Ogletree Deakins

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The Practical NLRB Advisor

Labor Law: A new year and a (troubling) 30,000 foot view

In this Issue

On December 8, 2025, in one of the most significant administrative law disputes since the New Deal, the Supreme Court of the United States (SCOTUS) heard oral argument in the case of *Trump v. Slaughter*. The case centers on whether the president can terminate, without cause, a member of an "independent agency" where the U.S. Congress has mandated that such members can be discharged only for specific reasons. The plaintiff, Rebecca Slaughter, was a member of the Federal Trade Commission (FTC), and was terminated by President Trump in contravention of the removal safeguards established by Congress.

The case tests whether such congressionally imposed removal restrictions violate the U.S. Constitution's separation of powers and the president's right to control the executive branch. Although the case involves the FTC, it has far broader implications and will impact all federal regulatory/independent agencies, including the National Labor Relations Board (NLRB). Similar to the situation with Slaughter at the FTC, President Trump removed NLRB Board Member Gwynne Wilcox shortly after his inauguration.

While it is always dangerous to predict what the Supreme Court will do in any case, the betting is heavily in favor of the high court validating a president's right to summarily remove such agency and commission officials without regard to any

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BRIAN IN BRIEF

As the calendar flips to a new year, the National Labor Relations Board (NLRB) remains mired in problems. Its workforce has experienced a ten percent net reduction over the last twelve months, and its case backlog at the Board and in the regions has reached record levels. Employee morale is rumored to be at rock bottom.

The agency also faces a host of consequential legal challenges to its structure, procedures, and remedial authority. While a quorum has finally been restored after a nearly year-long hiatus, the Board still lacks the three-vote majority necessary to overturn much of the ill-advised precedent issued in the last few years.

The Board's long history of decisional flip-flopping appears to be finally catching up with the agency as its credibility with stakeholders and reviewing courts has palpably plummeted in recent years. Its predominance in the labor management arena is waning, and, in several instances, states appear intent on usurping its role wherever possible. As this issue goes to press, the House-passed appropriations bill calls for $5 million decrease in the Board's operating budget.

Debate over the necessity and scope of all forms of federal regulation is as old as the existence of administrative law itself. The regulation of labor/management relations is no exception. At present, however, that debate is wholly academic since there is no realistic or viable alternative on the horizon. While there's no shortage of "reform" proposals, they are either too extreme to garner wide-spread support or too impractical to enable implementation.

Consequently, the NLRB and National Labor Relations Act (NLRA), despite their flaws and problems, remain the only show in town. That reality should cause all stakeholders to wish the Board's new general counsel and board members well as they at least try to correct the missteps of the Board's own making.

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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congressional restrictions. Whatever the benefits of that outcome, and there are many, it will result in some loss of "independence" for agencies like the NLRB. But that will represent only one of the factors that may change the NLRB in coming years.

[T]here is a growing awareness that collectivism is not the cure to every societal ill, and that it carries its own drawbacks and limitations.

A changing collectivism environment

In part, the impetus for change is rooted in the NLRB's history, and in economic and legislative progress. The National Labor Relations Act (NLRA) turns ninety-one years old in 2026, and its last major revision took place seventy-eight years ago. The law was enacted by Congress in a period of significant, and sometimes violent, labor unrest. It was also born in a factory-dominated economy with little worker mobility and fostered in the almost complete absence of state and federal employment laws that regulate today's workplace. The statute is predicated on the belief that, given the opportunity, employers will always exploit employees and the only antidote to such exploitation is "worker collectivism."

Time and circumstance have moved on, however, even if the federal labor statute has not. Individuals' relationship with work has become more transitory and attenuated. For most individuals currently entering the workforce, their projected career paths are decidedly non-linear. Research suggests the average Gen-Z and younger Millennial workers have a job tenure of only 1.1 years during their first five years of employment, and one out of every three younger workers plan to leave their current jobs within the next twelve months. In addition, the growth of the gig economy has supercharged a trend in which individual skills and experience have often become more important than collective "leverage" as a means of achieving financial security and job satisfaction. Nearly a quarter of individuals who leave their jobs cite the desire for a better work/life balance as their motive for doing so. Moreover, as older employees remain in the workforce longer and thus delay upward mobility for their younger counterparts, the latter have increasingly turned to entrepreneurship as the path to advancement.

The social safety net has grown exponentially, and state and federal regulation of the workplace is now ubiquitous. In 2026 alone, over fifty new state laws governing the workplace will become effective. They range from various forms of required paid leave, wage transparency, and equity, as well as restrictions on scheduling and scheduling changes. Nearly twenty states now have minimum wage rates at or above $15 per hour. There is also a growing appreciation among employers of the high cost of employee turnover and job disaffection. Consequently, with rapidly increasing frequency, employers are viewing their employees as "assets" to be cultivated rather than fungible "commodities" to be exploited.

