Ogletree Deakins

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EMPLOYERS AND LAWYERS, WORKING TOGETHER

The Practical NLRB Advisor

Supreme Court scorecard

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While perhaps the public largely views the current Supreme Court of the United States through the prism of its reversal of *Roe v. Wade,* many practitioners and scholars believe the Court's actual legacy may rest on its efforts to curb the power of the administrative state. It is no secret that conservative jurists and observers have been alarmed by and opposed to the growth, influence, and ubiquity of federal regulatory agencies, including the National Labor Relations Board (NLRB). Their objections are rooted in a host of constitutional limiting principles, including among others the nondelegation doctrine, the separation of powers, and the "take care" clause.

At the base of all these complex constitutional doctrines lies the fundamental notion that ours is a representational form of government. In such a form of governance those who make the decisions that affect citizens should be elected by them and accountable to them, but federal bureaucrats and regulators are neither. To be sure, the need for some federal regulation is warranted in any complex society. The problem comes, however, when regulation crosses the line into the purview of the three *constitutional* branches of government—the judicial, congressional, and executive. Since the New Deal that line has both moved and blurred, and the current Court is plainly focused on redrawing and clarifying that line.

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BRIAN IN BRIEF

There's a saying that in life timing is everything. It's not only true, but also a very good reason not to schedule any publication deadline immediately following a national election.

Indeed, as this copy goes to markup and press, we only know the outcome of the presidential race and that Republicans now have a majority in the U.S. Senate, though by how big of a majority remains unknown since some seats remain uncalled. We also do not know which party will control the U.S. House of Representatives since several races remain undecided.

So, like the rest of the country, we plan to take a deep breath and take the time necessary to reflect and take a close look at what effects the national vote will have on federal labor policy. Nationally and regionally the vote reflected some seismic shifts in policy perception and voter alignment. How all of that, plus the hardball politics inside the Beltway, will be the focus of our next installment of the *Advisor.*

In this current issue, however, we have noted how the federal judiciary, most notably the Supreme Court of the United States, has been incrementally reining in the power of federal regulators and quasi-judicial agencies like the National Labor Relations Board (NLRB). Not only has the federal judiciary raised broad constitutional questions about agency power, but the courts have also recently shown a marked sense of skepticism and downright criticism about how agencies are addressing even their most fundamental tasks.

For example, while the NLRB has traditionally enjoyed a remarkable degree of respect from reviewing federal courts and an extremely high "batting average" in having its orders enforced, in recent months federal courts of appeal have ruled that the agency is entitled to absolutely no deference, publicly scolded the agency for failing to follow the court's remand order, refused to enforce Board orders due to the agency's lack of substantial evidence, and dramatically narrowed the scope of the agency. The Board is likely to continue to receive many more appellate lumps, but those may pale compared to the new administration's actions.

Sincerely,

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About Ogletree Deakins' *Practical NLRB Advisor*

At Ogletree Deakins, we believe that client service means keeping our clients constantly apprised of the latest developments in labor and employment law. With the whirlwind of activity taking place at the National Labor Relations Board (NLRB) in recent years—affecting both unionized and nonunion employers—a quarterly newsletter focused on the NLRB is an essential tool to that end.

Ogletree Deakins' *Practical NLRB Advisor* seeks to inform clients of the critical issues that arise under the National Labor Relations Act and to suggest practical strategies for working successfully with the Board. The firm's veteran traditional labor attorneys will update you on the critical issues in NLRB practice with practical, "how-to" insights. Assisting us in this venture are the editors of Wolters Kluwer Legal and Regulatory Solutions' *Employment Law Daily.*

The *Practical NLRB Advisor* does not provide legal advice. However, it does seek to alert employers of the myriad issues and challenges that arise in this area of practice, so that they can timely consult with their attorneys about specific legal concerns.

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The Supreme Court has recently taken several steps to rein in federal regulatory power. For those of you keeping score at home, here's a summary:

The 2021-2022 and 2022-2023 terms

The Supreme Court's engagement with the regulatory community was evident in two cases that were decided in its prior two terms. First, in the early spring of 2023, the Court issued its decision in *Axon Enterprise, Inc. v. Federal Trade Commission,* 598 U.S. 175 (2023). In *Axon,* the Court ruled

Although largely a procedural decision, Axon *has given parties subject to agency action a significant advantage by allowing them to immediately go on the offensive by filing a preemptive constitutional claim in federal court.*

that even though an agency proceeding might eventually be reviewable in a federal appeals court, a party challenging the constitutionality of the agency action does not have to wait until the appellate stage to litigate such claims. Rather, this decision states that a party is entitled to bring an action in federal district court challenging the constitutionality of an agency proceeding *before* the proceeding even begins. Although largely a procedural decision, *Axon* has given parties subject to agency action a significant advantage by allowing them to immediately go on the offensive by filing a preemptive constitutional claim in federal court. Short circuiting the statutory process also allows a party to avoid the time and expense of an agency proceeding before it can litigate its constitutional claims.

Second, on the last day of its 2021-2022 term the Supreme Court delivered a *substantive* rebuff to agency actions in its decision in *West Virginia v. Environmental Protection Agency,* 597 U.S. 697 (2022). The case involved the U.S. Environmental Protection Agency's (EPA) authority to regulate greenhouse gases by placing caps on emissions from existing power plants. The authority to regulate power plants by this specific means was predicated on a somewhat strained interpretation of a vague provision in the Clean Air Act. Noting the broad impact of the EPA regulation, its enormous compliance costs, and its politically charged nature, the Court majority concluded that this form of regulation required a much clearer and specific authorization by the U.S. Congress rather than the vague statutory provision relied on by the EPA. The case revived the so-called "major questions" doctrine that requires a clear and explicit congressional delegation of authority to authorize any agency regulation that has a significant economic or policy impact.

The case has a clear "separation of powers" underpinning since it is aimed at preventing agencies from usurping the legislative role of the U.S. Congress by relying on vague statutory language rather than a clear and specific grant of authority. However, as important as the case is, its practical application may be somewhat limited since, by its terms, it is applicable only when a regulatory agency exercises its authority to determine a "major" policy issue predicated on a vague congressional grant of authority. The bar for what the Court would find to be a "major question" is not completely clear but is apparently a reasonably high one. Thus, the policy issue would typically be one that imposes substantial economic cost and is subject to considerable partisan division. Most agency decision-making may not reach the "major questions" threshold.

