Ogletree Deakins

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The Practical NLRB Advisor

The Continued Politicization of the NLRB

In this Issue

2 Brian in brief

6 Legal developments

8 NLRB developments

On the day before its 2025-2026 term ended, the Supreme Court of the United States dealt yet another body blow to the so-called “administrative state.” In *Trump, President of the United States v. Slaughter*, the Court found that congressionally mandated limitations on a president’s power to terminate members of the executive branch ran afoul of the U.S. Constitution’s separation of powers.

Early in his second term, President Donald Trump removed Rebecca Kelly Slaughter from her position as a commissioner of the U.S. Federal Trade Commission (FTC) because, in the president’s view, “her service was not consistent with the administration’s priorities.” This reasoning contravened the statutory removal protection afforded FTC commissioners who, under the enabling statute, were subject to removal only because of “inefficiency, neglect of duty, or malfeasance.” None of these “for cause” reasons applied to Slaughter. She was removed simply because her actions and views did not align with those of the president. In affirming a president’s right to summarily remove executive officers, the Court found that congressionally imposed removal restrictions such as those in the FTC statute violate the separation of powers doctrine. In doing so, the Supreme Court overruled its ninety-one-year-old decision in the case of *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935). [*See* Legal Developments (p. 6) for additional discussion.]

CONTINUED POLITICIZATION continued on page 3

BRIAN IN BRIEF

Due to unfilled vacancies, the five-member National Labor Relations Board (NLRB) lacked the statutorily required three-member quorum from January of 2025 to January of 2026. Without a quorum, the Board did not have the authority to issue decisions for this entire twelve-month period. In January of 2026, James R. Murphy and Scott A. Mayer were confirmed to Board seats. This put the Board at three members—enough to meet the quorum requirement. However, with two remaining vacancies and the three current members divided 2-1 on most major issues, the Board could not tackle any controversial cases since Board tradition requires three votes to overturn any precedent. This situation lasted another seven months beyond January of 2026, until a fourth Board member, James Macy, was sworn in on August 17. Thus, for more than nineteen months, we have seen no significant policy developments coming from the Board.

Although the Board has largely been in hibernation for an extended period, the federal courts have been particularly active in areas that directly impact the Board. Several of those cases are discussed in this issue's lead article and in the Legal Developments section. The overarching theme of these court decisions has been one of limiting the authority of federal agencies and increasing judicial scrutiny of their activity. These developments in administrative law have been extensive and consequential. Indeed, there are now serious questions as to whether so-called "independent agencies" are constitutionally viable at all.

To date, much of the judicial reassessment of administrative law has centered on the policymaking and administrative functions of federal agencies, boards, and commissions. Of equal and arguably greater concern and practical impact is the judicial function of many of these federal entities. The NLRB is considered by many to be the poster child for the accumulation of judicial power. Thus, it has its own complete judicial system that includes investigation, prosecution, trial court decision, and quasi-appellate review by the Board itself. It has its own set of procedural and evidentiary rules, presumptions, and burden allocations. Subsequent judicial review is rare, and heretofore exceedingly deferential. In the wake of *Trump v. Slaughter*, it is only logical to ask that this system may not pass constitutional muster. Justice Neil Gorsuch clearly previewed this question in his concurring opinion in *Slaughter* in which he notes that the Court must "finish the journey [it] start[s] today" and must restore judicial power to the federal courts. This may well portend a complete re-examination of the NLRB's system of adjudication and the administrative law theory that has delegated such authority to federal agencies. As Justice Gorsuch further noted: "We have tolerated [such] adventurous theories long enough."

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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CONTINUED POLITICIZATION **continued from page 1**

The constitutional principles contained in *Slaughter* are not limited to the FTC but apply to the myriad regulatory and independent agencies, boards, and commissions, which have multiplied exponentially, particularly in the wake of the New Deal. Those, of course, include the National Labor Relations Board (NLRB). Coincidently, like Rebecca Slaughter, the president also terminated NLRB Board Member Gwynne A. Wilcox early in her second term, and, like Slaughter, Wilcox was not terminated for one of the specific reasons set out in the NLRB's enabling statute. Again, like Slaughter, Wilcox sued over her termination. However, prior to the Supreme Court decision in *Slaughter,* the United States Court of Appeals for the District of Columbia, in a foreshadowing of the *Slaughter* decision, held that the president was constitutionally entitled to remove Wilcox without cause. Wilcox has not sought Supreme Court review of that determination and, while there might exist arguments at the margins to distinguish the two, it certainly appears that *Slaughter* applies with equal force to the NLRB.

