

Presenting a live 90-minute webinar with interactive Q&A

2022 NLRB Investigations: Bargaining Units, Independent Contractors, Handbooks, Captive Audiences, Arbitration

WEDNESDAY, JULY 13, 2022

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Ryan J. Funk, Partner, **Faegre Drinker Biddle & Reath**, Indianapolis, IN

Sarah C. Yerger, Founder, **Yerger Law**, Camp Hill, PA

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NLRB Update

July 13, 2022

Presented By:

Sarah C. Yerger, Esquire

Yerger Law

(717) 919-5486

sarah@yergerlaw.net



Ryan Funk, Esquire

Faegre Drinker

(317) 237-1131

ryan.funk@faegredrinker.com



Agenda

- **The Biden Board**
- **The Board**
- **Recent NLRB Activity**
- **The PRO Act**
- **NLRB Agenda**
- **Amazon Vote**
- **Starbucks Vote**
- **Preparing for Turbulence: Best practices for union and non-union employers**

A Refresher on the NLRB's Policy-Making Apparatus



The Board – five members appointed by the President:

- Five-year terms, with Senate consent; term of one Member expires each year
- Acts primarily as a quasi-judicial body in deciding cases based on records created in administrative proceedings
- Also has the authority to engage in rulemaking

The General Counsel – appointed by the President:

- Four-year term, with Senate consent; independent of the Board
- Supervises the Regional Offices in the investigation, settlement and litigation of “unfair labor practice” charges
- Oversees the administration of union organizing elections



The National Labor Relations Board

John Ring (R)

- Term expires December 2022

Gwynne Wilcox (D)

- Term expires August 2023

Lauren McFerran (D), Chairman

- Term expires December 2024

Marvin Kaplan (R)

- Term expires August 2025

David Prouty (D)

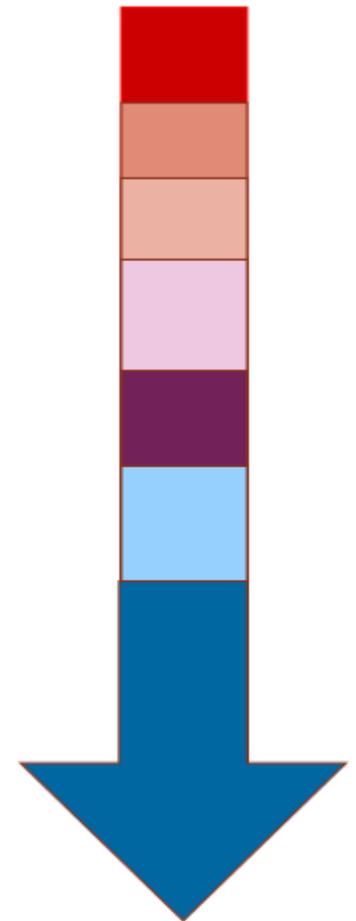
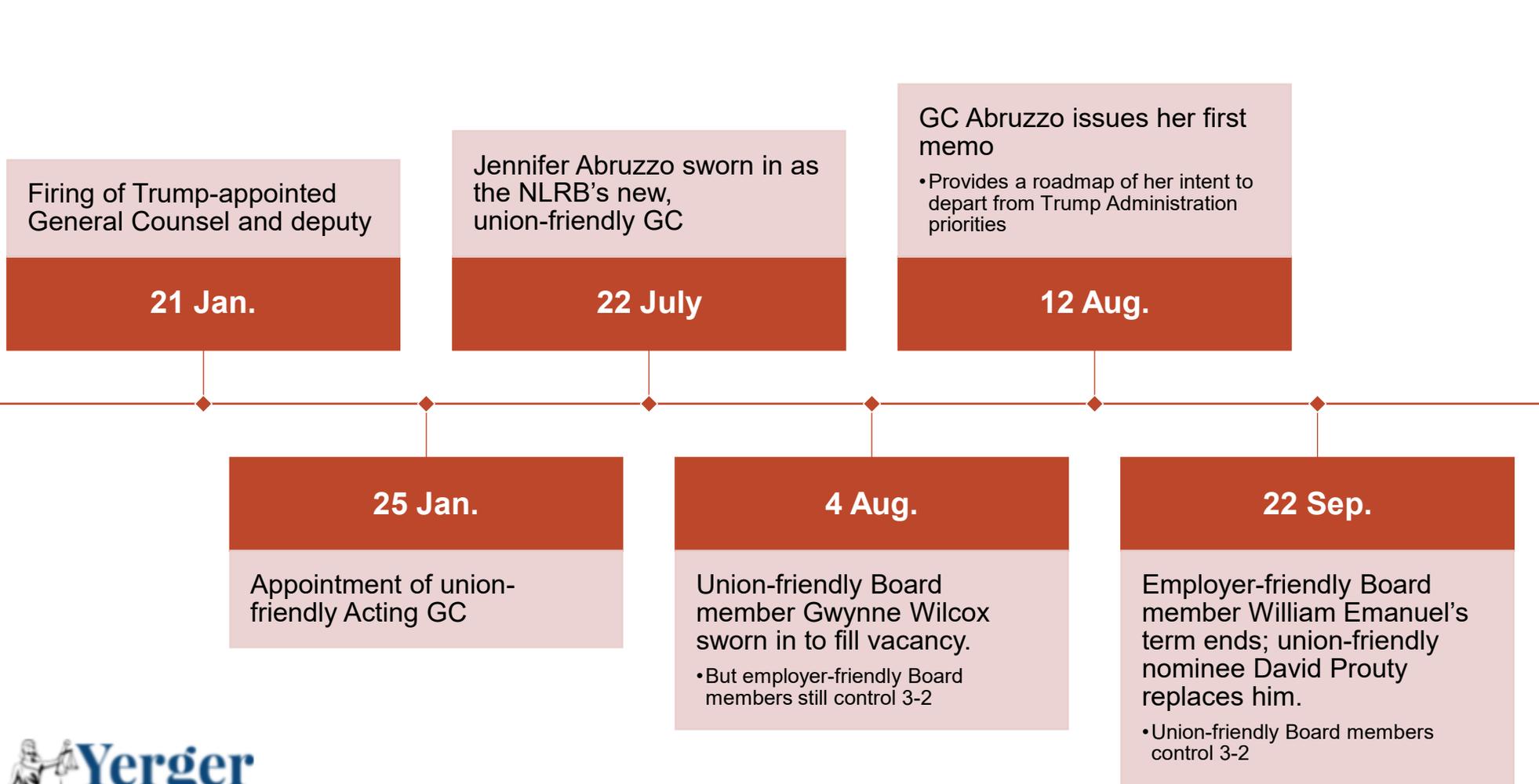
- Term expires August 2026



