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The Board Is A-Changing

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Ongoing changes at the National Labor Relations Board (NLRB) have the potential to significantly impact your company, whether it is unionized or not.

On January 27, 2025, President Trump took the unprecedented step to remove NLRB member Gwynne Wilcox mid-term. While her removal is being challenged in court, the NLRB is left with only two of five filled board seats, meaning the board lacks a quorum. Until this is remedied (either by appointment of new members or by the reinstatement of Wilcox), the NLRB will be limited in certain operations. For example, the board cannot issue decisions, regulations or otherwise take any substantive action that would require NLRB approval.

Simultaneously, confirmation of Trump's nomination for the NLRB General Counsel is needed. By way of background, the General Counsel, among other things, has the power to direct the resources of the agency, issue complaints, and seek reversal of existing precedent. On January 27, 2025, President Trump, as expected, terminated the NLRB's then General Counsel, Jennifer Abruzzo. Shortly thereafter, on February 1, 2025, Abruzzo's acting replacement, Jessica Rutter, was terminated. On February 3, 2025, Trump named William B. Cowen as Acting General Counsel. Then, on March 25, 2025, Trump nominated Crystal Carey to serve as General Counsel. However, Carey's appointment is subject to Senate confirmation, which has not yet occurred.

Cowen has not wasted any time while serving as Acting General Counsel. He quickly rescinded a number of Biden-era memoranda, including but not limited to, memoranda restricting the use of non-compete agreements (GC 23-08 and GC 25-01), and a memorandum that significantly limited which provisions could be contained in severance agreements (GC 23-05). As described below, these changes are significant and affect all employers, regardless of union status.

The NLRB's Restrictions on Non-Compete Agreements

On May 30, 2023, Abruzzo issued GC memorandum 23-08. GC 23-08 claimed that most non-compete agreements violated the National Labor Relations Act (NLRA) by interfering with employees' exercise of rights under Section 7 of the NLRA. Thereafter, on October 7, 2024, Abruzzo issued GC 25-1, in which she, among other things, argued that "make-whole" relief was the appropriate remedy for alleged unlawful non-compete provisions. These memoranda put into question the viability of most non-compete agreements in the United States. However, on February 14, 2025,



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Cowen rescinded GC 23-08 and GC 25-01, thereby removing the NLRB's related restrictions on an employer's ability to enforce non-compete agreements.

Restrictions on Severance Agreements

On March 22, 2023, Abruzzo issued a memo to all field offices that included guidance on the kinds of severance agreement provisions that could violate the NLRA if proffered, maintained or enforced, including confidentiality, non-disclosure, non-disparagement and

other provisions. GC 23-05 severely limited what could be included in severance agreements. However, on February 14, 2025, Cowen rescinded GC 23-05. The rescission of GC 23-05 expands an employer's ability to use broader confidentiality and non-disparagement provisions in their severance agreements.

Importantly, employers must still ensure that their non-compete and severance agreements are compliant with all applicable federal, state and local laws and rules.

Key Takeaways

These rescissions signal a shift in favor of employers. However, the administrative process and subsequent challenges remain ongoing. Therefore, employers should

continue to closely monitor new NLRB developments. Additionally, employers are encouraged to review their existing policies, procedures and employment agreements for compliance with counsel. Phillips Lytle's Labor and Employment attorneys are available for assistance.

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