

**UNITED STATES GOVERNMENT**  
*National Labor Relations Board*  
Memorandum



TO: Gwynne A. Wilcox, Board Member  
David M. Prouty, Board Member

FROM: Lori Ketcham,  
Associate General Counsel, Ethics  
Designated Agency Ethics Official

Jamal M. Allen,  
Special Ethics Counsel, Ethics  
Alternate Designated Agency Ethics Official

SUBJECT: Service Employees International Union v. NLRB, Lauren McFerran, John Ring,  
Marvin Kaplan, Gwynne Wilcox and David Prouty, Civil Action No. 21-2443

DATE: October 13, 2021

**Executive Summary**

This memo provides ethics guidance regarding whether Member Wilcox and/or Member Prouty may participate in the Board's consideration of how to respond to the lawsuit filed by the Service Employees International Union against the Board, and its individual members, challenging the NLRB's joint employer rule. As explained in more detail below, the Ethics Office has concluded that under both the relevant government and legal ethics provisions, Member Wilcox and Member Prouty do not have to recuse from consideration of the lawsuit. Additionally, the Ethics Office considered whether there are appearance concerns under the catch-all provision that would warrant recusal. Our recommendation is that Member Prouty's and Member Wilcox's participation would not raise appearance concerns.

**Background**


**A. Board Utilizes Its Rulemaking Authority to Create New Joint Employer Standard**

(b) (5), (b) (7)(A)

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<sup>1</sup>(b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)




**B. Service Employees International Union Challenges Board's Joint Employer Rule**

(b) (5), (b) (7)(A)




(b) (5), (b) (7)(A)




**C. National Right to Work Legal Defense and Education Foundation's Recusal Letter**

(b) (5), (b) (7)(A)




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(b) (5), (b) (7)(A)



<sup>2</sup>(b) (5), (b) (7)(A)



(b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

**D. Member Wilcox**

Member Wilcox was confirmed as a Board member by the U.S. Senate on July 28, 2021. Prior to coming to the Board, Member Wilcox was a senior partner at the law firm of Levy Ratner, P.C., where she also served as Associate General Counsel of 1199SEIU United Healthcare Workers East, one of her former clients. (b) (5), (b) (7)(A)

<sup>3</sup>(b) (5), (b) (7)(A)

<sup>4</sup>(b) (5), (b) (7)(A)

<sup>5</sup>(b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

**E. Member Prouty**

Member Prouty was confirmed as a Board member by the U.S. Senate on July 28, 2021. Prior to coming to the Board, Member Prouty served as General Counsel of SEIU Local 32BJ. (b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

**Analysis**

For purposes of our government ethics analysis, we have evaluated whether Member Wilcox and/or Member Prouty should be recused from participating in the litigation challenging the Board’s joint employer rule under 18 U.S.C. § 208, which is the criminal conflict of interest statute covering conflicting financial interests; the Biden Ethics Pledge (Executive Order 13989); and the Standards of Ethical Conduct for Employees of the Executive Branch regulations (The Standards of Conduct) codified at 5 C.F.R. § 2635.502, covering outside business and personal relationships.<sup>7</sup> Additionally, we have also considered whether recusal is warranted under the relevant legal ethics rules and as a matter of due process and prejudgment.

**A. Government Ethics Analysis:**

**1. 18 U.S.C. § 208**

(b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

<sup>6</sup> (b) (5), (b) (7)(A)

<sup>7</sup> (b) (5), (b) (7)(A)

- (b) (5), (b) (7)(A)
- (b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

Accordingly, because their participation in the litigation would not create a financial conflict of interest, neither Member Wilcox nor Member Prouty must recuse under 18 U.S.C. § 208.