Image from the NLRB website:

<https://www.nlrb.gov/about-nlrb/who-we-are/the-board>

The National Labor Relations Board



A Change in Administration Prompts Twin Efforts at the NLRB

Undo Prior
Administration's
Initiatives



Jump-Start
New Initiatives



The NLRB Has Three Main Tools



Prosecutorial Discretion: Undoing



On February 1, 2021, the acting GC revoked 10 administrative guidance memoranda issued by his predecessor.

- E.g.: guidance from September 2020 that encouraged the NLRB to adopt a stricter standard for evaluating “neutrality” agreements.

1 Feb. 2021

12 Aug. 2021

On August 12, 2021, GC Abruzzo asked the Agency’s field offices to consult her office on specific “cases and subject matter areas where, in the last several years, the Board overruled legal precedent.”

- “[O]ver the past several years, the Board has made numerous adjustments to the law, including a wide array of doctrinal shifts. These shifts include overruling many legal precedents which struck an appropriate balance between the rights of workers and the obligations of unions and employers.” These include:



Prosecutorial Discretion: New Initiatives

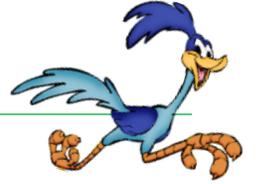
- **GC Abruzzo’s August 12 memorandum also asked the Agency’s field offices to consult her office on “other initiatives and areas that, while not necessarily the subject of a more recent Board decision, are nevertheless ones I would like to carefully examine.” These include:**
 - Weingarten rights to representation in investigations (even in non-union settings).
 - Employer duty to recognize and/or bargain, including where the union presents evidence of a card majority, but where the employer is unable to establish a good faith doubt as to majority status. See Joy Silk Mills, Inc., 85 NLRB 1263 (1949).
 - Employees’ rights to strike and/or picket.
- **On August 19, GC Abruzzo issued a memorandum announcing: “I intend to aggressively seek [injunctive] relief where necessary to preserve the status quo and the efficacy of final Board orders.”**



Prosecutorial Discretion: New Initiatives (Continued)