Lastly, there is a growing awareness that collectivism is not the cure to every societal ill, and that it carries its own drawbacks and limitations. These factors have not only contributed to the precipitous drop in union density, but they have also driven a concomitant decrease in the relevance of the NLRB.

Overreach and other self-inflicted wounds

Oftentimes, to resuscitate its flagging relevance, the NLRB has done little more than exacerbated the situation by overreaching its authority in terms of its jurisdiction as well as its regulatory purview and remedial authority. For example, in the absence of clear congressional authority, does the Board really have the power to award tort-like speculative damages, or to order bargaining predicated on minor unfair labor practices? Very likely not. Did Congress intend, or, perhaps more importantly, does it even make sense to apply the NLRA protections to student athletes; to "gig" or other workers who are, as a practical matter, self-employed; to fixed-term graduate assistants; or to franchisors or other business entities that have, at best, an extremely tangential relationship to the workplace? Once again, probably not. Finally, should the Board be fly-specking employer handbooks, and does it have a broad mandate to dramatically curtail free speech and free choice? The answer here is again self-evident. Yet in the hands of pro-union activists, the Board has done all these

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things and more. This kind of overreach has done much to harm the Board's credibility and moral authority.

The Board's self-inflicted wounds do not end here. In recent years, the pursuit of cases based on radical interpretations of the statute, as well as a disastrous settlement policy, have completely clogged the case-processing system. Outside factors including a year-long lack of quorum, staffing shortages, and declining budgets have heaped fuel on the fire. The case backlog at both the Board and regional levels is extraordinarily high and unsustainable. Processing time for most cases has become unreasonable and unworkable and staff morale is approaching an all-time low.

Unions, for their part, have devoted an ever-increasing share of time, money, and effort to political issues; and, in most instances, their stance has been to the left and extreme left of the policy spectrum.

The Board has often further squandered its own credibility by flip-flopping on major policies and doctrines and reversing long-standing precedent. This phenomenon has been particularly acute during both the Obama and Biden Boards, where literally hundreds of years of precedent were routinely overruled. The problem has been magnified when judicial disapproval, or a change in Board composition resulting in the necessary reversal of such ill-begotten decisional forays occurs. Unfortunately, it is axiomatic that nothing destroys respect for the rule of law as completely as its inconsistent interpretation and enforcement.

No easy solution. The cumulative effect of these forces and circumstances would suggest that this is an appropriate time for the federal government to reconsider how we regulate private sector labor relations and enact measures that accurately reflect the conditions on the ground. That kind of action, however, is highly unlikely. In truth, like much of society, politics and policymaking have become increasingly polarized over the last decade. In an environment where compromise is viewed as capitulation, there is little political advantage to be gained by seeking common ground. Thus, there is also little room for objective analysis and non-partisan problem solving. As the saying goes, if you can't find a solution, there's much to be gained by simply prolonging the problem.

This phenomenon has clearly affected labor law where the marriage of politics and policy has become increasingly problematic. Unions, for their part, have devoted an ever-increasing share of time, money, and effort to political issues; and, in most instances, their stance has been to the left and extreme left of the policy spectrum. Those politicians seeking to curry the favor and financial support of labor unions have, in turn, uncritically supported big labor's legislative wish list.

In multiple instances, those sought-after changes have been starkly undemocratic and ill-advised. On the opposite side, resistance to any change has been largely reflexive. The result on the federal level has been decades of "messaging" bills from both sides—each sufficiently laced with enough poison pills to render them useful for fundraising but impossible to pass. There is little to suggest that this will change any time soon.

State regulation quagmire

There is an argument that the resulting stasis in federal law is a good thing—that labor relations should be a function of a free market and not excessive government regulation. The flaw in the argument, however, is that both nature and big labor abhor a vacuum. In fact, the more union-friendly states have been trying to usurp control of labor policy from the federal government for decades. For example, in 2001 the California Assembly enacted legislation prohibiting any employer that received state funding from making expenditures to "deter union organizing." More recently, and as reported in this issue of the *Advisor*, California and New York both enacted statutes aimed at taking over the functions of the NLRB when it could not or would not act. Fortunately, these ill-conceived legislative actions were invalidated on the grounds of federal preemption. [See, e.g., *Chamber of Commerce of United States v. Brown*, 554 U.S. 60 (2008)].

But these efforts are only the tip of the iceberg. Again, as already noted, states have already largely taken over the regulation of much of the substance of labor law with dozens of new statutes every year. Seventeen states have a minimum wage rate of over $15 per hour, while the federally mandated

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minimum remains at $7.15. Some of this state-by-state regulation may be a good thing considering differing economic and market conditions among the states. However, others like leave mandates, have created a complex and difficult to navigate patchwork of state regulation for all multi-state employers.

