

Top Five Labor Law Developments for December 2024

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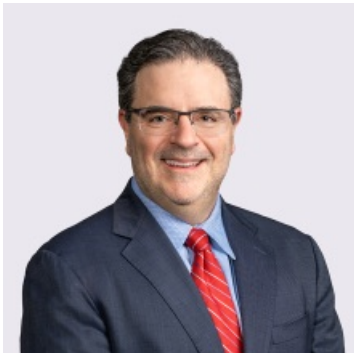
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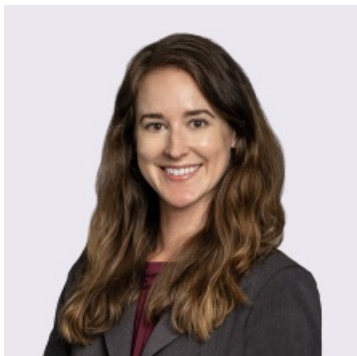
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1. *The National Labor Relations Board returned to the “clear and unmistakable waiver” standard for analyzing the legality of unilateral changes to employees’ terms and conditions of employment when there is an effective collective bargaining agreement. [Endurance Environmental Solutions, LLC](#), 373 NLRB No. 141 (Dec. 10, 2024). Under the [clear and unmistakable waiver standard](#), the Board will no longer infer a union waived its right to bargain over a specific issue from the plain language of the parties’ collective bargaining agreement. Rather, the Board will require the waiver of that issue to be “clear and unmistakable,” making it harder for employers to defend unilateral changes without explicit contract language. The decision overturns the more employer-friendly “contract coverage” adopted in 2019. While the decision will be applied retroactively, the Board may face enforcement challenges due to conflicting standards in various circuit courts.*
2. *The U.S. Senate blocked President Joe Biden’s renomination of Board Chair Lauren McFerran. Had the Senate confirmed McFerran, the Board would have retained its Democratic majority through Aug. 27, 2026, and likely continued its track of issuing labor-friendly decisions. President-Elect Donald Trump will be able to nominate two Republicans to the Board’s vacant seats, creating a 3-2 Republican Board majority and likely expedite employer-friendly decisions. Trump is also expected to discharge the Board’s current General Counsel Jennifer Abruzzo (D) and appoint a Republican — who is expected to pursue employer-friendly policies and initiatives — soon after taking office.*
3. *A Washington D.C. federal court held that removal protections for Board administrative law judges (ALJs) violate the U.S. Constitution. [VHS Acquisition Subsidiary No. 7 v. NLRB](#), 1:24-cv-02577 (D.D.C. Dec. 10, 2024). After a Board regional director issued a complaint against an employer, the employer sued the Board in the U.S. District Court for the District of Columbia, arguing the agency’s ALJ protections violate the Constitution. Granting the employer’s motion for summary judgment, the judge explained the Board can remove ALJs only for “good cause” after approval by the Merit Systems Protection Board (MSPB). Further, both the Board and the MSPB can only be dismissed by the U.S. president for cause. Such a structure, the judge held, is unconstitutional, because “[o]fficers of the United States cannot be insulated from the removal power by two or more levels of decisionmakers who themselves enjoy job protection.” The court therefore ordered the removal language be changed so Board members can*

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remove ALJs at will, rather than only for good cause. It also eliminated the second MSPB layer of protection. Although the ruling applies only to this case, other courts hearing similar arguments may look to this decision.

4. *The U.S. Supreme Court directed the U.S. Court of Appeals for the D.C. Circuit to review its deference to the Board in light of Loper Bright. Hospital Menonita de Guayama, Inc. v. NLRB, No. 24-138 (Dec. 16, 2024).* The D.C. Circuit had affirmed the Board's decision finding the employer violated the National Labor Relations Act when it failed to follow the Board's successor doctrine, which prevents a successor employer from challenging majority support of a predecessor employer's previously certified union for a reasonable period of time. The employer, however, argued the D.C. Circuit failed to apply the Supreme Court's holding in *Loper Bright*, which overturned its *Chevron* doctrine of court deference to federal agencies' subject-matter expertise. Accordingly, the D.C. Circuit must reconsider its decision in light of *Loper Bright* and independently assess whether the successor bar doctrine is consistent with the Act. It is unclear if the Supreme Court will address its ruling in *Ford Motor Co.*, which preceded the *Chevron* doctrine and established the foundation for generous judicial deference to Board decisions.
5. *Forbes' unionized editorial staff walked out on Dec. 3 after contract negotiations stalled and over the company's alleged unfair labor practice.* The Forbes Union, which is still without a first contract after organizing with The NewsGuild in 2021, timed the walkout to coincide with the magazine's high-profile "30 Under 30" issue. According to the union, it is seeking higher wages, salary minimums, layoff protections, minimum severance payments, and healthcare coverage. The Forbes Union represents approximately 100 writers and editors at the company.

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

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