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Axed ALJ Removal Protections Mark Big Shift For NLRB

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The continued legal challenges to the constitutionality of certain aspects of the National Labor Relations Board and the National Labor Relations Act took a potentially significant turn in a decision issued by the U.S. District Court for the District of Columbia on Dec. 10.

In VHS Acquisition Subsidiary No. 7 v. NLRB, the district court granted summary judgment in favor of the plaintiff Massachusetts hospital, holding that tenure protections for NLRB administrative law judges are unconstitutional, and that ALJs — as executive officers — must be removable at will by the NLRB, the agency that appoints them.

The district court severed the unlawful provision at Title 5 of the U.S. Code, Section 7521(a), that ALJs may only be removed for "good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board."

The court did not find, however, that the removal restriction actually inflicted harm, such that declaratory relief was appropriate, which would have provided a basis to block cases that ALJs are currently hearing.

This decision now also serves as the backdrop of the pending legal challenge to President Donald Trump's recent decision to fire NLRB member Gwynne A. Wilcox.

On Feb. 5, Wilcox sued Trump and NLRB Chairperson Marvin Kaplan under the theory that Wilcox's removal violates the NLRA.

Background

ALJs have enjoyed multitiered protections from removal, as they could only be fired by the NLRB after a determination of good cause. Additionally, a good cause finding can only be determined and established by the MSPB, which is only reviewable by the U.S. Court of Appeals for the Federal Circuit.

Furthermore, members of the MSPB and NLRB are shielded from removal. According to Title 5 of the U.S. Code, Section 1202(d), MSPB members can only be dismissed for "inefficiency, neglect of duty, or malfeasance in office." Similarly, NLRB members can

only be removed "for neglect of duty or malfeasance in office," according to Title 29 of the U.S. Code, Section 153(a).

Therefore, to remove an ALJ, the president's sole course of action was to appeal to the NLRB, which then would have needed to petition the MSPB for a good cause determination.

Beginning in September 2023, the Massachusetts Nurses Association filed unfair labor practice charges against VHS Acquisition Subsidiary Number 7, doing business as Saint Vincent Hospital, for several purported violations of the NLRA. The case was assigned to an ALJ for adjudication.

Days before the proceeding was set to begin, Saint Vincent petitioned the federal district court for a temporary restraining order. According to the decision, it "argued that the enforcement action violated the Constitution and that being forced to defend against it would subject the hospital to irreparable harm." The court denied the request.

Saint Vincent then moved for injunctive relief and summary judgment against the NLRB. Although the court determined it did not have the authority to issue injunctive relief, it reached Saint Vincent's motion for summary judgment as to the ALJ removal restrictions.

ALJ Tenure Protections Found Unlawful

In the Dec. 10 decision, U.S. District Judge Trevor McFadden drew on the U.S. Supreme Court's 2010 holding in Free Enterprise Fund v. Public Company Accounting Oversight Board[1] that a similar two-tiered removal protection for Public Company Accounting Oversight Board officers under the Sarbanes-Oxley Act was unconstitutional.

Judge McFadden found that the two-layered tenure protections for NLRB ALJs — one by the NLRB and the second by the MSPB, and for good cause only — are likewise unconstitutional under Article II of the U.S. Constitution.

He reasoned that they foreclose the president from deciding whether good cause exists and frustrate attempts to hold ALJs accountable for "unordained and perhaps unwise"

decisions.

The court also rejected the NLRB's argument that ALJs are excepted from the Free Enterprise Fund holding because they have adjudicatory functions. Instead, it found that as executive branch officers wielding executive power, ALJs must be subject to the president's at-will removal power through the NLRB.

Judge McFadden acknowledged a circuit split on the president's authority to remove an ALJ, with the U.S. Court of Appeals for the Fifth Circuit rejecting dual-layered protections in Jarkesy v. U.S. Securities and Exchange Commission in 2022,[2] and the U.S. Courts of Appeals for the Sixth, Ninth and Tenth Circuits affirming the existing statutory process in other recent cases.[3]

Siding with the Fifth Circuit, Judge McFadden criticized the Ninth and Tenth Circuit rulings, saying they "placed too much weight on the adjudicatory 'functions' of the ALJs," and noted that the U.S. Court of Appeals for the Sixth Circuit's ruling was reversed by the Supreme Court on other grounds.