Powerful industry boards. The attempt by states to take over the regulatory core of the NLRA has been far more subtle but potentially far more destructive of the federal control of private-sector labor relations. Six states (California, Colorado, Michigan, Minnesota, New York, and Nevada) have established so-called "industry standards boards" that function to secure wage and benefit guarantees for all employees within a specific industry. Minnesota and Michigan have established such boards in the nursing home industry, California in the fast-food industry, and Nevada and Colorado in the home health care industry. In virtually every instance, the boards were established through the direct efforts of the Service Employees International Union (SEIU), which exercises pervasive control over the boards. In general, the boards make industrywide recommendations about wages, hours and working conditions that are subsequently enacted into binding law by compliant state legislatures.

In essence, without any employee approval or democratic process these boards have assumed industrywide control over the traditional subjects of collective bargaining. It is essentially de facto exclusive representation on a sectoral basis with zero proof of majority and no determination as to the propriety of an industrywide unit. Doing away with secret ballot elections and compelling sectoral bargaining are two of the top items on organized labor's wish list, and they are slowly and subtly being achieved. This may well be the hidden price of stasis, inaction, and ineptitude at the federal level, and should prompt serious consideration regarding the need for change. The current situation is not unlike geopolitical regime change that takes place with no follow-up plan in place. The result is an inevitably failed state that becomes a welcoming place for radical ideas. ■

NLRB quorum restored following Senate confirmations

On December 18, 2025, the U.S. Senate voted to confirm President Donald Trump's nominations of labor attorneys Scott Mayer and James D. Murphy to serve on the National Labor Relations Board (NLRB) and Crystal S. Carey to serve as the NLRB's general counsel. The confirmation of the two Board nominees restores a quorum, allowing the Board to function and providing some certainty for labor relations after the five-member Board was left with only one member for months.

The Senate voted 53–43 to approve a Senate Resolution confirming a slate of ninety-seven Trump administration nominations *en bloc* that included NLRB nominations.

- Scott Mayer, an in-house legal counsel and current chief labor counsel at a multinational corporation. He fills the seat last held by Lauren McFerran, a Democratic appointee whose term expired on December 16, 2024. The new term expires on December 16, 2029.
- James Murphy, a career attorney at the NLRB who served, successfully, as chief counsel to former members Brian E. Hayes and Harry I. Johnson III and most recently to former chairman Marvin E. Kaplan. He fills the seat vacated by former member John F. Ring, expiring on December 16, 2027.
- Crystal Carey, a partner at a private practice law firm with eight years of experience as an attorney with the NLRB, will serve as the general counsel for a term of four years. She replaces the current acting general counsel, William B. Cowen, who served following President Trump's removal of Biden-appointed former general counsel Jennifer Abruzzo.

The Board has lacked a quorum since President Trump removed Democratic member Gwynne Wilcox in his first days in office in January 2025. For months, the NLRB has had only one sitting member: David Prouty, a Democratic member nominated by President Biden in 2021, whose term is set to expire in August 2026.

Wilcox firing upheld. Though Wilcox challenged her removal in federal court, on December 5, 2025, a divided panel of the U.S. Court of Appeals for the D.C. Circuit ruled that Congress could not prohibit President Trump from removing members of the NLRB and MSPB without cause, reversing district court rulings upholding the constitutionality of the statutory removal protections and reinstating

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Wilcox (see Issue 28 of the *Advisor*). The Supreme Court of the United States had stayed those reinstatements pending the appeal process. Wilcox has since sought *en banc* review by the full D.C. Circuit. The underlying issue will very likely be decided by the Supreme Court in *Trump v. Slaughter* (S Ct. Docket No. 25-332, Argued 12/8/25, Decision Pending).

Republican appointees. Mayer's and Murphy's confirmations follow a nearly six-month process after President Trump nominated them in July 2025. Their confirmations mean the Board will now have a quorum of three out of five members, with two of the members being Republican appointees.

Carey will replace NLRB Acting General Counsel William B. Cowen, who had served in that capacity after President Trump removed Abruzzo in January. While Cowen took actions to rescind the prior general counsel's memoranda and align the NLRB with the administration's policy priorities (see Issue 29 sof the *Advisor*), Carey's confirmation will allow the NLRB general counsel's office to take further action. The general counsel plays a crucial role in overseeing the investigation and prosecution of alleged labor violations, as well as in establishing enforcement policies. Carey is expected to differ significantly from Abruzzo and align closely with the Trump administration.

Need one more

The confirmation of the two Board nominees, which restores a quorum to the Board, together with the confirmation of the new general counsel, will enable the NLRB to return to close-to-normal operations in the coming year and further implement the Trump administration's policy priorities. However, that does not mean employers should expect the Board to reconsider some of the union-friendly NLRB decisions issued during the Biden administration. Long-standing Board tradition requires at least three affirmative votes to reverse extant precedent. Both Mayer and Murphy have stated publicly that they will uphold Board tradition in this respect. Thus, given the current makeup of the Board, with two Republican members and one Democratic member, the Board will not immediately overturn these problematic Biden Board decisions.