The 2023-2024 term

Left unanswered by the *West Virginia* case was the far more common issue of what is the proper role of agencies and courts in interpreting ambiguous statutory language in cases where the macroeconomic cost is not enormous but the consequence to the parties and stakeholders is real and significant. Indeed, over the last forty years this had emerged as perhaps the most significant and controversial issue in administrative law given the Court's prior adoption of the so-called *Chevron* deference doctrine. The doctrine draws its name from a 1984 Supreme Court decision which held that a reviewing federal court had to accept a federal agency's interpretation of any ambiguity in its own enabling statute provided only that the agency's interpretation was "reasonable" and, most significantly, *even if* the court itself would have resolved the ambiguity differently.

In the last decade *Chevron* has become increasingly more controversial with a growing group of more traditional and conservative commentators and scholars viewing it as

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allowing federal agencies to usurp the constitutional role of the federal courts. In their view, *Chevron* trenched on the fundamental precept articulated 220 years ago by Chief Justice Marshall in *Marbury v. Madison*, where he wrote, "[i]t is emphatically the province and duty of the judicial department to say what the law is." As many had predicted and the *West Virginia* case foreshadowed, the Supreme Court finally put an end to the *Chevron* doctrine in one of the most significant decisions in the 2023-2024 term.

The end of *Chevron*. At the very end of the term, the Court released its decision in *Loper Bright Enterprises v. Raimondo,* 603 U.S. __, 144 S. Ct. 2244 (2024), which the Court consolidated with *Relentless Inc. v. Department of Commerce,* Sup. Ct. Docket No. 22-1219. Both cases involved a regulation promulgated by the National Marine Fisheries Services (NMFS) that required commercial fishermen to defray the cost of having a federal "observer" on board to monitor compliance with the provisions of the Magnuson-Stevens Fishery Conservation and Management Act. While the act contained many compliance provisions that included the use of observers, it did not expressly provide that the fishermen would be required to pay the costs associated with having the observers on board. It was estimated that whenever an observer was sent aboard for a fishing run it cost the commercial fishermen approximately $700.

Since no express language allowed or required industry funding for the statutory observer program and the cost allocation was ambiguous, NMFS argued that it was "reasonable" to assign the compliance cost to the fishermen, given the overall intent of the statute. In particular, the agency claimed it was entitled to *Chevron* deference by the federal courts since the regulation was based on a reasonable interpretation of an ambiguous or missing term in the statute. The Supreme Court rejected the argument and, along with it, the continuing validity of *Chevron.*

While the *Loper Bright* opinion draws its essence from both Article III of the Constitution of the United States, which vests judicial authority in the federal courts, and the separation of powers doctrine, it was largely decided on statutory grounds. In particular, the decision notes that the *Chevron* doctrine is fundamentally at odds with the language of the Administrative Procedure Act (APA) which specifically reserves all "legal" questions in administrative proceedings for the courts. The Court reasoned that the *Chevron* doctrine essentially strips the federal judiciary of its ability to determine what a statutory ambiguity means, which does not comport with the independence and exclusivity of the federal courts to resolve legal issues as specifically enshrined in the text of the APA. In the wake of *Loper Bright*, when an agency's now-claimed authority stems from an ambiguous provision of its enabling statute, courts are no longer required to "defer" to the agency's interpretation of the statute. To the contrary, it is now clear that a reviewing court must independently resolve any underlying legal issue resulting from the ambiguity, and if the court parts company with the agency the court's determination prevails.

Dilution of agency power. *Loper Bright* represents a significant reassertion of judicial authority and a correspondingly significant dilution of agency power. Statutes typically contain a host of ambiguities because statutory language cannot possibly cover all possible contingencies and every law is the product of legislative compromise. Indeed, at the heart of most legal disputes arising under a statute is the meaning and applicability of that law to the particular facts.

Disputes under the National Labor Relations Act (NLRA) are no exception. For example, the statute nowhere uses the terms "joint employer" or "single employer" but instead only refers to the "employer." This then raises the question of what facts are sufficient to make two separate legal entities one for purposes of the NLRA. Once the facts are determined this is largely a legal question of resolving the ambiguity or filling in the blanks in a statute. Similarly, the NLRA contains no listing of what acts Congress intended to protect when it used the phrase "concerted activity." Again, this requires what is essentially a legal judgment.

Some deference remains. In the wake of *Loper Bright*, courts will no longer be required to rubber stamp those conclusions if they are "reasonable." But this does not mean that all agency legal conclusions will be vacated on appeal by federal courts. Quite the contrary, most agency interpretations are likely to survive review simply because the court *agrees* with the agency interpretation. Moreover, *Loper*

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Bright does not strip agency determinations of *all* deference, only the dispositive deference accorded to agencies under *Chevron.* Thus, agency decisions will continue to enjoy substantial, but not dispositive, deference predicated on the agencies' subject matter expertise and its history of dealing with the given issue. This bow to agency expertise is known as *Skidmore* deference, and it survives the death of *Chevron.*

It remains to be seen where exactly the federal appellate courts will draw the lines in a post-*Chevron* world. The opinion does, however, signal that the judiciary is about to enter an era of far closer scrutiny of agency decision-making. Moreover, while agencies will continue to receive some deference based on their expertise, the *Loper Bright* Court expressly noted that in assessing the weight or degree of deference to accord an agency interpretation, a reviewing court may (and should) consider the longevity and consistency of the agency's view. This dictum should be particularly significant in the case of the NLRB, which has often been notoriously inconsistent and ever-changing in its interpretations of statutory terms, including being prone to adopting "new" applications of the NLRA that somehow were not "discovered" for decades and decades.