In the history of the republic, only eight federal judges have been impeached by trial in the U.S. Senate. By contrast, the ouster of executive branch officials is just another day in the office for presidents.

The decision in *Slaughter* is emblematic of increasing judicial and scholarly scrutiny over the power, constitutionality, and ubiquity of the administrative state. There has long existed the theoretical view that the vast number of independent regulatory agencies, boards, commissions, and the like are nothing more than the legitimate and necessary offspring of one of the three branches of government—executive, legislative, and judicial. There also exists the countervailing argument that these entities have morphed into an extra-constitutional "fourth branch" of government—a fourth branch that is unelected, unaccountable, possesses expansive mandates, and is often unfettered by traditional safeguards against the exercise of governmental authority. As the number and power of these entities has increased exponentially, these issues have become more acute and so too has the degree of judicial attention. Such critical reappraisal of the administrative state is readily apparent in the recent jurisprudence of the Supreme Court. Over its last few terms, the Court has ruled in *West Virginia v. Environmental Protection Agency*, 597 U.S. 697 (2022) that the "major questions" doctrine prohibits agencies from establishing far-reaching regulations based on ambiguous statutory language. [For further discussion of the *West Virginia* decision, see Issue No. 27 of the *Advisor*.]

The decision in Slaughter *is emblematic of increasing judicial and scholarly scrutiny over the power, constitutionality, and ubiquity of the administrative state.*

Next, in *Securities and Exchange Commission v. Jarkesy*, No. 22-859 (2024), the Court held that the SEC's internal trial process for assessing civil penalties in securities fraud cases violated the Seventh Amendment right to trial by jury. [For further discussion of the *Jarkesy* decision, see Issue No. 27 of the *Advisor*].

Loper Bright Enterprises v. Raimondo, No. 22-451 (2024), the Supreme Court upended the so-called "*Chevron* deference" doctrine, a foundational bulwark of the administrative state, and held that reviewing courts must independently decide the meaning of ambiguous statutory provisions. [For further discussion of the *Loper Bright* decision, see Issue No. 27.] Most recently, as noted at the outset, the Court decided *Slaughter*, where it held that executives that *assist* the president in the execution and administration of the law must be accountable to the president. Clearly, there is no shortage of judicial skepticism with respect to the workings of the administrative state and there is a clear decisional trajectory aimed at reining in its powers.

These decisions also bring to light further questions of constitutional legitimacy. If the current judicial trajectory continues, those further questions are very likely to focus on the adjudicatory function of many of these governmental entities. For example, in the wake of *Slaughter*, some observers have asked how it is possible to square its holding with much earlier Supreme Court jurisprudence regarding the fairness of federal adjudication. As early as 1927, in *Tumey v. Ohio,* 273 U.S. 510 (1927), the Supreme Court recognized the principle that it offends the most fundamental precepts of fairness and due process for anyone to be subject to an adjudication in which the judge has

CONTINUED POLITICIZATION **continued on page 4**

CONTINUED POLITICIZATION continued from page 3

a personal financial or pecuniary interest in the outcome. The same observers now note, in the wake of *Slaughter,* since agency adjudicators can be summarily removed from their jobs and livelihoods if the president disagrees with their decisions, they could not possibly have a more vested financial or pecuniary interest in ensuring that any decision they make comports with the president's views. In many instances, it has always been hard to argue that independent agencies are truly independent. It is now pretty much impossible to do so.

Despite seemingly well-grounded criticism, the exercise of executive branch adjudication has traditionally been preserved by the courts.

Outside the Comfort Zone

Presidential authority and principles of fairness and due process have always been easier to square with agency activity that is regulatory or policy oriented. To the extent an agency is engaged in such quintessentially "executive" activities, it should surprise no one that this policymaking and administration, should, of course, align with the views of the chief executive. Additionally, procedural safeguards such as the Administrative Procedure Act and traditionally robust judicial review of regulatory activity lend a meaningful sense of comfort with the fairness of the regulatory process. Further still, the regulatory process is aimed at implementing policies of general applicability or to address issues affecting large sectors of the economy or the populace as opposed to individuals or distinct businesses. Finally, policymaking is a function traditionally within the wheelhouse of the executive branch. We elect individuals because we want them to implement the policies we favor, so we fully expect our congressional representatives and senators to do that through the legislative process and our elected presidents to do so through their administrative agencies that are a part of the executive branch.