## 2. The Biden Ethics Pledge

Pursuant to Paragraph 2 of the Biden Ethics Pledge, Member Wilcox and Member Prouty have agreed that they “will not for a period of 2 years from the date of [their] appointment participate in any particular matter involving specific parties that is directly and substantially related to [their] former employer or former clients, including regulations and contracts.” (b) (5), (b) (7)(A)

[REDACTED]


(b) (5), (b) (7)(A)

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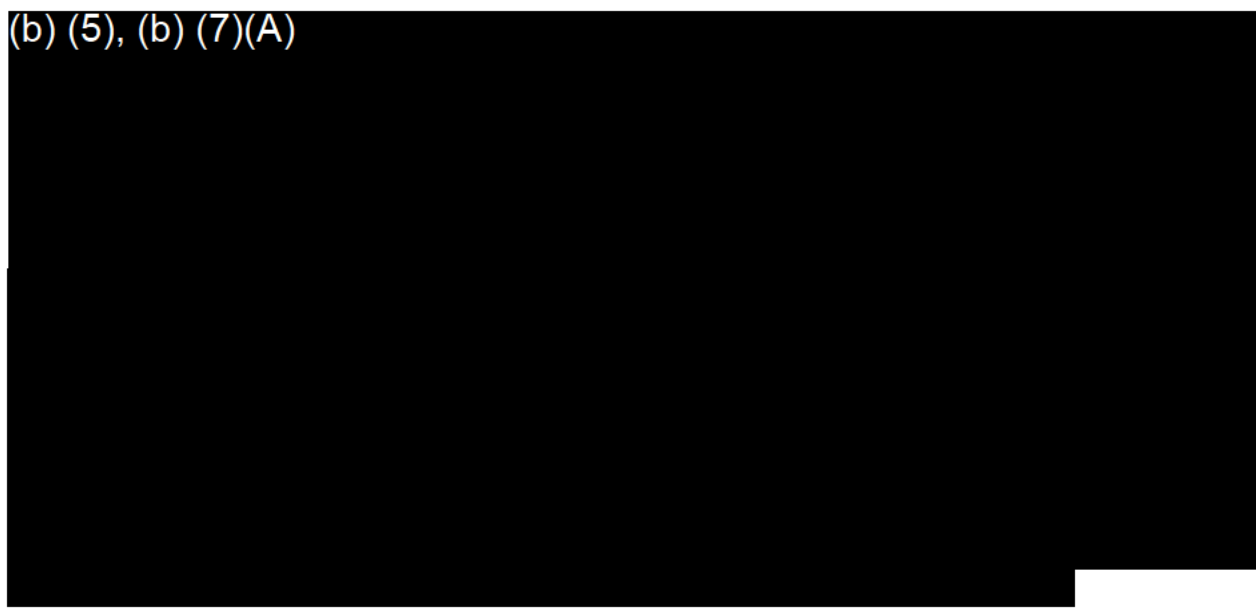
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<sup>9</sup> (b) (5), (b) (7)(A)


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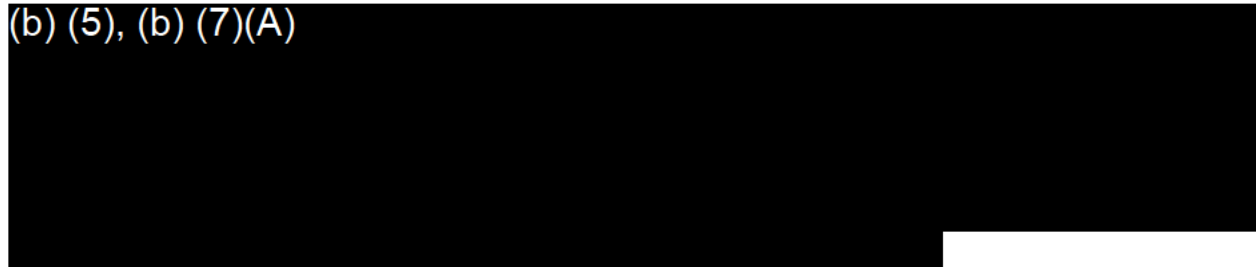
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(b) (5), (b) (7)(A) Members Wilcox and Prouty are not required to recuse from *SEIU v. NLRB* under the Biden Ethics Pledge.