Even so, Mayer and Murphy have the authority to amend or address the ambush regulations or engage in other rulemaking. The Board can also begin addressing the current backlog by ruling on noncontroversial cases. ■

Circuit split over broad damages deepens

Two recent decisions by the U.S. Courts of Appeal for the Fifth and Sixth Circuits have deepened a circuit split over the remedial authority of the National Labor Relations Board (NLRB). In a 2022 decision, the Board held it could order an employer to pay for any "foreseeable pecuniary harms" resulting from its unfair labor practices. The claimed authority to order this type of financial remedy was extremely broad and largely unprecedented. With these new decisions, the Fifth and Sixth Circuits have now joined the U.S. Court of Appeals for the Third Circuit in holding that the National Labor Relations Act (NLRA) does *not* provide the NLRB with power to order such relief. However, the Ninth Circuit has held that the Board does possess this remedial authority and that such relief is consistent with the NLRA's purpose.

Lopsided circuit split

In *Thryv*, the NLRB announced that employers that engage in unfair labor practices—such as discriminatory firings—are liable for "all direct or foreseeable pecuniary harms" resulting from those practices. This new remedy represented a significant expansion of the standard make-whole relief that the NLRB typically awards, pursuant to its statutory authority to "take such affirmative action including reinstatement of employees with or without backpay." Instead of just providing for lost wages in the form of backpay, *Thryv* enabled the NLRB to hold employers liable for paying for discharged employees' out-of-pocket medical expenses, childcare costs, transportation expenses, credit card fees, penalties on early withdrawals from retirement accounts, and a wide variety of other costs when those costs were arguably attributable to the unlawful firing. (For further discussion of the *Thryv* decision, see Issue 23 of the *Advisor*).

Since *Thryv* was issued, four circuit courts have considered the NLRB's authority to award these expanded remedies, and a clear circuit split has emerged. As noted, the Third,

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Fifth and Sixth Circuits have rejected the NLRB's claimed authority to issue *Thryv* remedies, creating a lopsided split with the Ninth Circuit.

The [Fifth Circuit] rejected the NLRB's attempts to characterize the foreseeable remedies as equitable because they were designed to restore the status quo, stating 'that feature alone does not render the ordered relief equitable.'

On November 5, 2025, the Sixth Circuit, in *National Labor Relations Board v. Starbucks Corporation*, vacated the *Thryv* remedy, rejecting the NLRB's categorical approach to "all direct or foreseeable pecuniary harms," reasoning that such awards mirror compensatory and consequential damages in tort and contract and thus exceed the statute's remedial authority. That decision followed closely on the heels of the Fifth Circuit's ruling on October 31, 2025, in *Hiran Management, Inc. v. National Labor Relations Board*, that the NLRB was limited to providing equitable remedies—such as reinstatement and backpay—and lacked statutory authority to impose penalties requiring employers to compensate employees for all foreseeable harms resulting from unfair labor practices.

Both rulings contrast with the Ninth Circuit's decision upholding *Thryv* remedies in January 2025, in *International Union of Operating Engineers, Stationary Engineers, Local 39 v. National Labor Relations Board*. In the Ninth Circuit's view, *Thryv* remedies are consistent with the purposes of the NLRA to make workers whole for losses suffered due to unfair labor practices and are akin to backpay and restitution, which "restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table." The Ninth Circuit reaffirmed that holding on October 20, 2025, in an amended opinion that included a lengthy dissent arguing that the NLRB "has no authority to order this type of monetary relief," as it is "unauthorized by statute and forbidden by the Seventh Amendment."

Compensatory vs. equitable damages

In its recent ruling, the Fifth Circuit observed a distinction in the types of remedies available to the NLRB, finding that the NLRA only allows the NLRB to issue equitable remedies, such as backpay, and not legal consequential remedies. The court said the NLRB "broke new ground" with the *Thryv* decision in asserting that it could order damages for direct and foreseeable remedies. The court rejected the NLRB's attempts to characterize the foreseeable remedies as equitable because they were designed to restore the status quo, stating "that feature alone does not render the ordered relief equitable."

"In demonstrating no principled distinction between legal and equitable relief, the Board's result diverges sharply from the well-established principle that compensatory damages are a form of legal relief," the Fifth Circuit wrote. "The Board is not entitled to re-create established distinctions in the law, or in its governing statute, to serve parochial purposes."

