Newsletter

Top Five Labor Law Developments for July 2024

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1. *The National Labor Relations Board returned to its pre-Trump Board union election procedures.* The Board issued its "Fair Choice-Employee Voice" Final Rule, rescinding portions of its April 2020 union representation procedures related to blocking charges, the voluntary recognition bar, and construction industry collective bargaining relationships. The Final Rule reinstates the Board's pre-April 2020 rule in each area, including the process for Board regional directors to delay an election following an unfair labor practice charge filing if the alleged conduct, if proven, would interfere with employee free choice. The Final Rule is scheduled to take effect Sept. 30, 2024, and will apply only to cases filed after the effective date. However, the rule may face legal challenges due to the recent U.S. Supreme Court's decision overturning *Chevron* deference.

2. *The Board withdrew its appeal of a Texas district court's order vacating the agency's 2023 joint-employer rule. NLRB v. U.S. Chamber of Commerce, et al.,* No. 24-40331 (5th Cir. July 19, 2024). The rule sought to broaden the Board's prior standard by finding joint-employer status where an entity possesses the authority to control at least one of seven enumerated essential terms and conditions of employment, regardless of whether the entity actually exercises that control. Although the Board may still seek to reinstate the rule through case adjudication, the 2020 standard requiring "direct and immediate control" remains in effect.

3. *The U.S. Court of Appeals for the D.C. Circuit signaled it would maintain high deference to Board rulings, despite the U.S. Supreme Court's recent overruling of* Chevron. *Hospital de la Concepcion v. NLRB,* No. 22-1272 (D.C. Cir. July 5, 2024). In this case, an employer petitioned the D.C. Circuit to review a Board decision found the employer violated the National Labor Relations Act. The court upheld the Board's decision, noting it reviews the agency's decisions with a "very high degree of deference" and will set aside a decision only if it "departs from established precedent without reasoned justification, or when the Board's factual determinations are not supported by substantial evidence." The court did not discuss, or even cite, the U.S. Supreme Court's recent *Loper Bright* decision, which overturned *Chevron* and limited judicial deference to administrative agencies. Although the D.C. Circuit decision shows that circuit will continue deferring to Board decisions, other circuits may not follow suit.

4. *Board General Counsel (GC) Jennifer Abruzzo issued a memo urging field offices to continue seeking Section 10(j) injunctions.* A recent U.S. Supreme Court decision directed district courts to use a four-part test when evaluating whether a preliminary injunction should issue at the Board's request while litigation under the Act is pending. The Court's decision raised the standard for the Board to prove its need for an injunction, requiring it to meet each prong of the four-part

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test for a court to grant an injunction, including that it is "likely to succeed on the merits." Nonetheless, the GC asserted that the Court's decision "will not have a significant impact on the Agency's Section 10(j) program" and that the office has a high success rate in circuits that already applied the four-part test.

5. *The Fifth Circuit vacated and remanded the Board's 2023 decision returning to the "setting-specific" standards in employee abusive conduct cases. Lion Elastomers, L.L.C. v. NLRB,* 23-60270 (5th Cir. July 9, 2024). In May 2020, the Board found Lion Elastomers violated the Act when it discharged an employee who engaged in abusive conduct amid protected concerted activity. On appeal, the Fifth Circuit remanded the case to the Board in light of the agency's new standard set forth later that year which established a single framework for determining the lawfulness of employee discipline in abusive conduct cases, regardless of where or how the conduct took place. On remand, the Board in 2023 used the case as a vehicle to return to the pre-2020 setting-specific standard. In its most recent decision, the Fifth Circuit held that not only did the Board exceed the scope of the remand order, it violated the company's due process rights by not providing it a full opportunity to be heard on the matter.

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