3. **Standards of Conduct**

We have also examined Member Wilcox’s and Member Prouty’s recusal obligations under the Standards of Conduct. The general principles of the Standards of Conduct state that “employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the

[Standards of Conduct]. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.” (5 C.F.R. § 2635.101(b)(14)). (b) (5), (b) (7)(A)

[REDACTED]

(a) Appearance Conflicts based on a Covered Relationship

The regulations at 5 C.F.R. § 2635.502(a)(1) state, with respect to a particular matter involving specific parties, that where an employee knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate unless he has informed, and received authorization from, the agency designee. Pursuant to 5 C.F.R. § 2635.502(b)(1)(iv), an employee has a “covered relationship” with “[a]ny person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee.” (b) (5), (b) (7)(A)

[REDACTED]

(b) Appearance Conflicts based on the Catch-all Provision

(b) (5), (b) (7)(A)

The catch-all provision states that “an employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter.” (b) (5), (b) (7)(A)

[REDACTED]

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<sup>12</sup>(b) (5), (b) (7)(A)

[REDACTED]



(b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

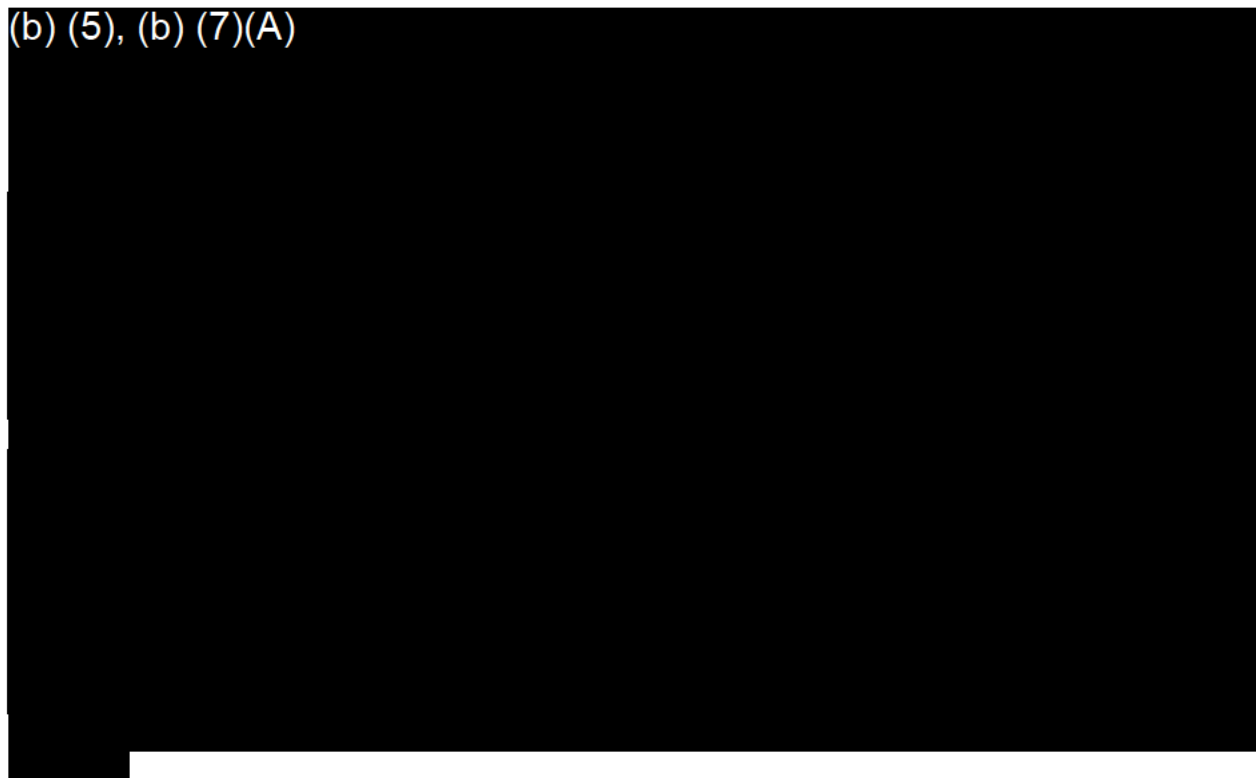
because Member Wilcox and Member Prouty have sought guidance from the Ethics Office, we have made an assessment and recommendation. (b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)


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<sup>13</sup>(b) (5), (b) (7)(A)


(b) (5), (b) (7)(A)