Similarly, the Sixth Circuit noted that the NLRB in *Thryv* had "located newfound, categorical authority to 'order respondents to compensate affected employees for all direct or foreseeable pecuniary harms.'" While the NLRA grants the NLRB a remedial power to take "affirmative action" to effectuate the policies of the NLRA, the court held that power only encompasses equitable remedies. The court explained that *Thryv* remedies are not equitable but legal in nature, and the substance—paying money for losses incurred "as a result" of an unfair labor practice—tracks compensatory and consequential damages in tort and contract. While equitable remedies often restore the status quo, legal damages frequently do too. Simply asserting that a remedy "restores" the status quo, as the NLRB urged in defending *Thryv*, does not transform legal damages into equitable relief.

The Sixth Circuit noted the structure of the NLRA suggests that the NLRB has limited remedial power, stating, "That the NLRA nowhere specifies monetary relief is thus a strong indicator that Congress did not design the Act to empower the Board with such legal remedial power."

The Sixth Circuit further cited the Supreme Court of the United States' 2024 decision in *Securities and Exchange*

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Commission v. Jarkesy, discussed in Issue 27 of the *Advisor*, which called into question whether federal agencies can seek civil penalties in administrative enforcement actions, since such penalties implicate the Seventh Amendment's right to a jury trial.

Next steps

The *Thryv* decision has exposed employers to increased liability in unfair labor practice cases and has consequently made them more challenging to settle. With only the Ninth Circuit as an appellate outlier, the weight of federal court opinion is decidedly against the Board's claimed remedial authority. However, *Thryv* remains Board law, and a circuit split—lopsided though it may be—still exists. That split raises the prospect of eventual consideration by the Supreme Court.

In the interim, however, there are several practical considerations. Given that the bulk of decisional authority rejects *Thryv* remedies, employers currently facing such claims should strongly resist them in any settlement discussions. The remedy is not enforceable in at least the three named circuits and likely not enforceable in others. At present, only the Ninth Circuit would definitively enforce a *Thryv* remedy. Again, at present, however, the *Thryv* decision remains Board law and will not be overturned until there are three Board Members prepared to do so. As that situation does not currently exist the decision remains "on the books." Thus, administrative law judges continue to be bound by the decision in any case in which the remedy is sought. The saving grace here is that since the decision rests on some very thin legal ice, the current general counsel is likely to exercise her prosecutorial discretion and not plead or seek a *Thryv* remedy in any new unfair labor practice cases. ■

Injunctions issued against CA and NY labor laws

Federal district courts in New York and California have held that recently passed laws in each state purporting to grant authority over private sector labor relations to state public employment boards are preempted by the National Labor Relations Act (NLRA). Both courts issued preliminary injunctions against the enforcement of the respective statutes.

The California law. On September 30, 2025, Governor Gavin Newsom signed into law Assembly Bill (AB) 288, empowering the California Public Employment Relations Board (PERB) to assume control of private sector labor relations if the NLRB is unable to or declines to carry out its duties. The California law authorized PERB to oversee and certify private sector union elections any time the president, the U.S. Congress, or the courts limited the NLRB's authority, or the agency "expressly or impliedly" ceded its jurisdiction. The law was enacted at a time when the NLRB had been without a quorum to issue decisions since January 2025.

Similar to the New York labor law, AB 288 seeks to maintain worker protections for concerted activities and organizing efforts as provided by the National Labor Relations Act (NLRA), including rights to take concerted action; organize, form, or join a union; and engage in collective bargaining, when the NLRB is unable to or declines to act. The law also expressly states that it must "be liberally construed to ensure that all workers in California can effectively vindicate their fundamental rights."

When the law would apply. AB 288 would allow covered workers to petition the California PERB to enforce their rights under the NLRA in situations in which "they lose coverage under" the NLRA because the law has been "repealed, narrowed, or its enforcement enjoined in a case involving that worker," whether by the president, Congress, or the federal courts, or when "the NLRB has expressly or impliedly ceded jurisdiction."

Without the federal court's injunction, the NLRB would have been deemed to have ceded jurisdiction as of January 1, 2026, in cases in which:

- A certification of results of an election, including the certification of a bargaining representative, has been issued or where a challenge or objection to a representation election is pending before the NLRB, and the NLRB: (1) lacks a quorum; (2) "has lost its independence" because the Supreme Court of the United States rules that Board members are not constitutionally

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protected from removal; or (3) has been enjoined by a court in a constitutional challenge to its structure or authority;

- a certification, complaint, or decision has *not* been issued, and "processing delays" cause a case to be pending before a regional director or an administrative law judge (ALJ) for more than six months without a decision;
- a certification of election results, or other reviewable order has been issued, by a regional director or an ALJ, but "processing delays" prevent the NLRB from accepting or declining review or granting permission for an immediate appeal for more than six months following a request for review or appeal; or
- a review before the NLRB is pending but is delayed more than twelve months without a decision.

Notably, the California PERB would retain jurisdiction over pending matters even if it determined the situations no longer apply "unless ordered by a court of competent jurisdiction to cede its jurisdiction."