In stark contrast, there is no similar sense of constitutional or inherent comfort when federal agencies engage in adjudication, as opposed to policymaking or regulation. This again should come as no surprise since in performing the latter, agencies are engaging in activity commonly understood and accepted to be a proper function of the executive branch, but when it engages in the former it appears to many as the executive branch improperly assuming the role of the judicial branch.

The two branches have very different constitutional roles and very different attributes and constraints. For example, the members of the judicial branch, by constitutional design, are to be independent and apolitical. It is for that reason that its judges are accorded life tenure and can only be removed through impeachment and only for specific and limited cause. As *Slaughter* illustrates, that is decidedly not the case with officers in federal agencies that are not designed to be either independent or apolitical. They are there to effectuate the policies of the president and subject to dismissal if they do not. They are not independent. The numbers amply illustrate the point. In the history of the republic only eight federal judges have been impeached by trial in the U.S. Senate. By contrast, the ouster of executive branch officials is just another day at the office for presidents.

The legislative effort to fit a judicial square peg into an executive round hole has always been problematic. Courts, for decades, have grappled with the constitutional discomfort and anomaly of the executive branch exercising judicial functions and powers through administrative agencies. Despite seemingly well-grounded criticism, the exercise of executive branch adjudication has traditionally been preserved by the courts. While beyond the scope of this comment, those decisions that have effectively untethered agency tribunals from Article III of the U.S. Constitution typically cite two factors.

First, such adjudications have been found constitutionally viable because at the end of the process, there is a provision for review of the adjudicatory process by an Article III court. Second, courts have drawn a distinction between so-called "private rights" and "public rights," the former being concerned with disputes between individuals that involve common law rights, and the latter being concerned with disputes between individuals and the government that involve rights created by statute. Critics, however, have argued that such justifications are insufficient. They note that appellate review is too rare, too far removed, and often too perfunctory to be meaningful. A similar history of somewhat supine

CONTINUED POLITICIZATION continued on page 5

CONTINUED POLITICIZATION continued from page 4

appellate review in the rulemaking arena most certainly drove the Supreme Court decision in *Loper Bright* and could well do the same in the adjudication arena. Perhaps more importantly, the public versus private rights distinction is being called into question by some. They argue that in many cases it is a facial distinction without a substantive difference.

Reassessing NLRB Independence

Whatever one's views, recent judicial experience suggests that the continuing viability of agency adjudication is ripe for a critical reassessment. If that happens, there would seemingly be no better candidate for reassessment than the National Labor Relations Board where the concerns of critics are glaringly apparent.

Courts instill public confidence when they are consistent in principle without regard to result and when their principles remain consistent over time. For many observers, the NLRB's adjudicatory history, particularly lately, seems the polar opposite.

As *Slaughter* makes clear, NLRB officials are in no meaningful sense "independent" even when they act in their judicial or adjudicatory capacities. To many this appears like a football owner acting as referee at his team's games. Yet this is the inevitable outcome where the agency's enabling statute blesses the unholy marriage of regulatory and judicial activity.

The architectural problems with the statute do not end with the lack of adjudicatory independence. The NLRA also creates an entire adjudicatory system within a single entity. Thus, the NLRB is designed and functions to investigate, prosecute, try, and decide all claimed violations of its own statute. It is effectively prosecutor, judge, and jury all rolled into one—a concentration of judicial authority that is inherently alarming and facially unfair. Moreover, its critics argue the Article III court review of agency adjudication is no constitutional backstop for these concerns since that review is rare and too deferential.

A Question of Fairness

While the concentration of such a broad array of government power in a single entity raises genuine fairness and process concerns, the NLRB has done little to assuage them. On the contrary, the agency often seems intent to demonstrate that in its adjudicatory function, its processes are anything but fair. For example, despite express statutory language requiring the agency to conduct its adjudicatory proceedings "in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States," litigation before the NLRB hardly mirrors civil practice. For respondents, there is no pre-trial discovery, nor in most instances is there any robust or meaningful pre-trial motion practice. The agency has extensive investigatory rights while those of respondents are largely nonexistent and often effectively prohibited. The agency has no obligation to reveal the existence of exculpatory evidence. It remains a system of adjudication by surprise.