(b) (5), (b) (7)(A)




(b) (5), (b) (7)(A)




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<sup>14</sup>(b) (5), (b) (7)(A)



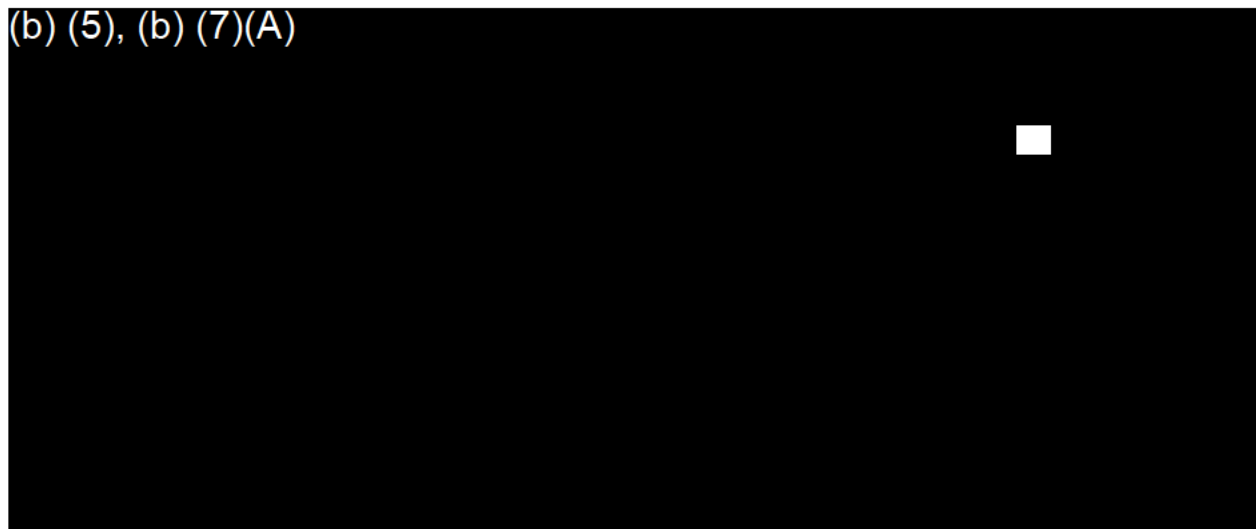
(b) (5), (b) (7)(A)



(b) (5), (b) (7)(A)



(b) (5), (b) (7)(A)



(b) (5), (b) (7)(A)

**B. Legal Ethics Rules**

In addition to the government ethics regulations, we have also considered whether there are any legal ethics considerations that may raise recusal concerns in the court litigation. (b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

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<sup>15</sup>(b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

there are no ethics concerns under (b) (5), (b) (7)(A) legal ethics rules that would prohibit her from participating in the Board's consideration of how to respond to SEIU International's lawsuit.

(b) (5), (b) (7)(A)

we do not believe that the (b) (5), (b) (7)(A) legal ethics rules prohibit Member Prouty from considering how to respond to SEIU International's lawsuit. (b) (5), (b) (7)(A)

**C. Prejudgment**

(b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

(b) (5), (b) (7)(A)

**Conclusion**

It is our determination that, Member Wilcox and Member Prouty do not have to recuse from the Board's consideration of how to respond to SEIU International's challenge to the Board's joint employer rulemaking based on 28 USC § 208 (the financial conflict of interest statute), Paragraph 2 of the Biden Ethics Pledge, or 5 C.F.R. § 502(a)(1) (covered relationships). We also recommend, for the reasons set forth in this memo, that Member Wilcox's and Member Prouty's participation in the litigation, including consideration of how to respond to the lawsuit, would not raise appearance concerns under the catch-all provision in 5 C.F.R. § 502(a)(2) should they want to do so. We also do not believe that their participation would be prohibited by the relevant provisions of the applicable legal ethics rules or as a matter of due process. (b) (5), (b) (7)(A)

cc: Roxanne Rothschild, Executive Secretary

Amanda Jaret, Chief Counsel to Member Wilcox

David Goldman, Chief Counsel to Member Prouty

Lara Zick, Deputy Chief Counsel to Member Prouty