Right to jury in SEC proceedings. While overruling *Chevron* was certainly last term's most significant administrative law decision by the Supreme Court, it was not the only one. Earlier in the term, the high court issued its opinion in *Securities and Exchange Commission v. Jarkesy*, Sup. Ct. Docket No. 22-859. The case involved an administrative proceeding in which an investment advisor was found to have made material stock misrepresentations in violation of the Dodd-Frank Wall Street Reform and Consumer Protection Act administered by the Securities and Exchange Commission (SEC). Among other remediations, the SEC levied civil penalties on the defendant as provided in the statute.

Among other defenses, the defendant claimed that the SEC proceeding was unconstitutional and that he was entitled to a jury trial under the Seventh Amendment of the U.S. Constitution, not an administrative trial under the statute. The Supreme Court agreed. The Seventh Amendment provides that a citizen is entitled to a jury trial for "suits at common law where the amount in controversy is more than two hundred dollars." The alleged misrepresentations by the defendant would have constituted "stock fraud" under the common law, long before the passage of the Securities Act. Moreover, the civil penalty was essentially punitive and not remedial or restorative. In other words, the penalty was "at law" and not "in equity." Given these facts the Seventh Amendment applied, and the defendant was entitled to a jury trial.

While significant, *Jarkesy's* applicability to other administrative proceedings remains to be seen. For the bulk of NLRB claims, it appears that the reasoning of *Jarkesy* would not apply since such claimed legal violations as a "discharge for concerted activity" or a "refusal to bargain" did not exist at common law. More significantly, the typical remedy in these cases is "restorative" and thus equitable in nature, and no right to a jury trial attaches to equitable claims.

[S]ome observers have raised the question of whether some of the new forms of remediation being entertained by the current Board may raise Seventh Amendment issues.

However, some observers have raised the question of whether some of the new forms of remediation being entertained by the current Board may raise Seventh Amendment issues. Two examples are most pertinent. First, in discharge or suspension cases the Board, in addition to reinstatement and backpay, is now seeking remuneration for all foreseeable pecuniary losses suffered by the employee as a result of the unlawful personnel action. Second, in refusal to bargain cases the Board is considering seeking speculative benefits they would have received had the employer not refused to bargain. (See *Issue 21* of the *Practical NLRB Advisor* for further discussion of the NLRB general counsel's effort to overturn the NLRB's landmark 1970 decision in *Ex-Cell-O Corp.*, in which the Board squarely refused to require make-whole relief in refusal-to-bargain cases). Critics of these forms of proposed remediation argue that they are not only beyond the Board's authority, but also raise a Seventh Amendment right to a jury trial.

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The theory is that the remediation sounds more like that applicable in a common law tort or contract claim and is, in varying degrees, speculative.

The 2024-2025 term

While the *Jarkesy* decision is significant for what it says about the Seventh Amendment right to a jury trial, it is probably more significant for the constitutional issues in the case that the Supreme Court did not reach. The case was before the Supreme Court on appeal from a decision by the U.S. Court of Appeals for the Fifth Circuit which had held that the SEC proceeding was constitutionally infirm on *three separate* grounds. The Fifth Circuit first held (and the Court subsequently affirmed) that the investment advisor was entitled to a jury trial. Next, the appeals court determined that the congressional delegation of certain authority to the agency lacked any "intelligible principle" to guide the exercise of that authority and therefore ran afoul of Article I of the Constitution, which vests all legislative power in the Congress. Lastly, the Fifth Circuit determined that the SEC process was constitutionally flawed since the agency's administrative law judges (ALJs) were protected from removal at will by the president of the United States and such removal protection violates Article II of the Constitution. Because the Supreme Court disposed of the case only on the Seventh Amendment issue and did not reach the Article I or Article II grounds, the Fifth Circuit's decision remains valid and binding on all district courts within the circuit.

However, the Article II issue and its further implications may be of the most significance in the context of the NLRB since Board ALJs are identical to those that adjudicate SEC cases and are similarly protected from summary removal. Thus, at least in the Fifth Circuit, NLRB unfair labor practices are subject to the same constitutional infirmity that the Fifth Circuit found in its *Jarkesy* decision. But the appeals court's *Jarkesy* decision presages an even *more* significant Article II issue. While ALJs enjoy removal protection, so too do most agency heads and principal officers, including all five of the NLRB members who by statute can be removed by the president only "upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause." Thus, the question becomes if restrictions on the removal of ALJs run counter to Article II, why then does a restriction on the removal of NLRB members not create exactly the same constitutional infirmity?

Currently, the answer lies in a ninety-year-old precedent entitled *Humphrey's Executor v. United States*, 295 US 602 (1935), in which the Supreme Court held that the removal issue did not apply in the case of multimember, bipartisan expert boards or commissions. Critics of *Humphrey's* have long argued that the structure or composition of the board or agency is fundamentally immaterial for purposes of an Article II analysis. However, those critics may have to wait a while before that claim is definitively addressed.

This summer, a petition for certiorari was filed at the Supreme Court in a case entitled *Consumers' Research et al., Petitioners, v. Consumer Product Safety Commission, Respondent*, Docket No. 23-1323 (June 14, 2024). *Consumers' Research* directly raised the question of whether removal restrictions in the case of multi-member boards or commissions ran afoul of Article II. In other words, it teed up the question of whether *Humphrey's* should remain good law. The Fifth Circuit Court of Appeals deemed itself bound by *Humphrey's* and thus rejected the Article II argument but also expressly invited the Supreme Court to address the issue. On October 21, however, the Supreme Court declined that invitation and denied certiorari in *Consumers' Research.*

What's next? There is a division of opinion among observers as to what the denial of certiorari in *Consumers' Research* signals. Some believe the Court majority is simply unwilling to further hobble administrative boards and agencies. Others believe the Court is not prepared to address the remedial ramifications of finding a constitutional infirmity. On one end, the infirmity could be addressed by severing the statutory removal restrictions and making the board and commission members at issue removable by the president at will. On the other end, however, the infirmity could render the entire agency structure unsustainable and essentially shut its doors.