Private sector employees or their representatives would also have been able to petition the California PERB to certify exclusive bargaining representatives or decide unfair labor practice (ULP) charges, including those based on allegations of a refusal to bargain, not recognizing a bargaining representative, or failure to bargain in good faith. PERB would have been able to conduct union elections, certify bargaining representatives, issue bargaining orders, order employers to submit to binding arbitration, or "[o]rder any appropriate remedy" when an "employer refuses to comply" with the law, including injunctive relief and penalties.

Legal challenges

On September 5, 2025, Governor Kathy Hochul signed into law New York Senate Bill 8034A / Assembly Bill 8590A (S.8034A/A8590A) which, similar to the California labor law, authorizes the New York State Public Employment Relations Board (New York PERB) to assert jurisdiction over disputes between private employers, employees, and unions when the NLRB is unable to act effectively. Supporters of both laws have contended the legislation is necessary if the NLRB cannot or will not act and is not preempted when the NLRB is functionally ineffective.

As noted in Issue 29 of the *Advisor*, on September 12, 2025, the NLRB's acting general counsel filed a lawsuit in the U.S. District Court for the Northern District of New York alleging that the New York law is preempted by the NLRA because it "unlawfully usurps the NLRB's authority by attempting to regulate areas explicitly reserved for federal oversight, creating a parallel regulatory framework that conflicts with the NLRA." On December 4, 2025, a U.S. District Court for the Eastern District of New York granted an employer's bid for a preliminary injunction to block enforcement of the New York state law. The court ruled that the employer was likely to succeed on the merits of its claim that the amendment was preempted by the NLRA and that it was likely to suffer irreparable harm absent injunctive relief.

On October 15, 2025, the Board also filed a similar lawsuit challenging the California law. On December 26, 2025, a U.S. District Court for the Eastern District of California largely granted the agency's motion for a preliminary injunction seeking to enjoin the enforcement of the law. The court determined that the implied cessation conditions contained in the bill—loss of quorum, loss of independence, and processing delays—create a conflict between the state labor board and the NLRB and would effectively give the state labor board authority over conduct subject to the NLRA. However, the court did find some sections of A.B. 288 avoided this conflict, specifically those concerning loss of coverage, enjoinment, and express cessation of jurisdiction.

What next?

Attempts by California and New York to assert jurisdiction over federal labor relations issues is the latest development in the evolving labor law landscape under the Trump administration. Notably, the lack of a Board quorum was likely a motivating factor in enacting those laws. Now that there is a quorum at the Board (see page 5), and that these recent court decisions have reinforced the scope of federal preemption in this area, similar legislative efforts by the states are unlikely. ■

NLRB reinstates 2020 joint-employer rule

On February 26, 2026, the National Labor Relations Board (NLRB) unveiled a new final rule, published in the *Federal Register* on February 27, that withdrew the NLRB's November 2023 final rule. The 2023 rule had sought to cast a wider net in determining joint employer status and was struck down by a federal district court in March 2024. The new final rule formally reinstates the NLRB's February 2020 narrower standard for determining joint employer status based on thirty years of previous NLRB case law and required evidence that the putative joint employer exercised "substantial direct and immediate control over one or more essential terms or conditions" of another employer's employees.

The NLRB issued the new final rule without a period of notice and comment. The final rule reinstates the 2020 rule that has functionally been in effect since a March 2024 decision by U.S. District Court for the Eastern District of Texas vacated the rule before it ever took effect, finding it was unlawfully broad and was "arbitrary and capricious."

The Board determined a notice and public comment period to be unnecessary given the 2023 rule never took effect after it was vacated and the Board voluntarily dismissed its appeal of that decision. The reinstated 2020 joint-employer rule turns on an entity's substantial direct control over essential employment terms and conditions as opposed to indirect control or unexercised authority.

Prior 2023 rule. The prior 2023 rule would have made it more likely that an entity could be deemed a joint employer of another employer's workers, focusing the inquiry on whether an entity has authority or control over any essential term or condition of employment, regardless of whether it ever actually exercised that control. The 2023 rule further would have set forth "essential terms and conditions of employment," including some vague terms, and would have required joint employers to bargain with workers' bargaining representative over all terms and conditions with which the joint-employer has control, even if they are not deemed "essential."

Key requirements of reinstated 2020 rule

While both the 2020 and 2023 joint-employer standards focused on an entity's control over essential terms and conditions of employment, the now-reinstated 2020 standard shifts the inquiry to whether the entity actually exercises direct control, rather than whether it arguably possesses authority to control, either indirectly or based on authority that it has not actually exercised.

Under the reinstated 2020 rule, an employer may be considered a joint employer of another employer's employees only if the two employers "share or codetermine the employees' essential terms and conditions of employment." Critically, establishing joint employer status requires demonstrating that an entity possesses and exercises "substantial direct and immediate control" over one or more essential terms or conditions of employment such that it "meaningfully affects matters relating to the employment relationship." The rule further clarifies that "substantial direct and immediate control" must have a "regular or continuous consequential effect" on employment terms, not control exercised only on a "sporadic, isolated, or de minimis basis."