As if that were not enough, the NLRB employs its own trial judges, often drawn from its own employee ranks, untenured and unvetted by legislature or judiciary, yet empowered to make critical findings of fact and resolve pivotal questions of credibility between conflicting witnesses. At a statistically eyebrow-raising rate they find union witnesses overwhelmingly credible compared to employer witnesses, and often rely on boilerplate and unsubstantiated "presumptions" to reach those conclusions. Such findings are, however, rarely, if ever, subjected to critical review.

Courts instill public confidence when they are consistent in principle without regard to result and when their principles remain consistent over time. For many observers, the NLRB's adjudicatory history, particularly lately, seems the polar opposite. For the Board, *stare decisis* seems quaintly out of touch, as it routinely reverses its own precedent with increasing frequency and decreasing justification.

NLRA Constitutionality in Question

The root of all these problems lies in the statutory architecture of the National Labor Relations Act (NLRA) itself that forces executive policymakers to make policy through individual judicial adjudication. The result is not only inferior policymaking, but constitutionally offensive adjudication. It is also policymaking that may have serious statutory as well as constitutional infirmities. Thus, the Sixth Circuit in

CONTINUED POLITICIZATION continued on page 6

CONTINUED POLITICIZATION continued from page 5

Brown-Forman Corp. v. NLRB recently held that the Board's practice of policymaking through individual case adjudication runs afoul of the Administrative Procedure Act.

While this statutory criticism of the Board's operation is of relatively new vintage the constitutionally based irregularities and complaints about Board structure and adjudication have been around for a long time and yet the agency has continued to survive. Its defenders note that the constitutionality of the NLRA has been a matter of "settled law" since the Supreme Court's 1937 decision in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, No. 301 U.S. 1 (1937). What is unsaid by those defenders is that virtually the entire *Jones* opinion addresses the breadth of the U.S. Constitution's Interstate Commerce clause and whether it was broad enough to allow federal regulation of labor/management relations at all. Beyond its affirmation that labor/management relations is a constitutionally permissible *subject* for such regulation, it says little regarding the constitutionality of *how* that regulation is carried out. Indeed, in its more than seventy-page opinion, it devotes a scant few sentences to this issue essentially saying that there is a record of agency action that is subject to eventual court review that is sufficient to guard against agency abuse or arbitrariness. It's not exactly an extensive or compelling analysis of the agency's procedural constitutionality, nor was it at all the focus of the Court's conclusion regarding the Act's substantive constitutionality. Moreover, much has changed with both the practice and critical assessment of administrative law over the last ninety years. In an era where the power of the administrative state is being subjected to judicial scrutiny, it seems as if a more fulsome analysis of the NLRA's operational constitutionality than that in *Jones* is inevitable.

Legal Developments

The last several months have seen the issuance of several court cases of significance with respect to the National Labor Relations Act (NLRA). Simultaneously there have been few newsworthy decisions out of the National Labor Relations Board (NLRB) since it had lacked the necessary third vote to tackle any outstanding controversial precedent. Since the decisional output from the Board has been inconsequential, this issue will devote the legal developments space to a more detailed analysis of those federal court decisions.

As this issue's lead story notes, the Slaughter *decision plainly raises the question of whether so-called "independent" agencies can act as fair and impartial judges where such agencies exercise adjudicatory authority.*

Court Decisions

Trump v. Slaughter, No. 25-332 (2026)

Although not an NLRA decision, *Slaughter* has a direct and significant impact on the NLRB. The case itself arose from the president having fired Rebecca Slaughter, an independent commissioner of the Federal Trade Commission. The FTC enabling statute, the Federal Trade Commission Act, like the NLRA, prohibits any commissioner or board member from being dismissed except for very specific statutory reasons. Slaughter, and coincidently former NLRB Board member Gwynne Wilcox along with several other federal officials, were discharged by the president for reasons not specified in the respective enabling statutes. Although several of these individuals filed suit, the *Slaughter* case was the first to reach the Supreme Court of the United States. The question before the Court centered on whether the statutory safeguards against removal that the U.S. Congress included in the statute were constitutional. A 6-3 Supreme Court majority concluded they were not. They held that Slaughter, and presumably all others like Gwynne Wilcox, served in executive positions within the executive branch, and that as the chief executive the president had the unfettered right to dismiss them for any reason at all. The attempt by Congress to limit a president's removal authority thus violated the U.S. Constitution's "separation of powers."

