

Top Five Labor Law Developments for February 2023

By Jonathan J. Spitz & Richard F. Vitarelli

March 7, 2023

Meet the Authors



Jonathan J. Spitz

(He/Him • Jon)

Principal

(404) 586-1835

Jonathan.Spitz@jacksonlewis.com



Richard F. Vitarelli

Principal

860-331-1553

Richard.Vitarelli@jacksonlewis.com

Related Services

Labor Relations

1. *The National Labor Relations Board reinstated its previous standard for restricting employee severance agreements.* **McLaren Macomb**, 372 NLRB No. 58 (2023). The Board's ruling applies to all severance agreements for employees covered by the National Labor Relations Act (NLRA) and restricts certain confidentiality and non-disparagement clauses, as well as releases of NLRA claims. The decision emphasized the importance of employees' rights to make public statements about the workplace and that severance agreements restricting such statements prevent employees from participating in Board investigations or filing unfair labor practice (ULP) charges. The Board has not provided practical guidance on its ruling.
2. *The Board's General Counsel urged the Board to reinstate the "Blocking Charge" Rule.* Board General Counsel Jennifer Abruzzo voiced her support for the Board to return to its former rule allowing a ULP charge to suspend a representation election until the charge is resolved. In November 2022, the Board issued a Notice of Proposed Rulemaking and requested comments on proposed rescissions of its union representation procedures for blocking charges, voluntary recognition bar, and construction industry collective bargaining relationships. Abruzzo submitted a comment supporting the return to the pre-2020 procedures, including blocking a pending union election if a party files a ULP charge and the alleged conduct threatens to interfere with employee free choice. Abruzzo also commented on additional changes, including proposing a defined "reasonable period" of time for bargaining of one year from the date of an employer's voluntary recognition of the union before a decertification petition can proceed.
3. *U.S. Labor Secretary Marty Walsh will step down from the Biden administration; President Joe Biden nominated Deputy Secretary Julie Su as labor secretary.* Walsh's departure, effective mid-March, is the first among President Biden's Cabinet secretaries. A strong advocate for the president's aggressive agenda to boost organized labor, Walsh will become the executive director of the National Hockey League Players' Association. Julie Su has been the deputy secretary since July 2021 and previously served as the secretary of the California Labor and Workforce Development Agency. Senate Democrats lauded the nomination, while many Republicans expressed concern over Su's handling of California's unemployment matters during the COVID-19 pandemic.
4. *Union membership in the retail and service industries increased in 2022, despite a continued drop in union density among private sector workers.* While union organizing activity increased, the size of the national workforce also grew compared to the prior year, accounting for the overall decline. According to a Bloomberg Law analysis, however, the Service Employees International Union added approximately 20,000 members, while the United Food and Commercial Workers added more than

2,500. Election wins in the retail and service sectors also increased, including a rise in organizing victories for grassroots labor organizations. Since the onset of the COVID-19 pandemic, many workers in these industries have sought representation to improve pay and working conditions, specifically citing a lack of health and safety measures.

5. *The Board vacated a third decision due to former Member William Emanuel's conflict of interest. Marathon Petroleum Co. d/b/a Catlettsburg Refining, LLC, 372 NLRB No. 53 (2023).* Following Emanuel's failure to disclose a financial interest in the company, the Board re-adjudicated its earlier decision and issued a new order remanding the case to the regional director. Board Member Kaplan dissented, arguing the Board lacked the authority to take further action because the case had been remanded and then transferred to former General Counsel Peter Robb, who closed the case in 2020. The majority explained there is no limitation on the Board's authority to modify or set aside its own remand order. The decision is one of a handful of cases in the last year in which the Board vacated rulings because of Emanuel's undisclosed stock ownership in parties to the case. Two additional cases are pending.

Please contact a Jackson Lewis attorney if you have any questions about these developments.

©2023 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 1000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit <https://www.jacksonlewis.com>.