- **Since then, the GC's office has published memoranda directing the field offices to:**
 - Request from the Board the full panoply of remedies available to ensure that victims of unlawful conduct are made whole for losses suffered as a result of unfair labor practices.
 - Seek the most full and effective relief in **settlement agreements** to ensure workers' statutory rights are vigorously protected.
 - Take the prosecutorial position that certain "Players at Academic Institutions" are employees under the Act and that misclassifying such employees as mere "**student-athletes**" is itself a violation of the Act.
 - "I fully expect that this memo will notify the public, especially Players at Academic Institutions, colleges and universities, athletic conferences, and the NCAA, that I will be taking that legal position in future investigations and litigation under the Act."
 - "[H]old fully accountable those entities that, by targeting **immigrant workers** and their workplaces, undermine the policies of the NLRA and the nation's immigration laws."

Prosecutorial Discretion: A COVID Initiative



On November 10, the GC's staff published a memorandum telling field offices to inform the public that unionized employers must bargain over certain components of the OSHA ETS, like:

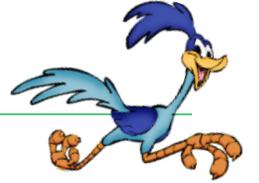
- The option to implement a mandatory vaccine policy or to permit unvaccinated employees to work subject to weekly testing and wearing face coverings.
- The amount of time the employer must give employees to recover from side effects of the vaccine.
- Which party will bear the cost of testing for unvaccinated employees.
- The method for the maintenance of records of employee vaccination status.
- The implementation of the face covering requirement for unvaccinated employees if the employer opts to permit unvaccinated workers to test weekly and wear a face covering.

Adjudication: Undoing

On December 7, the Board invited parties and amici to submit briefs addressing whether the Board should reconsider its standard for evaluating which groups of employees a union can attempt to organize.



Adjudication: New Initiatives



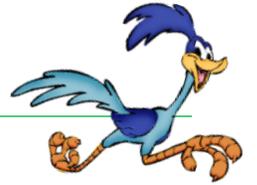
On November 10, the Board invited parties and amici to submit briefs addressing whether the Board should expand its traditional make-whole remedy for employees who are discharged, laid off, or otherwise discriminated against to more fully account for their actual economic losses. The Board will consider whether to establish a practice of awarding a fuller accounting of “consequential damages,” in addition to loss of earnings and benefits, to employees who suffer unfair labor practices.



The Board quietly put plans to issue a notice of proposed rulemaking on its regulatory agenda released at the end of 2021:

- It will engage in rulemaking on the standard for determining whether two employers are a joint employer under the Act.
- Meanwhile, in September a union (the SEIU) filed a lawsuit challenging the Trump Board's joint employer rule.

Rulemaking: New Initiatives



On November 4, the Board published an Advance Notice of Proposed Rulemaking in the Federal Register seeking public input on the continued use of videoconference technology post-pandemic as an option to conduct hearings.

Don't Forget Congress!

A piece of the union-wishlist “PRO Act” passed the House as part of the Build Back Better Bill, which is now before the Senate:

