

Top Five Labor Law Developments for June 2023

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July 7, 2023

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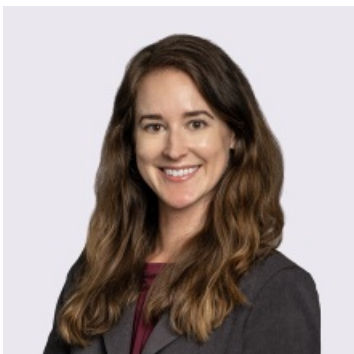


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1. *The National Labor Relations Board returned to its prior employee-friendly test for determining whether an individual is an independent contractor.* *The Atlanta Opera, Inc.*, 372 NLRB No. 95 (June 13, 2023). The Board overruled its Trump-era decision in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), which held entrepreneurial opportunity for gain or loss is the primary factor in determining employee status. The Board's decision lowers the threshold for finding employee status and, thus, whether workers are afforded protections under the National Labor Relations Act, including the right to unionize and collectively bargain. The Board again will assess all aspects of the working relationship, with no single factor being decisive. The entrepreneurial opportunity factor will depend on whether the individual is rendering services as part of an independent business or if they are performing functions that are essential to the employer's normal business operations. Any weight given to entrepreneurial opportunity also must be actual (not theoretical) and take employer restrictions into consideration. The decision is expected to have a significant impact on businesses in certain industries that have long treated their workers as independent contractors.
2. *Legislation banning "captive audience" meetings was enacted in Minnesota and passed in New York and is pending in California.* Minnesota will prohibit employers from mandating their employees attend meetings in which the employer attempts to dissuade them from unionizing. Similar legislation passed in the New York State legislature and is expected to become effective shortly after the governor signs it. Minnesota and New York will join two other states, Oregon and Connecticut, that have enacted such bans. California also has pending legislation on the same issue. The U.S. Chamber of Commerce is challenging Connecticut's law, arguing it is preempted by federal law. A Connecticut district judge denied the state's motion to dismiss. While captive audience meetings have historically been protected as employer free speech under the Act, Board General Counsel Jennifer Abruzzo has argued they are unlawful because they are "inherently coercive" of employees' right to organize.
3. *Union contracts ratified in the first quarter of 2023 provided employees with first year pay increases averaging 7%, according to a Bloomberg Law report.* The average quarterly wage increase is the highest since at least 2007, according to the report, which was based on 177 collective bargaining agreements covering approximately 236,000 workers. Average pay increases were even higher when accounting for signing bonuses and other lump-sum payments, reaching 7.8%. Some likely explanations for the gains are the post-COVID-19 pandemic era, increased strike and union activity, high inflation rates, and an employee-friendly Board.
4. *The Biden Administration's Spring Regulatory Agenda indicated an August release date for new joint-employer and election rules.* The new rules are in their

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final stages and will overturn rules and procedures that went into effect during the Trump Administration. The joint-employer standard has significant implications for employers, as it determines when one entity can be held liable for the other's unfair labor practices. The proposed election-protection rule would rescind portions of the 2020 union representation procedures on blocking charges, voluntary recognition bar, and construction industry collective bargaining relationships.

5. *President Joe Biden announced his nomination of Board member Gwynne Wilcox to serve a second term, leaving the Board's Democratic majority at 3-1.* Board member Wilcox has served on the five-member panel since August 2021. The Board has had one vacant seat since former member Republican John Ring's term expired in December 2022. Because of the vacancy, the Democrats' 3-1 majority means each three-member panel selected to rule on a case has a Democratic majority. Many believe this has led to the wave of more union- and employee-friendly Board decisions in 2023. President Biden has not yet announced a nomination for the Board's vacant Republican seat.

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

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