The rule limits the role of indirect control, including "contractually reserved but never exercised authority," over mandatory bargaining subjects other than essential employment terms. Such "indirect control" explicitly does *not* include "control or influence over setting the objectives, basic ground rules, or expectations for another entity's performance under a contract."

Furthermore, evidence of indirect control "is probative of joint-employer status, but only to the extent it supplements and reinforces evidence of the entity's possession or exercise of direct and immediate control over a particular essential term and condition of employment." The rule states that "contractually reserved authority" that has "never been exercised" does not, on its own, establish joint employer

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status. Additionally, the party claiming there is a joint employer relationship bears the burden of proof.

'Essential terms and conditions.' The reinstated 2020 rule narrows the defined "essential terms and conditions of employment" to an eight-factor list traditionally considered to be core terms and conditions of employment: wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.

The rule provides detailed guidance on what constitutes "direct and immediate control" for each factor:

- **Wages**: An entity must actually determine wage rates, salaries, or pay rates for individual employees or job classifications. Cost-plus contracts, even those with a maximum reimbursable wage rate, do not establish direct control sufficient to establish joint employer status.
- **Benefits**: An entity must actually determine fringe benefits, such as selecting health insurance or pension plans. Permitting another employer to participate in benefit plans under an arm's-length contract does not establish direct control.
- **Hours of Work**: An entity must actually determine work schedules or overtime. The rule states that simply establishing operating hours or when services are needed does not suffice to establish a joint employer relationship.
- **Hiring**: An entity must actually decide which particular employees will be hired. Requesting staffing level changes or setting minimal hiring standards (such as government-required qualifications) does not constitute the requisite direct control.
- **Discharge**: An entity must actually decide to terminate an employee. Reporting misconduct, expressing a negative opinion, refusing to allow an employee to continue performing work, or setting minimal performance standards does not establish requisite direct control.
- **Discipline**: An entity must actually decide to suspend or otherwise discipline an employee. Notably, simply reporting issues to the actual employer or "refusing to allow another employer's employee to access its premises or perform work under a contract," does not qualify to establish a joint employer relationship.
- **Supervision**: An entity must actually instruct employees on how to perform their work or issue "performance appraisals" beyond routine instructions on "what work to perform, or where and when to perform the work, but not how to perform it."
- **Direction**: An entity must assign employees their "individual work schedules, positions, and tasks." Employers do not exercise control by setting project completion schedules or describing work objectives.

Key takeaways

The formal return to the 2020 rule is a welcome sign for employers following several years of uncertainty. The reinstated 2020 rule provides greater clarity and predictability for employers, particularly those operating in franchise, staffing, subcontracting, or other arrangements involving multiple entities.

While joint employer status will still be determined by a totality of the circumstances, under the current framework, the focus remains squarely on whether an entity actually exercises substantial direct and immediate control over the core aspects of an employment relationship based on wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. Thus, entities that simply set broad parameters, establish performance expectations, or maintain contractual rights that they never exercise may be less likely to be found to be joint employers.

Businesses may want to review their contracts, operational practices, and day-to-day interactions with workers and business partners, including franchise, staffing, subcontracting, and other similar business arrangements, to ensure they understand the potential for joint employer liability and can structure their relationships accordingly. ■

Other NLRB Developments

Circuit Court decisions

3rd Cir. and D.C. District Court: NLGA barred injunctive relief against NLRB. The U.S. Court of Appeals for the Third Circuit has held that the Norris-LaGuardia Act (NLGA) strips federal district courts of jurisdiction to enjoin unfair labor practice (ULP) proceedings where the underlying dispute involves or grows out of a labor dispute. The employer in the case sought to enjoin a National Labor Relations Board (NLRB) ULP proceeding on the ground that NLRB members and administrative law judges (ALJ) are unconstitutionally insulated from removal by the president. The Third Circuit, however, held that such constitutional claims were ancillary to the underlying dispute. It found that the core of the case was clearly a "labor dispute"; and that the NLGA, with only two exceptions neither of which applied, prevents a federal court from issuing any injunction in a labor dispute.

The Third Circuit also noted that any federal district court injunction against the NLRB's administrative proceedings "would put a thumb on the scale [in favor of the employer] in the underlying dispute, precisely the kind of 'judicial interference in management-labor relations' the Act's anti-injunction provisions seek to prevent." In addition, the appeals court dismissed the argument that the injunctive relief was sought against the Board and not the union, noting that "Congress did not limit the applicability of the Norris-LaGuardia Act only to cases involving identical parties to that dispute. And it did not create an exception for challenges to agency structure." The case is at odds with an opinion by the U.S. Court of Appeals for the Fifth Circuit, which held that an employer's action to enjoin NLRB proceedings against it did not "grow out" of the underlying labor dispute (*Spring Creek Rehabilitation and Nursing Center LLC v. National Labor Relations Board* (3rd Cir. Dec. 3, 2025)).