As this issue's lead story notes the *Slaughter* decision plainly raises the question of whether so-called "independent"

LEGAL DEVELOPMENTS continued on page 7

LEGAL DEVELOPMENTS continued from page 6

agencies can act as fair and impartial judges where such agencies exercise adjudicatory authority. That question will no doubt be the subject of much future litigation. However, in the near term the decision in *Slaughter* left open a more immediate question. If the removal provisions of a statute are unconstitutional what happens to the rest of the statute?

When a court finds that a statutory provision is unconstitutional it typically applies the "severability" doctrine that preserves the remainder of the statute by eliminating only the constitutionally problematic portion. It simply "re-writes" and *severs* that part of the statute, effectively rendering it inoperative. Indeed, many statutes, including the NLRA, contain specific "severability" clauses that provide in cases where a portion of the statute is unconstitutional the rest of the statute survives. In one of the first post-*Slaughter* cases a federal district court in Texas found that the typical severance remedy applies to the NLRA. *Aimbridge Employee Service Corp. v. National Labor Relations Board* (E.D. Tex., July 27, 2026) In the case the employer had successfully enjoined the NLRB from proceeding against it because the removal protections were unconstitutional. The court lifted the injunction reasoning that *Slaughter* had severed out the unconstitutional section of the NLRA, and thus there was no further impediment to allowing the NLRB to proceed.

Severance, however, is not *always* the remedy when part of a statute is found unconstitutional. In certain instances, a court may find that the entire statute must fail because of the unconstitutional portion. Courts, as noted, are typically very reluctant to void an entire statute, particularly where there is an express severability clause. However, if a court finds that the unconstitutional portion of the statute is *essential* to the purpose of the entire statute it may resort to such a drastic remedy. Put another way, a reviewing court is essentially asking if Congress would have enacted the statute if it did not contain the unconstitutional provision. In the case of the NLRB, since *Slaughter* arguably eliminates the "independence" of NLRB Board members as adjudicators it is at least conceivable that a court could find that such "independence" was essential to the statute. Were that the case, the entire NLRA would fail.

Brown-Forman Corp. dba Woodford Distillery v. National Labor Relations Board, Nos. 24-2107/25-1060

In a case that may pose an existential threat to the NLRB's practice of making policy determinations through individual case determinations the Sixth Circuit Court of Appeals has refused to enforce a Board bargaining order based on its controversial *Cemex* decision. [For further discussion on this topic, see Issue No. 29 of the *Advisor*.] In its *Cemex* decision the Biden Board made sweeping changes to the standard necessary to trigger a Board bargaining order remedy. Those changes dramatically lowered the bar for imposing a bargaining order. The circuit, however, denied enforcement to the Board's order on the ground that such major policy changes could only be made through the rulemaking process, not through an individual case adjudication. Inasmuch as the Board did not engage in formal rulemaking under the Administrative Procedure Act (APA) the court held the new standard was invalid.

The case has major implications for the NLRB since it has utilized its formal rulemaking authority on a handful of occasions in its nearly one-hundred-year history. Rather it has announced, and often subsequently overruled, major policy changes through individual case adjudication. *Brown-Forman Corp.* calls into question the continuing viability of that practice. The NLRB in late spring 2026 filed a motion for reconsideration of the decision by the full Sixth Circuit panel. As we go to press the Sixth Circuit has not ruled on that request. Should it be denied the Board could seek Supreme Court review. However, that review is discretionary with the Supreme Court. The Board will also very likely engage in its policy of "non-acquiescence." Under that policy the Board considers adverse circuit court opinions to apply only within the geographic jurisdiction of the circuit court that has rendered the given opinion. This means the Board would consider the *Brown-Forman Corp.* decision binding only in cases arising withing the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee).

