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When It Rains, It Pours – Several Appeals Lined Up to Challenge NLRB Precedent in Court

Labor Relations Update on **May 7, 2024**

We have reported extensively over the last few years regarding the many pro-labor decisions issued by the National Labor Relations Board ("NLRB"), which largely align with General Counsel ("GC") Jennifer Abruzzo's expansive prosecutorial agenda (discussed here and here). However, employers have not sat idly by in response to such rulings. Rather, employers have availed themselves of their right to challenge these decisions in federal court. Employers may bring challenges in the circuits where they are headquartered or do business, where the alleged labor law violation occurred, or in the U.S. Court of Appeals for the District of Columbia Circuit.

Indeed, this confluence of new NLRB precedent and federal court oversight of the NLRB appears very likely to come to a head in the next several months, as there are a number of impactful appeals lining up the dockets, that we plan to watch very closely.

Below is a brief snapshot of the status of some of these challenges:

- ***Cemex* (Union Representation Rules):** Cemex Construction Materials Pacific, LLC, is awaiting oral argument in the U.S. Court of Appeals for the Ninth Circuit in the company's challenge to the NLRB's landmark ruling from August 2023, 372 NLRB No. 130 (discussed here), which established an easier path for unions to achieve representation. As a reminder, when confronted with a demand for recognition, the Board's decision in *Cemex* requires employers to either grant voluntary recognition and bargain with the union *or* file an RM petition to seek a government-supervised secret ballot election. This landmark decision established a brand new standard that departed from more than 50 years of precedent. GC Abruzzo provided guidance on this decision in a Memorandum published in November 2023, which discussed key issues such as the process by which unions can demand recognition and bargaining, how unfair labor practices during the "critical period" for an election may trigger a remedial bargaining order, even with a minor violation, and the standard's retroactive application. Although the Ninth Circuit—and potentially, the U.S. Supreme Court—may alter or vacate the watershed *Cemex* decision, that has certainly not stopped labor unions from taking

advantage of the new framework in the meantime, which has established many new collective bargaining relationships that will not be undone, regardless of the outcome of *Cemex*.

- ***McLaren* (Severance Agreements):** Oral argument took place on Tuesday, April 30 in the U.S. Court of Appeals for the Sixth Circuit in an appeal brought by Michigan hospital McLaren Macomb. The hospital appealed a significant NLRB decision issued in February 2023, 372 NLRB No. 58, which held that broad non-disparagement and confidentiality clauses in severance agreements signed by employees covered by the NLRA violate Section 8(a)(1) of the Act. After the decision was issued, GC Abruzzo swiftly published a Memorandum to Regional Directors regarding enforcement of the decision. Her Memorandum instructed, among other things, that the decision applies retroactively, that an employer's inclusion of a "savings clause" or disclaimer will not save an overbroad provision, and that employers cannot negotiate their way out of compliance with the ruling.
- ***Starbucks* (10(j) Relief Standard):** On April 23, 2024, oral argument before the United States Supreme Court took place in *Starbucks Corp. v. McKinney*, U.S., No. 23-367. In this case, the NLRB Region filed an administrative unfair labor practices complaint against the company, after Starbucks terminated seven employees involved in union-organizing efforts at one of its stores. During the pendency of this ULP charge, the NLRB filed a petition for temporary injunctive relief against Starbucks in the U.S. Court of Appeals for the Sixth Circuit pursuant to Section 10(j) of the National Labor Relations Act ("NLRA"). As previously discussed here, Section 10(j) of the NLRA authorizes the NLRB to seek injunctive relief in federal court to remedy an alleged unfair labor practice while the merits of the underlying case are being litigated. The Supreme Court will decide the appropriate standard governing Section 10(j) requests for temporary injunctive relief, which, for decades, had been the subject a split among circuit courts (discussed here). Resolution of this critical issue is particularly important, as GC Abruzzo has made it a priority to seek 10(j) relief.

- ***Lion Elastomers* (Protected Activity):** Oral argument was held on Monday, April 29 in *Lion Elastomers, LLC v. NLRB*, No. 23-60270, in the U.S. Court of Appeals for the Fifth Circuit. The company appealed a May 2023 NLRB decision, 372 N.L.R.B. No. 83, challenging the Board's framework for deciding when an employee's abusive workplace conduct may be characterized as protected activity under the Act. The Board's ruling reinstated the use of a trio of context-specific standards to determine whether an employer's discipline of an employee's abusive workplace conduct violates the Act in various settings, including when an employee converses or interacts with management in the workplace, when they post on social media and when they are on picket lines. The case pending before the Fifth Circuit involves a complicated procedural history as well, with the NLRB abandoning the

legal tests used to support its original decision from 2020, 369 NLRB No. 88, less than a year after the decision was issued, and instead adopting a new standard in *General Motors LLC*, 369 NLRB No. 127 (2020). In 2021, the Fifth Circuit granted the NLRB's unopposed request to remand the case back to the Board to consider whether the new standard under *General Motors LLC* was applicable. On remand, however, GC Abruzzo argued in a statement of positions that the *General Motors LLC* standard should be overturned. While Lion Elastomers asked for a chance to respond to the GC's argument in a reply brief, the Board denied the request. In its briefing in the instant case, Lion Elastomers took issue with the Board's rejection of its request, arguing that it violated the company's due process rights to be heard.

Takeaways

A reversal of a decision by the NLRB by a federal appeals court is significant with respect to the parties in the underlying case. However, because the NLRB adopts a policy of non-acquiescence, it typically does not change its own precedent based on an appellate court decision—only a determination by the U.S. Supreme Court or a subsequent decision by the NLRB will definitively change NLRB precedent for the parties in subsequent proceedings.

We will continue to monitor these important cases as they travel through the federal court system.

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