The U.S. District Court for the District of Columbia similarly held that, under the terms of the NLGA, a grocery chain was not entitled to a preliminary injunction barring the NLRB from proceeding with pending ULP charges. The employer sued the Board and several of its officers, alleging that the agency's pending ULP case proceeding against it was unlawful. The court noted that the employer "has not identified any of its 'property' that would be substantially and irreparably injured without an injunction," which by itself was sufficient to conclude that it could not satisfy the NLGA. Moreover, the court found that the underlying dispute involved "the terms and conditions" of certain employees such that the employer's suit "involves or grows out" of a labor dispute for purposes of the NLGA. Additionally, the employer's challenge to the appointment of the Board's acting general counsel failed at least the first two *Thunder Basin* factors and so fell outside the court's jurisdiction. Lastly, the court lacked jurisdiction over the employer's claim that it would suffer irreparable harm if it were ordered to pay what it described as "impermissible and unconstitutional consequential damages," allegedly in violation of its rights under the Seventh Amendment of the U.S. Constitution (*Hannam Chain USA, Inc. v. National Labor Relations Board* (D.D.C. Nov. 17, 2025)).

4th Cir.: Firearms instructor not 'managerial employee.' The U.S. Court of Appeals for the Fourth Circuit held that substantial evidence supported the NLRB's finding that a firearms and tactics instructor was not a "managerial employee" excluded from the protection of the National Labor Relations Act (NLRA) against retaliation for engaging in protected concerted activity. In a case that provided the court its first opportunity to construe the managerial exception, the Fourth Circuit explained that "[i]n assessing whether an employee is managerial, the proper focus is on the employee's 'actual job responsibilities, authority, and relationship to management.'" Here, the employee's position "lacks sufficient indicia of managerial status to fall under the exception" since firearms instructors were not permitted to formulate or effectuate management policies, had no ability to alter the curriculum, played no role in selecting students for training, were not allowed to discipline students independently, and could not make the ultimate decision regarding whether a student would be permitted to remain in the training program, Accordingly, the appeals court granted the Board's application for enforcement and denied the employer's cross-petition for review (*National Labor Relations Board v. Constellis, LLC* (4th Cir. Dec. 1, 2025)).

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9th Cir.: Constitutional challenges to NLRB structure rejected. The U.S. Court of Appeals for the Ninth Circuit rejected several constitutional challenges to the structure and function of the NLRB in a case in which the Board found that an apartment management company unlawfully fired an employee who discussed his compensation with other workers. The employer raised multiple constitutional claims, arguing that: (1) the ALJ's removal protections violated Article II; (2) the claim for a *Thryv* remedy violated the Seventh Amendment's right to a jury trial; and (3) the agency's combined investigatory and adjudicatory functions are incompatible with the separation of powers and thus ran afoul of the due process clause of the Fifth Amendment of the U.S. Constitution. As to the Article II claim, the Ninth Circuit found that, even assuming the NLRB's for-cause removal protections for ALJs were invalid, the employer's failure to show harm precluded retrospective relief. It also rejected the jury claim, noting that the Supreme Court of the United States "has squarely held that an NLRB unfair practice proceeding is not a 'suit at common law' for purposes of the Seventh Amendment." Finally, it further rejected the due process argument holding that: "'[t]he combination of investigative and judicial functions within an agency does not, of itself, violate due process'" (*National Labor Relations Board v. North Mountain Foothills Apartments* (9th Cir. Oct. 28, 2025)). ■

Latest GC memo addresses enhanced remedies, workplace rules

On February 27, 2026, National Labor Relations Board (NLRB) General Counsel Crystal Carey (GC) issued a memorandum providing guidance to regional offices on "best practices, settlement considerations, and investigatory procedures in unfair labor practice cases." The memo builds on Acting GC William Cowen's rejection of former GC Jennifer Abruzzo's expanded remedies approach, stating, "Enhanced remedies—such as notice readings, apology letters, or nationwide postings—should not be routinely included in settlement agreements or complaints."

The memo goes on to note that pursuing cases "based solely on the maintenance of potentially unlawful rules, without any concurrent allegation of enforcement or evidence demonstrating actual impact on employees … is not an efficient use [of Board resources]." As mentioned in this issue of the *Advisor*, immediate policy changes at the Board are unlikely to transpire anytime soon, due to the current case backlog and a lack of a third affirmative vote to overturn extant Board case law. However, with this memo, GC Carey has sought incremental changes that will impact parties to Board proceedings.

We will cover the memo, as well as other breaking NLRB news developing as we go to press and in the weeks to come in the next issue of the *Advisor.* Stay tuned...

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