Still others believe the denial of certiorari may have a more mundane significance. For instance, the majority may have believed the case was not factually appropriate for addressing the question or that the underlying question would be better addressed under an alternative constitutional theory. Whatever the reason, it seems clear that the Court is not done with its reassessment of the administrative state. ■

NLRB unravels representation case election rules

On July 26, 2024, the National Labor Relations Board (NLRB) completed its unraveling of the commonsense representation case election rules previously implemented by the Board in 2020. The Biden Board unveiled a new final rule that will restore the Board's pre-2020 procedures by changing the practice for processing union elections when the union alleges an employer has interfered with the vote and by protecting voluntary union recognition regardless of employee sentiment.

Critics charge that the policy is nothing more than an exercise in protecting incumbent unions from ouster at the cost of employee free choice.

The NLRB unveiled its "Fair Choice-Employee Voice Final Rule," which the agency said will make changes in three key areas: restoring the "blocking charge" policy, "voluntary recognition of a union," and "construction-industry bargaining relationships." The rule, which was formally published in the *Federal Register* on August 1, 2024, largely follows the proposed rule released in November 2022. The final rule went into effect on September 30, 2024, and rescinded the Board's prior rule adopted on April 1, 2020. It will not be applied retroactively to cases filed before the effective date.

Final rule

Return to "blocking charge" policy. The new final rule returns to the prior policy under which regional directors "delay the processing of an election petition at the request of a party who has filed" an unfair labor practice (ULP) charge alleging that the employer has interfered with employees' "free choice in an election," known as a "blocking charge," so long as "the party simultaneously files an adequate offer of proof and agrees to promptly make its witnesses available."

Under the 2020 rule, regional directors would hold elections even if a blocking charge had been filed and delayed certification of the results until after the election. However, the Board said this often required "regional directors to conduct, and employees to vote in, elections in a coercive atmosphere that interferes with employee free choice."

Employee advocates correctly note that the blocking charge policy is most often applied in the context of *decertification* elections in which employees seek to vote out their incumbent unions. Application of the policy blocks the decertification vote, often for years. Critics charge that the policy is nothing more than an exercise in protecting incumbent unions from ouster at the cost of employee free choice.

Return to voluntary recognition. Under the new final rule, once an employer voluntarily recognizes a union as an exclusive bargaining representative "based on a showing of the union's majority status," there will be no union election for a "reasonable period of time," at least six months, to allow for collective bargaining. The rule eliminates the "notice-and-election procedure" that the Board first adopted in a 2007 decision and then re-established in the 2020 rule, in which there was a forty-five-day window following voluntary recognition during which a petition for a secret ballot election could be filed. In the new final rule, the Board characterized that approach as treating "voluntary recognition [as] inherently suspect with respect to employee free choice." The contrary argument is, of course, that where necessary a secret ballot is invariably the best test for employees' actual sentiments.

Parity for the construction industry. The final rule rescinds the rules "governing the application of the voluntary recognition bar and contract bar in the construction industry" in an effort to create parity with union representation in the construction industry and other industries. Section 8(f) of the National Labor Relations Act (NLRA) provides an alternative way for construction employers to voluntarily recognize a union as a bargaining representative.

In the final rule, the Board stated that "there is no statutory basis to deprive unions representing construction employees from utilizing the same procedure under Section

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9(a) [of the NLRA] to obtain voluntary recognition—and its attendant benefits—that is available to all other unions." This change will allow construction unions to gain voluntary recognition as the bargaining representative under Section 9(a), which would protect the union's long-term representative status. That represents a major change for construction employers accustomed to recognition under Section 8(f) in which the union's representative status does not survive a contract's expiration.

Dissent. Member Marvin Kaplan dissented from the new rule, stating it is unnecessary and contributes to uncertainty for stakeholders. The majority "rescind[ed] [the rule] not because they must, but because they can," he argued. Member Kaplan argued that the rule improperly prioritizes the interests of unions over that of employees in making a free or fair choice for representation. The revised rule permits unions to unfairly delay elections while they build support by filing unfair labor practice charges claiming coercive conditions, Member Kaplan said.

Member Kaplan further argued that it is an "open question" as to whether the Board's rule change can withstand scrutiny in the courts, following the June 2024 Supreme Court of the United States' overturning of deference to federal agency rulemaking in the June 2024 *Loper Bright Enterprises v. Raimondo* decision, discussed in page 4 of this issue of the *Advisor.* ■

General counsel's latest directives

The general counsel (GC) of the National Labor Relations Board (NLRB) has issued a number of directives over the past several months that address multiple issues, including expanded "make whole" remedies in cases involving unlawful work rules, student-employee privacy rights, and a refusal to back down from aggressively seeking injunctions. Here's a summary of those and other notable happenings at the Biden Board.

Continued quest for expanded remedies

On April 8, 2024, the GC continued her push to expand the types of remedies available in situations involving unlawful workplace conduct by issuing a memorandum entitled "Securing Full Remedies for All Victims of Unlawful Conduct." In Memorandum GC 24-04, the GC instructs NLRB regional directors that they should seek expanded remedies in cases involving unlawful work rules because "mere rescission of an overbroad, unlawfully promulgated, or unlawfully applied rule or contract term does not expunge discipline imposed under those unlawful provisions or retract related legal enforcement actions, and thus fails to make impacted employees whole." According to the memorandum, in addition to rescinding an unlawful rule, "Regions should seek settlements that include make-whole relief for employees who were disciplined or subject to legal enforcement as a result of an unlawful work rule or contract term."

Work rule cases targeted. In addition to a plethora of make-whole remedies that are compensatory, which the regions have already "done an excellent job in securing," the GC explained that more work is needed to ensure that the agency seeks 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.

Thus, the general counsel instructed regions to seek settlements that encompass make-whole relief for employees who were disciplined or subject to legal enforcement as a result of an unlawful work rule or contract term since the start of the Section 10(b) period. That relief should be sought where "the discipline or legal enforcement action targets employee conduct that 'touches the concerns animating Section 7,' unless the employer can show that the conduct actually interfered with the employer's operations and it was that interference, and not reliance on the unlawful rule or term, that led to the employer's action."

Regions should seek and obtain that information from the employer during settlement efforts, the GC indicates in the memo, and where cases do not settle the regions should urge the Board to ensure that employees receive

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expungement and backpay where they would have been entitled to make-whole relief under a 2005 ruling if their discipline had been alleged as an independent violation.