Hospital Menonita De Guayama, Inc. [*Hospital Menonita De Guayama, Inc. v. National Labor Relations Board,* No. 22-63 D.C Cir. 2026]

In the most significant application to date of the Supreme Court's *Loper Bright* decision to the NLRB, the United States Court of Appeals for the District of Columbia has struck down the Board's "successor bar" doctrine. *Hospital Menonita De Guayama, Inc. v. NLRB,*

LEGAL DEVELOPMENTS continued on page 8

LEGAL DEVELOPMENTS continued from page 7

No. 22-1163, United States Court of Appeals for the District of Columbia on remand from the Supreme Court of the United States, decided July 21, 2026. Successorship arises when a new employer acquires an existing unionized business under circumstances that require the purchaser to continue recognition of the incumbent union. In such circumstances the NLRB's "successor bar" precluded the affected employees, as well as any rival union, from challenging the incumbent union's continuing support through the NLRB's secret ballot election process. The appeals court noted that not only was such an irrebuttable presumption unsupported by any provision in the NLRA, but it was also totally contrary to express language in the statute that ensured employees the fullest freedom in the selection of their bargaining representative. The decision could have a major impact on other controversial Board "doctrines" or "presumptions" that are not grounded in statutory language and are in tension with express provisions of the statute.

NLRB Developments

Fourth Board Seat Finally Filled

Just before adjourning for its annual August recess, the full U.S. Senate, on August 7, 2026, voted to confirm the nomination of James Macy to serve as a member of the National Labor Relations Board (NLRB). His confirmation fills the fourth seat on the five-member Board. The Senate also confirmed current Board Member David M. Prouty for a new term. The fifth seat on the Board remains open and there is no nominee yet named for that post.

Prior to Macy's confirmation, the then-constituted Board was sharply divided 2-1 with respect to the continuing viability of several controversial decisions issued by the Biden Board. Current Board Member Prouty, now the Board's sole Democratic member, was in the majority in all of those controversial Biden Board decisions. His two current colleagues, Member Scott A. Mayer and new Chair James R. Murphy, are, however, presumed to be in favor of overruling a slew of those controversial decisions. However, a long-standing Board tradition, and one which Member Mayer and Chair Murphy have honored, has prevented the Trump Board from overturning any precedent in the absence of three votes to do so. The confirmation of Macy, a Republican Trump nominee, may very well supply the crucial third vote to overturn much of the precedent found so troubling by the management community.

This outcome, of course, is founded on the belief that Macy's views will align with those of his two Republican colleagues. While having enjoyed a successful legal career as a prominent employment attorney and serving at the U.S. Department of Labor as both acting administrator of the Wage and Hour Division, and most recently as the director of the Office of Workers' Compensation Programs, he has very little experience dealing with the National Labor Relations Act (NLRA) or with NLRB issues. His private practice and government service have been focused on aspects of employment law other than NLRA-governed labor-management relations. Consequently, his views on several critical NLRA-related issues are unknown.

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Case Handling Backlog

In an attempt to deal with a historic backlog of cases at the regional office level, the Board's general counsel (GC), Crystal Carey, has re-allocated some 3,500 pending cases to other regions. The initiative has reassigned cases from the agency's busiest regional offices to offices with smaller current case inventories in an effort to maximize efficiency. Thus, the GC has transferred selected cases from regions 2, 5, 7, 8, 9, 13,15,16, 22, 28, and 31 to other offices nationwide that have the capacity to process them more

NLRB DEVELOPMENTS continued on page 9

NLRB DEVELOPMENTS continued from page 8

quickly. No cases that were already being processed were transferred, and in all instances the transferred cases will retain their original case numbers. All parties to these cases have been formally advised of the transfers.

