Harris Administration.

GC Abruzzo is also likely to continue and increase her efforts to obtain “make-whole remedies” for employees who were victims of unlawful conduct. In her [GC Memorandum 24-04](#) issued on April 8, 2024, she requested that Regions and the Board seek “full make-whole remedies for all employees harmed as a result of an unlawful work rule or contract term, regardless of whether those employees are identified during the course of the unfair labor practice investigation.” The stated rationale is that “the remedy of mere rescission of an overbroad, unlawfully promulgated, or unlawfully applied contract term does not expunge discipline” and therefore “fails to make impacted employees whole.” This is particularly notable because the NLRB in *Stericycle* loosened the standard for determining whether a

work rule is unlawful under the Act. In other words, we can expect more decisions that are adverse to employers, as well as increased remedies for employees.

GC Abruzzo penned [GC Memorandum 22-04](#) on April 7, 2022. She has been attempting for more than two years to prevent employers from holding mandatory “captive audience” meetings in the lead-up to a representation election. The law on this issue has been settled for quite some time in favor of employers. Currently, an employer has the right to require employees on paid working time to attend meetings where the employer (or a labor consultant) presents the employer’s views about the union or the election. In the view of GC Abruzzo, these meetings have a chilling effect on employees’ rights and violate Section 8(a)(1) of the NLRA. Although the Board has not yet adopted her position, we anticipate that she would continue to pursue its adoption during a Harris Administration.

She is also expected to advocate to the Board aggressive application of the NLRA against employers in favor of organized labor in the context of union organizing. One of the key holdings of *Cemex* was that the Board will issue a bargaining order (meaning the employer forfeits its right to have an election) if the employer commits even minor violations of the Act before the election.

Outcome 2: Trump-Vance Administration

Although President Trump has some support from union members, his last administration advanced less of a pro-organized labor agenda than did the Biden Administration. If President Trump wins, he is likely to fire GC Abruzzo promptly, just as President Biden fired Trump’s General Counsel, Peter Robb, in the first few days of the Biden Administration.

A second Trump Administration would be expected to attempt to seat a Board majority that could overrule multiple Board decisions from the Biden era, as well as the General Counsel policy initiatives discussed above. This would, of course, include a return to the [pre-*Cemex* standard](#) for bargaining orders and demands for recognition from unions.

It is also possible that a Republican majority Board would loosen the timetable for representation elections. Currently, a pre-election hearing is typically scheduled eight calendar days from service of the notice of hearing. This of course leads to increased stress for employers and less time to prepare for hearings. Elections must be scheduled for “[the earliest date practicable](#)” after a Regional Director’s decision and direction of election.

Before the current timetable was adopted, the Board scheduled elections to take place 20 business days after the decision and direction of election. It is fair to assume that a Republican-majority Board would revert to these prior regulations.



If President Trump wins next Tuesday, a newly seated Board majority is almost certain to come into existence. It bears mentioning, however, that he could not necessarily change the composition of the Board immediately. Doing so could take months, or even years. One complicating factor, as suggested above, is the fact that he cannot replace current Members of the Board until their terms expire. The terms of two Democratic Biden appointees – David Prouty and Gwynne Wilcox – will not expire until August 27, 2026, and August 27, 2028, respectively.

Labor law is somewhat unique, in that it can shift dramatically from one Presidential administration to the next as the Board's General Counsel and the composition of the Board majority change. Employers should be ready for whatever November 5 brings.