Focus on student-employee privacy rights

On August 6, 2024, the GC issued a memorandum entitled "Clarifying Universities' and Colleges' Disclosure Obligations under the National Labor Relations Act and the Family Educational Rights and Privacy Act." In GC-24-06, the GC addresses the impact of the Family Educational Rights and Privacy Act of 1974 (FERPA)—which protects the privacy of student education records—on certain educational institutions' obligations under the National Labor Relations Act (NLRA) to provide labor unions with relevant information. The memo seeks to clarify the interplay between the statutory duty to furnish information and the student records law.

The memo tracks with the Biden Board's decision to categorize college students and athletes as statutory "employees." Indeed, the announcement regarding GC 24-06 explains that the NLRB has certified dozens of elections for union representation involving student-workers in the last several years, with almost 50,000 students represented by these unions.

Consent template. The memo notes that when student workers exercise their right to form a union, it often requires educational institutions to disclose student-related information to a labor union representing or seeking to represent those student-workers. However, FERPA protects the privacy of student education records and personally identifiable information contained therein. Therefore, to help facilitate an efficient process, the memo includes a voluntary FERPA consent template that student-employees can sign at the start of their employment. According to the GC, this form will "reduce delay and obviate the need to seek students' consent at the time a union seeks to represent employees or submits an information request to carry out its representative functions."

The memo also states that if a union "seeks information protected by FERPA, the institution must offer a reasonable

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MOU vows assistance in antitrust investigations

The NLRB has agreed to collaborate with other federal agencies on labor issues in antitrust merger investigations to strengthen worker protections and fair competition. On August 28, 2024, the GC joined the U.S. Department of Labor (DOL), the Federal Trade Commission (FTC), and the U.S. Department of Justice (DOJ) Antitrust Division (ATR) in signing a "Memorandum of Understanding on Labor Issues in Merger Investigations." In announcing the memorandum of understanding (MOU), the NLRB emphasized its goal "to strengthen worker protections and fair competition by collaborating on labor issues in antitrust merger investigations." On September 27, the FTC announced that it would withdraw from the MOU, though it stated that it "will continue to closely scrutinize all issues related to mergers, including potential impacts on labor, in accordance with its merger guidelines."

Pursuant to the MOU, the agencies commit "to working together to ensure all relevant and appropriate information and expertise can be used to facilitate the Antitrust Agencies' ability to assess the potential impacts of mergers and acquisitions on labor markets." This includes the NLRB and the DOL providing "training to appropriate personnel from the Antitrust Agencies" and meeting with those agencies to provide "technical assistance, as appropriate, on labor and employment law matters in merger review, including in the resolution of labor market merger investigations."

The Board has entered into similar MOUs with the FTC, Occupational Safety and Health Administration, and the DOJ.

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accommodation in a timely manner and bargain in good faith with the union toward a resolution of the matter." Then, if they reach agreement over an accommodation, the institution must abide by that agreement and furnish the records. If they cannot reach an agreement, the union may file an unfair labor practice charge and the Board will strike an appropriate accommodation in light of the proposals.

Other Board happenings of note…

- **Aggressive pursuit on injunctions despite Supreme Court ruling.** On July 16, 2024, the GC issued a memorandum addressing the recent decision by the Supreme Court of the United States holding that courts must apply the traditional four-factor test when evaluating the Board's 10(j) injunction requests. (For a detailed analysis, see the Injunction section, below) The GC vowed that the Board will remain aggressive in pursuing injunctive relief: "[T]he Supreme Court's decision does not change my approach to seeking Section 10(j) injunctive relief in appropriate cases." The GC concluded by noting that while the Supreme Court's decision "provides a uniform standard to be applied in all Section 10(j) injunctions nationwide, adoption of this standard will not have a significant impact on the Agency's Section 10(j) program as the Agency has ample experience litigating Section 10(j) injunctions under that standard."

The GC vowed that the Board will remain aggressive in pursuing injunctive relief: '[T]he Supreme Court's decision does not change my approach to seeking Section 10(j) injunctive relief in appropriate cases.'

- **Joint-employer rule abandoned, for now.** On July 19, 2024, the NLRB withdrew its appeal of the March 8, 2024, decision by the U.S. District Court for the Eastern District of Texas vacating the Board's 2023 joint-employer rule. This means that the Board's 2020 joint-employer rule, which requires substantial control over essential employment terms for joint-employment status, remains in place. Notably, in the weeks after the court struck down the rule, President Biden vetoed a resolution passed by the U.S. Congress that sought to rescind the rule, stating that he was "proud to be the most pro-union, pro-worker President in American history." Republicans in the U.S. House of Representatives attempted to override the veto, but the 214–191 vote fell well short of the necessary two-thirds vote requirement.
- **First chief artificial intelligence officer.** On August 29, 2024, the NLRB announced that, consistent with guidance from the White House's Office of Management and Budget (OMB), it has appointed its first chief artificial intelligence officer (CAIO), David K. Gaston. He also will continue to serve as an assistant general counsel and the Board's branch chief of e-litigation. "We are very pleased that David will be serving as our new CAIO," said the general counsel. "David has ably led the development and execution of information policy and litigation strategy for seven years at this Agency and for nearly 15 years in the federal government," the Board's general counsel said. "His expertise will allow the NLRB to move forward strategically in the area of AI."
- **Chosen names and pronouns.** On August 1, 2024, the NLRB's Office of the General Counsel, Division of Operations Management issued a new memorandum, OM 24-09, detailing how the agency "shall ensure that all charging parties, petitioners, discriminatees, and other witnesses are referred to by their correct or chosen name and pronouns throughout all unfair labor practice and representation cases." Entitled "Ensuring Dignity and Respect in NLRB Processes to Ensure Compliance with Title VII Principles," the memo outlines specific areas in which the NLRB's regional offices and the Office of the General Counsel will seek to ensure that LGBTQIA+ charging parties, discriminatees, petitioners, witnesses, and party representatives—particularly transgender, nonbinary, and gender nonconforming persons—are treated with dignity and respect when they participate in NLRB processes. ■

Supreme Court weakens Board's ability to obtain injunctions

On June 13, 2024, the Supreme Court of the United States held that courts must assess injunction requests by the National Labor Relations Board (NLRB) using the traditional four-factor test for preliminary injunctions. Several circuit courts of appeals had taken the position the Board need only show that there was "reasonable cause" to believe an unfair labor practice had been committed, and that the grant of injunctive relief was "just and proper." That formulation created a much lower bar for the grant of injunctive relief than the traditional four-factor test. In finding the latter applied to all such requests the Supreme Court significantly raised the bar in those jurisdictions that had previously applied the more liberal test.