In the order, quoting Title 5 of the U.S. Code, Section 7521(a), Judge McFadden declared that "the following statutory language is repugnant to the Constitution and therefore inoperative as applied to administrative law judges in the National Labor Relations Board: 'only for good cause and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.'"

Judge McFadden then ordered that Title 5 of the U.S. Code, Section 7521(a), shall be revised to provide that NLRB ALJs shall be removable at will by the NLRB, which is the agency that appoints them.[4]

A Rising Tide?

This decision comes in the wake of ongoing challenges to the NLRB's authority in the Fifth Circuit. Last year, it heard oral arguments in two cases challenging the constitutionality of the NLRB in several respects.[5]

The first was Space Exploration Technologies Corp. v. NLRB,[6] where the plaintiff-appellant argued, in part, that the NLRB's structure unconstitutionally limits the removal of ALJs and NLRB members.

The second case was Amazon.com Services LLC v. NLRB,[7] where the plaintiff-appellant presented nearly identical constitutional arguments to SpaceX, and argued that an "illegitimate proceeding" presided over by an illegitimate decision-maker would cause irreparable injury requiring injunctive relief.

ALJs in other federal agencies have also faced challenges to their removal protections.

In addition to Free Enterprise Fund, which was cited extensively in VHS Acquisition and dealt with the removal of Public Company Accounting Oversight Board members, the Supreme Court held in SEC v. Jarkesy last year[8] that in securities fraud cases where the SEC seeks to impose civil penalties, defendants must be brought before a court of law where they are entitled to a jury trial, not ALJ-led proceedings.

In another 2024 decision, ABM Industry Groups LLC v. U.S. Department of Labor,[9] the U.S. District Court for the Southern District of Texas granted the plaintiff a preliminary injunction against a pending DOL enforcement action on the basis that limiting the president's authority to remove the ALJ was unconstitutional.

Many agencies that use ALJs, not just the DOL and the SEC, may soon be impacted by decisions similar to VHS Acquisition, Jarkesy and ABM Industry Groups.

According to the most recent data from the U.S. Office of Personnel Management, the federal agency that administers the recruitment and examination of ALJs, the federal government employs nearly 2,000 ALJs across 25 agencies.

The vast majority of ALJs serve in the U.S. Social Security Administration, where they adjudicate various types of claims for benefits under the Social Security Act.

Other agencies with large numbers of ALJs include the U.S. Environmental Protection Agency, the U.S. Department of Health and Human Services, and the Occupational Safety

and Health Review Commission.

These agencies, which hear a vast range of disputes and use ALJs to form administrative precedent, could face similar structural challenges to their most basic enforcement mechanisms.

Challenges to the legitimacy of ALJ authority across multiple agencies may also drastically alter the landscape for employers. Indeed, many laws that employers must follow — including regulations governing workplace safety, environmental protection and securities transactions — are enforced through ALJ-led agency proceedings.

The curtailing of ALJ authority, combined with the potential application of the Jarkesy standard to other agencies, may make courts the only available venue for adjudicating statutory violations where the federal government seeks civil penalties.

Employers may also decide to proceed to federal court — like Saint Vincent did — to challenge ALJ decisions with which they disagree.

Loper Bright Reaches the NLRB

Critically, this recent decision also comes during a broad attack on agency deference in the wake of the Supreme Court's June 2024 ruling in Loper Bright Enterprises v. Raimondo.[10]

In reversing the Supreme Court's Chevron decision, Loper Bright overturned 40 years of precedent by eliminating the deference given to agencies when interpreting statutes. Federal agencies, including the NLRB, have only begun to feel the effects of this landmark decision.

In particular, the amount of deference afforded to the NLRB when interpreting the NLRA in a post-Chevron world has been an open question.

In February 2024, the U.S. Court of Appeals for the District of Columbia Circuit determined in Hospital Menonita de Guayama Inc. v. NLRB[11] that the NLRB was

entitled to deference in its application of the successor bar doctrine. However, that case was recently remanded[12] on appeal by the Supreme Court for further consideration in light of Loper Bright.