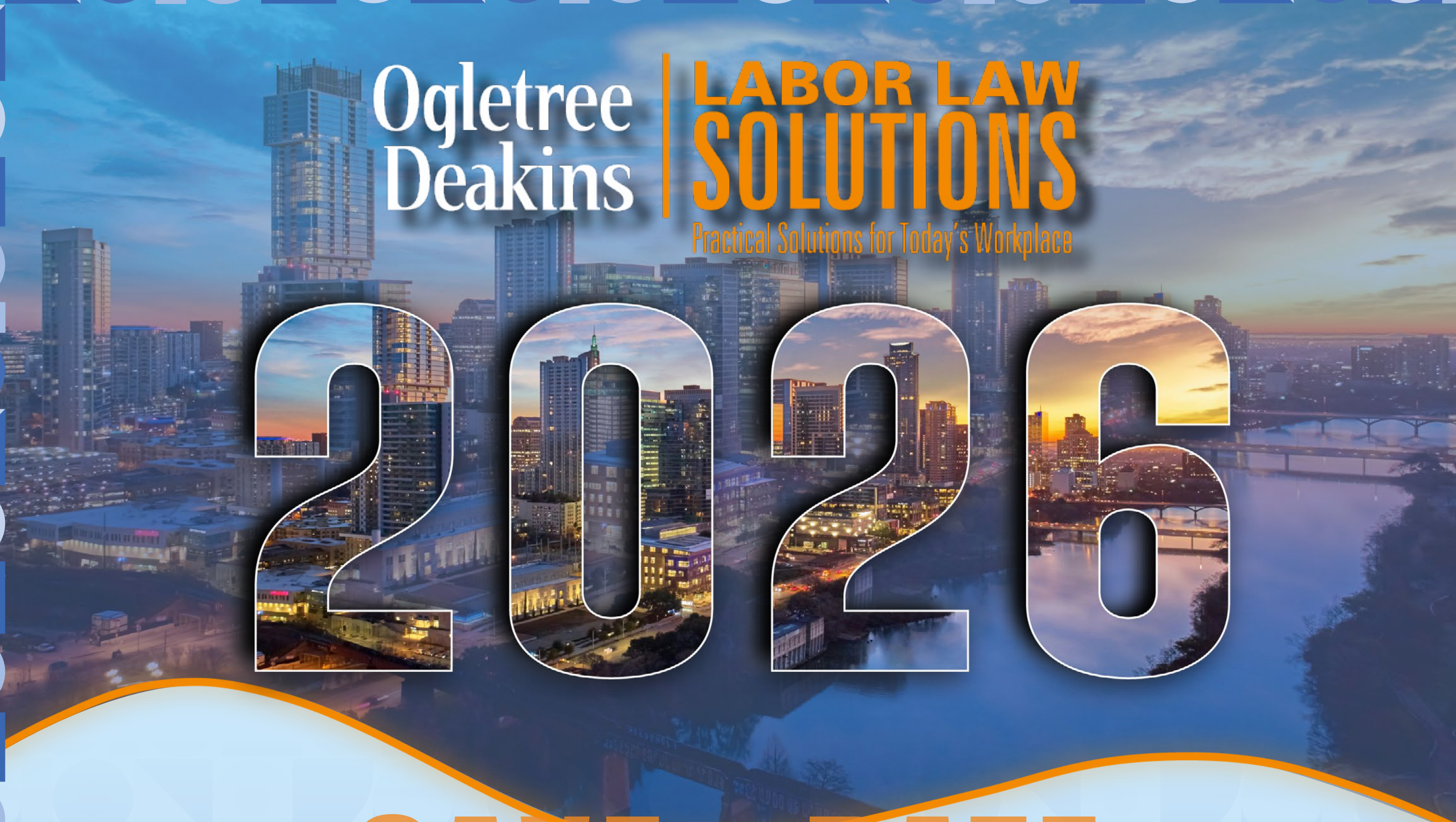
Faster Labor Contracts Act

On June 9, 2026, the U.S. House of Representatives passed the highly controversial Faster Labor Contracts Act (H.R. 5408). The legislation provides that, in the case of a newly elected union, the parties must commence bargaining within ten days of the union's certification. If the parties fail to reach a final agreement within ninety days, the matter is then referred to non-binding mediation. If the mediation does not result in agreement in thirty days, the matter is then referred to an arbitration panel that will impose a binding contract on the parties without regard to their agreement. The legislation mirrors the language of the Protecting the Right to Organize (PRO) Act that was introduced and rejected in a number of previous Congresses.

In an unprecedented political realignment, the very union-friendly bill was supported by some Republican House members who provided the votes to secure passage. Equally unprecedented is the fact that the companion bill in the Senate (S. 844) was actually offered by a Republican—Josh Hawley (R-MO). The Senate bill faces a more uncertain future. At present, the legislation, if offered as a stand-alone measure, very likely does not have the sixty votes necessary for Senate passage despite having some Republican support. That situation could, however, be a fluid one, particularly after the mid-terms, and thus bears close watching. The White House has not indicated if the president would support or veto the legislation in the event it passed both legislative chambers.

Striker Unemployment Benefits

With the enactment of S. 916, Oregon now joins New York, New Jersey, and Washington state in providing unemployment insurance (UI) benefits to striking employees. In all cases, there is a brief waiting period before the benefits kick in; however, thereafter they provide benefits for up to twelve weeks. The U.S. Department of Labor has recently issued a guidance memo clarifying the fact that, under federal law, striking workers must still demonstrate that they are both “available” for and “actively seeking” work. Critics of the legislation note that it may result in more frequent and longer-lasting work stoppages.



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