Injunctive relief under Section 10(j) of the National Labor Relations Act (NLRA) is one of the NLRB's most potent enforcement weapons. For example, in cases where an employee is discharged allegedly in violation of the NLRA, an injunction can order that employee be returned to work until the underlying unfair labor practice case is adjudicated. As a practical matter, the grant of injunctive relief often short circuits the typical statutory adjudication process. The consequential result in most injunctive proceedings caused many management advocates to argue that the "just and proper" test simply set the bar too low.

The Supreme Court's June decision reverses the determination of the Sixth Circuit that affirmed use of the "just and proper" standard. The Supreme Court held that when considering 10(j) injunction requests under Section 10(j) *all* federal courts must now apply the four traditional equitable factors outlined in the high court's 2008 decision in *Winter v. Natural Resources Defense Council, Inc.* The decision means that courts must consider 10(j) injunction requests under the same equitable principles that they do for other preliminary injunctions without deferring to the NLRB's determination that an unfair labor practice had occurred.

Four-part analysis proper. The Supreme Court noted that courts are not stripped of their equitable powers simply because the NLRA provides a mechanism for securing injunctive relief. The Court further held that when courts exercise that equitable power they must apply the traditional four-factor rule as articulated in *Winter.* Under that rule, a plaintiff must show "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."

No deference for Board. The Supreme Court rejected the NLRB's argument that Section 10(j) informs the application of equitable principles and that courts should use a "reasonable cause" standard as applied by the Sixth Circuit in the case. The NLRB had pointed to the context that the U.S. Congress has given it the authority to adjudicate unfair labor practice charges in the first instance and that courts must give deference to the NLRB's final decisions.

Justice Clarence Thomas, writing for the Court, stated that the reasonable cause standard "substantively lowers the bar for securing a preliminary injunction by requiring courts to yield to the Board's preliminary view of the facts, law, and equities." Justice Thomas stated the fact that the NLRB is the body that will adjudicate unfair labor practice charges on the merits does not mean courts must defer to what amounts to be the NLRB's initial litigating position. Section 10(j) "does not compel this watered-down approach to equity," Justice Thomas stated.

In a partial dissent, Justice Ketanji Brown Jackson agreed that the NLRA does not strip courts of their equitable powers and that the injunction in the case should be overturned. However, Justice Jackson argued the Court should not ignore the fact that Congress, through the NLRA, granted the NLRB authority over labor disputes.

A fairer playing field

The Supreme Court ruling resolves the split between the appellate circuits and requires courts to make their own assessment of the equitable factors for issuing preliminary injunctions without deference to the NLRB's initial investigative findings that an unfair labor practice has occurred. Under the reasonable cause standard, the NLRB merely had to show that its legal theory was not frivolous and that an injunction was necessary to protect the "status quo" pending the NLRB's proceedings. That standard was simply unfairly tilted in the Board's favor, particularly given the fact that injunctive proceedings are, as noted, almost always dispositive. ■

The McFerran renomination: Election politics and assorted machinations

Note to readers: As this issue of the Advisor was going to press, Donald J. Trump won the presidential election and Republicans took the majority in the U.S. Senate.

The U.S. Senate adjourned until after the November elections without voting on the nomination of Joshua Deitelberg, a Republican, and the renomination of the current chair, Lauren McFerran, a Democrat, to two of the five seats on the National Labor Relations Board (NLRB). The McFerran renomination is potentially consequential. Confirming McFerran to a second five-year term would ensure a pro-labor, Democratic majority on the five-member Board well into the next administration, even if the Republicans capture the White House this fall. The terms for McFerran's Democratic colleagues, David Prouty and Gwynne Wilcox, do not end until August 2026 and August 2028, respectively. Thus, even if Donald Trump were to win in November, there would be a Democratic-controlled Board until Prouty's term expires at the end of August 2026.

Given the pro-labor tilt of the current Board, it should come as little surprise that the McFerran renomination has been the object of intense lobbying by both labor and management interests. There are several potential reasons why Majority Leader Chuck Schumer (NY) did not force a floor vote on the nomination package before the adjournment. Those range from the periodic absence of key senators to a simple lack of floor time. However, the real reason may reside in the hills of Montana. Its senior senator, Jon Tester, a Democrat, is up for reelection in a deeply Republican state, and the outcome of that race could determine the balance of power in the Senate. Tester is currently trailing his Republican opponent in the polls and Democratic strategists may have concluded that forcing Tester to vote to confirm McFerran, a liberal, pro-labor nominee would significantly damage his electoral chances in ruby-red Montana. The electoral calculus of the nomination vote obviously changes after November when the U.S. Congress goes into its "lame duck" mode. Whether he wins or loses the Senate election, Tester will have a "free" vote for McFerran in the lame-duck session.

Although currently vulnerable Democrats will be free of electoral considerations, the post-election scenario may become more complex than it would first appear. If Vice President Kamala Harris wins, it seems likely almost all of the Democrats will fall in line and vote to confirm McFerran. A Trump win, however, would raise the countervailing argument that he should be able to pick his own nominees, and that a defeated party should not be able to keep its majority through a lame-duck vote. Joe Manchin, the retiring Democratic senator from West Virginia, has publicly indicated he would not vote for any nominee who lacks bipartisan support. It is possible that Kyrsten Sinema, the retiring Independent senator from Arizona, or even Angus King, an Independent from Maine, could well be of the same mind. "No" votes, or abstentions, by these senators could scuttle the nomination regardless of what Senator Tester does.