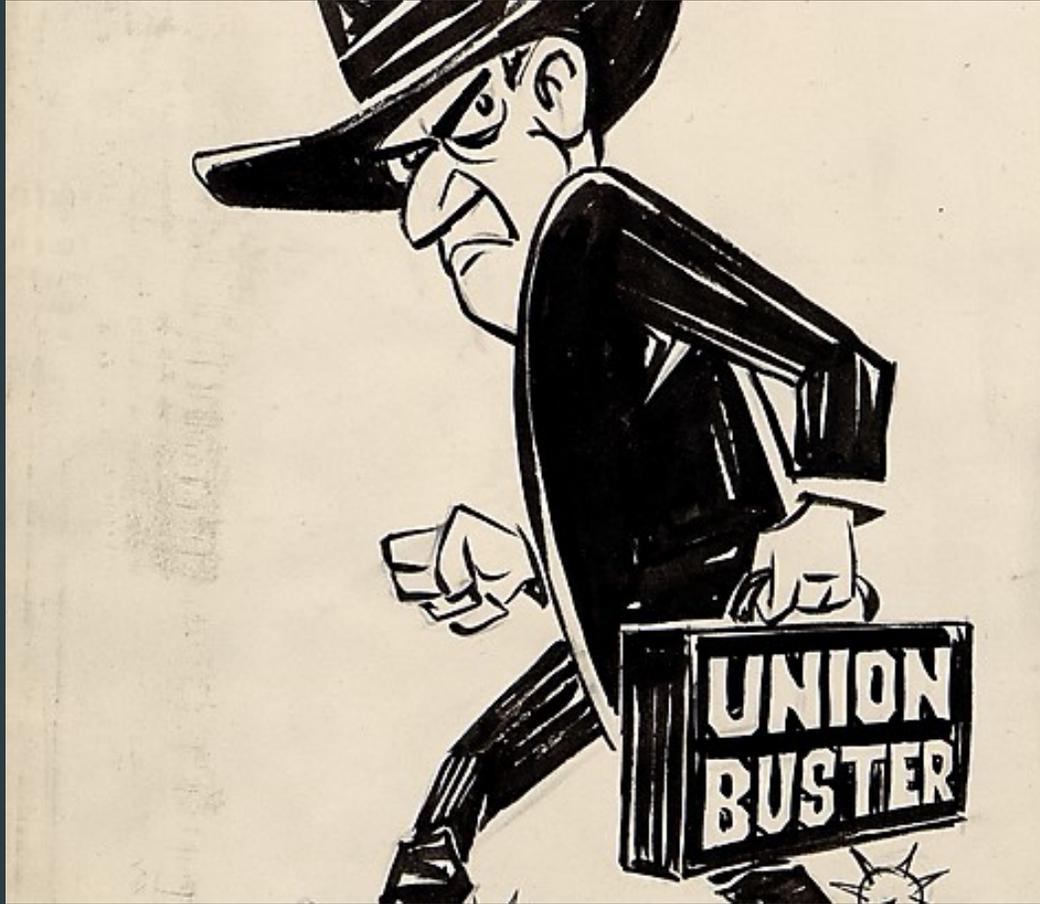
- NLRB could levy up to \$50k fine against employer found to have discriminated against an employee.
- Can be up to \$100k for repeat offenders.
- Directors and officers can be personally liable.
- No fines for unions that violate the Act.



**THE
PRO
ACT =**

WORKER POWER





Pro Act or
Rulemaking -
Return of the
Persuader Rule



Yerger
Law

Joint Employer Rule



Independent Contractors as Employees

▶ ABC employment test - no IC status unless:

A: Worker is free from the control and direction of the hiring entity in connection with the work's performance, both under the contract for the performance of the work and in fact.

B: Worker performs work that is outside the usual course of the hiring entity's business.

C: Worker is customarily +engaged in an independently established trade, occupation or business of the same nature as the work performed.





Captive
Audience
No More!

Work Rules Under A Biden Board

- **HR Policies and Work Rules**

- Since the *Boeing* (2017) decision, the Board has evaluated facially neutral policies or work rules on a case-by-case basis and taken into consideration any business justification for the rule
- Most post-*Boeing* cases have resulted in finding contested rules are valid
 - Work rules that requires confidentiality during workplace investigations are presumptively valid
 - Social media policies requiring employees to be “respectful and professional” are valid if not discriminatorily enforced
 - Rule restricting use of union insignia based on legitimate business justification is valid
 - Rules prohibiting employees from using company email for union activities are valid

- ***What to expect from Biden Board?***

- Will *Boeing* decision stay?
 - *Tesla* decision (March 2021) may provide some light



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Arbitration/ Confidentiality Agreements

- ▶ Epic Systems - prohibit mandatory arbitration agreements



Why Are We Here?





Amazon Unionizes!

Amazon Alabama Election Outcome

- ▶ Retail, Wholesale & Department Store Union obtained enough signatures to petition for recognition
- ▶ Vote was overwhelmingly against union at 738 to 1798.
- ▶ Union has charged that Amazon illegally interfered by threatening layoffs and firing a pro-union employee. Amazon denies the allegations.





AMAZON Union Gains Ground

If coffee can't fix it,
it's a serious problem.



STARBUCKS



Prepare for Turbulence!

- ▶ The confluence of these events means that businesses are likely to see:
- ▶ More Pro-labor decisions from the NLRB
- ▶ An uptick in Union Organizing
- ▶ More aggressive activity from unions in day-to-day contract administration and at the bargaining table





Prepare for Turbulence!

To prepare for these anticipated changes:

- Keep your ears listening to your employees

- Prepare for more scrutiny of handbook policies and work rules

- Train your management teams on positive employee relations and, in unionized workplaces, effective contract administration

Questions?



Sarah C. Yerger, Esquire

(717) 919-5486

sarah@yergerlaw.net



Ryan Funk, Esquire

(317) 237-1131

ryan.funk@faegredrinker.com