The Supreme Court's instruction to the D.C. Circuit could signal sweeping changes to NLRA policy in the future, or even foreshadow the reexamination of long-standing precedent that has specifically upheld deference to the NLRB when deciding statutory questions under the NLRA.

Takeaways

The removal of tenure protections for ALJs could potentially have wide-reaching implications for their decision-making authority. Previously, the NLRB and federal courts were the sole methods of review for ALJ decisions. Now, the threat of removal by the NLRB directly — without the need to show good cause — provides another measure by which ALJs may be checked.

The district court's decision in VHS Acquisition is currently being appealed to the D.C. Circuit, potentially setting up a circuit split that makes its way to the Supreme Court.

More broadly, VHS Acquisition comes at a time of great upheaval, as challenges to ALJ authority emerge across multiple agencies.

In the wake of Loper Bright and the decline of Chevron deference, as well as the existing upheaval at the NLRB in light of Wilcox's removal — which has left it without a quorum — the NLRB could see a dramatic reduction in its ability to interpret and apply the NLRA.

For ALJs and employers alike, a diminished NLRB would be novel territory, and may portend an increase in the importance of the court system in both resolving disputes and setting forth interpretations of the NLRA.

ALJs would need to decide whether to apply the NLRB's existing precedent with an understanding that their decisions could more frequently be overturned by the courts, all while facing the threat of removal under VHS Acquisition.

Employers may more frequently turn to the courts to not only challenge individual ALJ decisions, but also NLRB precedent itself under the Loper Bright standard.

While it remains to be seen whether the courts will retain some level of deference to the NLRB, as the D.C. Circuit attempted in its original Hospital Menonita de Guayama decision, employers should be aware of the potential effects of declining agency deference post-Chevron.

Conclusion

In removing long-standing tenure protections for ALJs, VHS Acquisition represents a significant shift in the NLRB's ability to prosecute and adjudicate cases.

The decision also raises questions about NLRB oversight, agency deference and the role of the courts in interpreting the NLRA in a post-Chevron legal environment.

With the recent removal of Wilcox, VHS Acquisition may be only one episode amid an ongoing and quickly developing state of play at the NLRB that bears close watching in the coming months and years.

[1] Free Enterprise Fund v. Public Company Accounting Oversight Board , 561 U.S. 477 (2010).

[2] Jarkesy v. SEC , 34 F.4th 446 (5th Cir. 2022).

[3] Calcutt v. Fed. Deposit Ins. Corp , 37 F.4th 293 (6th Cir. 2022); Decker Coal Company v. Pehringer , 8 F.4th 1123 (9th Cir. 2021); Rabadi v. U.S. Drug Enf't Admin. , F. 4th ___, 2024 WL 4899531 (9th Cir. 2024); Leachco, Inc. v. Consumer Prod. Safety Cmm'n , 103 F.4th 748 (10th Cir. 2024).

[4] 5 U.S.C. § 7521(a).

[5] https://www.laborrelationsupdate.com/2024/11/amazon-spacex-must-navigate-procedural-roadblocks-in-constitutional-challenge-of-nlrb/.

[6] SpaceX v. NLRB , No. 24-40315 (5th Cir. 2024).

[7] Amazon.Com Services LLC v. NLRB , No. 24-50761 (5th Cir. 2024).

[8] SEC v. Jarkesy , 603 U.S. ___ (2024).

[9] ABM Industry Groups, LLC v. Department of Labor et al. , No. 4:2024cv03353 (S.D. Tex. 2024).

[10] https://www.laborrelationsupdate.com/2024/07/two-blockbuster-u-s-supreme-court-decisions-may-spell-end-of-nlrbs-expansion-of-reach-of-nlra-as-well-as-how-agency-prosecutes-cases/.

[11] Hosp. Menonita de Guyama, Inc. v. Nat'l Lab. Rels. Bd. , 94 F.4th 1 (D.C. Cir. 2024).

[12] https://www.proskauer.com/blog/supreme-court-remands-nlrb-successor-bar-case-signaling-potential-changes-to-board-deference-doctrine#:~:text=Raimondo%2C%20144%20S.,own%20construction%20of%20the%20la

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