There are, however, two more possible plot twists. First, the populist strain within the Republican party has made some of its members far friendlier with organized labor than the party has ever been. For example, Josh Hawley, the junior Republican senator from Missouri, has forged an alliance with the Teamsters union, supporting them on the picket line and receiving a reelection contribution from the International Brotherhood of Teamsters. He's been endorsed by a transportation workers union and supported some of the NLRB's more controversial, pro-union stances. It is certainly possible that a populist or a liberal Republican could vote to confirm McFerran. A Republican defection would not only put her over the top, but it would also serve to assuage the bipartisan support concerns of senators like Manchin. That would turn the renomination vote into a legislative lay-up for Democrats. However, there is one possible final twist. And it's tied directly to this issue's lead story. If Trump wins, and McFerran is nonetheless confirmed, that would place the constitutional Article II removal issue front and center. Could Trump reprise his television role and decide to tell McFerran: "You're fired"? Stranger things have happened. Stay tuned. This one could be interesting. ■

Other NLRB developments

Circuit court decisions

D.C. Cir.: Court defers to Board in post-*Loper* failure-to-bargain decision. The U.S. Court of Appeals for the D.C. Circuit denied a hospital's petitions to review an NLRB decision finding that the employer violated Section 8(a)(5) and (1) of the NLRA by failing to bargain with a union representing four units of hospital employees before reducing their work hours and by failing to provide the union with requested information relevant to the decision to reduce work hours. Notably, in its first review of an NLRB order following the Supreme Court of the United States' decision in *Loper Bright Enterprises v. Raimondo*, discussed elsewhere in this issue, the D.C. Circuit explained that it reviews Board decisions with a "very high degree of deference," and rejected the hospital's argument that it had no obligation to bargain with the union over its decision to reduce unit employees' work hours because the collective bargaining agreement's (CBA) management rights clause authorized it to take such action unilaterally. The D.C. Circuit also concluded that the hospital had a duty to provide the union with the information it requested (*Hospital de la Concepcion v. National Labor Relations Board*, July 5, 2024).

D.C. Cir.: NLRB erred in finding surveillance of union supporters unlawful. The D.C. Circuit reversed an NLRB decision finding that a wholesale produce distributor unlawfully created the impression of surveillance of a pro-union employee when his manager sent him a single text message instructing him not to cover the camera in his truck and unlawfully disciplined another union supporter for allegedly insulting a coworker based on his perceived race, ethnicity, and sexual orientation. Though the two drivers had testified in prior proceedings in which the Board found that the employer committed several unfair labor practices (ULPs) in connection with a representation election, the D.C. Circuit found that the "one-off warning" to the first employee not to cover his camera neither referred to union activity nor suggested that he had been singled out because of his support for the union. The second employee's written warning was "facially consistent

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Insistence on limiting bargaining to noneconomic issues violated NLRA

A divided three-member panel of the D.C. Circuit held that substantial evidence supported a decision by the National Labor Relations Board (NLRB) that an employer unlawfully refused to bargain over mandatory subjects and violated the National Labor Relations Act (NLRA) "by resolutely refusing" to discuss wages, health benefits, and retirement benefits during months of negotiations over an initial collective bargaining agreement (CBA). The Board had found that over the course of the parties' several bargaining sessions, the employer failed to provide the union with even a single counterproposal on economic subjects and "steadfastly refused to bargain on economic subjects until non-economic subjects were resolved." Thus, the Board "reasonably found that [the employer's] persistent refusal to discuss economic subjects 'unreasonably fragmented the negotiations and drastically reduced the parties' bargaining flexibility.'"

Judge Neomi Jehangir Rao dissented, writing that "the Board's decision rests on a fundamental misstatement of longstanding legal standards. By failing to consider the totality of the circumstances, the Board creates what is, in effect, a per se rule that an initial refusal to discuss mandatory bargaining subjects will constitute an unfair labor practice." According to Rao, "[t]his new rule disrupts the delicate balance between unions and employers protected by Congress and allows the Board to intervene prematurely into the ordinary hurly burly of labor negotiations" (*Troutbrook Co. LLC d/b/a Brooklyn 181 Hospitality LLC v. National Labor Relations Board*, July 12, 2024).

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with the company's equal employment opportunity policy," and there was no evidence suggesting that he was punished for improper reasons beyond the general counsel's contention that discipline was "unusually severe" (*Stern Produce Company, Inc. v. National Labor Relations Board,* March 26, 2024).

5th Cir.: NLRB exceeded scope of remand by overruling *General Motors*. The U.S. Court of Appeals for the Fifth Circuit held that on remand, the NLRB failed to afford an employer the opportunity to be heard before the Board "overrule[d] *General Motors*" and "return[ed] to earlier Board precedent, including *Atlantic Steel*. In so doing, the Board applied setting-specific standards aimed at deciding whether an employee has lost the [NLRA]'s protection." In its first appeal in this case, the Board successfully sought a remand to apply a new interpretation of the NLRA that was announced in *General Motors*. However, the Board instead used the remand proceeding as a vehicle to overrule *General Motors*, thereby exceeding the scope of the remand, and violating the employer's due-process rights during the remand proceeding. Explaining that the NLRB cited "no authority as to why it should be afforded deference in interpreting *this court's remand order*" (emphasis in original), the appeals court vacated the remand determination and sent the case back to the Board again with instructions to apply the *General Motors* standard (*Lion Elastomers, LLC v. National Labor Relations Board*, July 9, 2024).

6th Cir.: Nursing home excused from some bargaining obligations during pandemic. The U.S. Court of Appeals for the Sixth Circuit essentially reversed an NLRB decision relating to a nursing home's pay and staffing practices in response to the COVID-19 pandemic. The court agreed that the Board had properly found that the employer's unilateral decisions to implement hazard pay and hire temporary nonemployees without giving notice to the union and providing it a meaningful opportunity to bargain were not unlawful since those obligations were excused by the "exigent circumstances presented by COVID." However, sufficient evidence did not support the Board's conclusion (Member Kaplan dissenting) that the employer's termination of the pay increase was a decision distinct from the one to implement the pay increase, and, thus, that it was not excused by the extraordinary circumstances. Rather, the court concluded that the employer "was excused from its decisional-bargaining obligations when it implemented the pay raise and had none when it rescinded it because those actions constituted one decision" (*National Labor Relations Board v. Metro Man IV, LLC d/b/a Fountain Bleu Health and Rehabilitation Center, Inc.*, August 29, 2024).

6th Cir.: President can remove Board's general counsel at will. The Sixth Circuit ruled that President Biden's dismissal of former NLRB general counsel Peter Robb in January 2021 was lawful even though he had ten months remaining on his four-year term. The appeals court determined that the NLRA "contains no provision restricting the President's removal power" of the Board's general counsel, and that even though the U.S. Congress set the general counsel's term at four years, "[t]he Supreme Court has long held that a fixed term of office, without any additional limitation, does not impact the President's discretionary removal power." The Fifth and Ninth Circuits have also upheld Robb's dismissal, and these decisions could play a factor in Jennifer Abruzzo's continued tenure as the Board's top prosecutor during a potential Trump administration in 2025 (*Rieth-Riley Construction Co., Inc. v. National Labor Relations Board*, August 14, 2024).

NLRB rulings

Employer unlawfully fired employee for testimony before state Senate committee. On remand from the D.C. Circuit, the NLRB reaffirmed its conclusion that a company violated NLRA Section 8(a)(3) and (1) by discharging an employee for his protected concerted union activity of testifying at a Texas state Senate committee hearing about a safety issue. At the direction of the D.C. Circuit, the Board applied the *Jefferson Standard* framework and found the employee's testimony "sufficiently indicated an ongoing labor dispute so as to satisfy the first step of the applicable test." Therefore, because the D.C. Circuit had enforced the Board's initial finding that the employee's testimony remained protected under step two of the test, the Board affirmed its conclusion that the company unlawfully discharged the employee for his protected concerted activities.

Dissenting in part, Member Marvin Kaplan argued that the Board majority was "attempt[ing] to redefine the terms of *Jefferson Standard* so that a labor dispute may be inferred when an employee disparages the employer and makes any reference to working conditions and/or the union," and in doing so, "[n]either acted consistently with the Supreme Court decision or satisfied the court's order on remand." Kaplan further emphasized that the majority's "redefining of *Jefferson Standard* as an inference-based test that does not require the

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speaker to directly indicate a labor dispute is without support in that decision or subsequent case law applying it" (*Oncor Electric Delivery Co., L.L.C.*, July 26, 2024).

Casino ordered to bargain with union despite election loss. The NLRB ruled that a casino employer violated Section 8(a)(1) by repeatedly promising, announcing, and/or implementing improved benefits or other terms and conditions of employment to dissuade employees from supporting a union. The Board agreed with an administrative law judge (ALJ) that the employer's "egregious and pervasive unlawful conduct required a remedial affirmative bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)."

Further, the Board concluded that a remedial bargaining order was separately warranted under the standard set forth in the Board's recent decision in *Cemex Construction Materials Pacific, LLC,* which had been issued after the ALJ issued his decision in this case and set forth a new standard for evaluating employers' statutory obligations when faced with a union's claim to represent its employees. The Board explained that "[u]nder the new standard, an employer violates Section 8(a)(5) and (1) of the Act by refusing to recognize, upon request, a representative designated for the purposes of collective bargaining, within the meaning of Section 9(a), by a majority of employees in an appropriate unit, unless the employer promptly files a petition pursuant to Section 9(c)(1)(B) (an RM petition), or unless the union files a petition pursuant to Section 9(c)(1)(A) (an RC petition)" (*NP Red Rock LLC d/b/a Red Rock Casino Resort Spa*, June 17, 2024).

Employer unlawfully blamed union activity for delay in raises. The NLRB ruled that an employer violated Section 8(a)(1) of the NLRA "by … telling employees that they would have already received a raise if it were not for their union activities." Here, the employer went too far in its response to a flyer that the union distributed to employees. Instead of objectively pointing out inaccuracies in the union flyer, the employer responded with a written post which stated that "'if it wasn't for them [the Union] trying to steal money out of your paychecks you would already have your raises.'" The Board explained that this was unlawful since "[i]t is well established that an employer violates Section 8(a)(1) of the Act when it blames the union (or employees' union activity) for the lack of raises" (*Garten Trucking, LC*, May 24, 2024). ■

NLRB will no longer approve consent orders

On August 22, 2024, the NLRB issued *Metro Health, Inc. d/b/a Hospital Metropolitano Rio Piedras*, in which it held in a 3-1 decision that the Board will no longer accept consent orders. In a press release, the NLRB stated, "[T]he practice of accepting consent orders seems contrary to the language of the board's Rules and Regulations, creates administrative difficulties and inefficiencies, and tends to interfere with the prosecutorial authority of the General Counsel."

Before *Metro Health*, respondents could seek judicial approval of a consent order under the standards set forth in *Independent Stave Co.*, 287 NLRB 740 (1987). Under *Independent Stave*, administrative law judges (ALJs) applied a four-factor test and exercised discretion to evaluate whether proposed resolution terms were reasonable and effectuated the purposes of the National Labor Relations Act (NLRA). In overruling prior decisions accepting the practice of consent orders, the Board is determined to apply the new standard both prospectively and retroactively to any open cases pending before the NLRB.

Dissent. Member Marvin Kaplan dissented, writing: "It is damaging to the Agency's credibility to, on the one hand, plead for additional resources from the American people while, on the other, change Board policies to divert those resources to be spent on needlessly litigating cases where the Respondent offered to provide either an eminently reasonable settlement or, even, a full remedy. Worse, the misallocation of resources that is the unavoidable result of my colleagues' decision today needlessly reduces the amount of available resources for the Board to use actually protecting American workers."

Next steps. The decision in *Metro Health* is significant as it eliminates a previously available method for employers to resolve unfair labor practice charges on terms that an administrative law judge finds reasonable. Now, employers' options for resolving ULP charges are limited to either reaching a settlement with the general counsel or the charging party, or proceeding to litigation.

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