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Rejected: Ninth Circuit Denies Constitutional Attacks on NLRB

Labor Relations Update on **October 30, 2025**

On October 28, 2025, the Ninth Circuit, in a unanimous, published decision, rejected three key constitutional attacks on the National Labor Relations Board ("NLRB" or "Board"), some of which have gained favor in other circuit courts, making it harder—for now—for employers to challenge Board proceedings in that jurisdiction. This decision creates a circuit split that could foretell a U.S. Supreme Court resolution.

Below is a factual background of the case, legal analysis of the constitutional implications, and practical takeaways from the Ninth Circuit's decision in *Nat'l Lab. Rels. Bd. v. N. Mountain Foothills Apartments*.

Background

In the underlying unfair labor practice case, the Ninth Circuit upheld the Board's finding that the employer violated Section 8(a)(1) of the National Labor Relations Act ("NLRA" or the "Act") by illegally interrogating and disciplining an employee who discussed wages, other benefits, and workplace conditions with coworkers.

After a closed-door meeting between a supervisor and the employee—who secretly recorded the meeting—the supervisor berated the employee for his workplace discussions and fired him after his fourth day on the job for alleged failure to complete his work.

A Board administrative law judge ("ALJ") held that the employer violated the Act by (i) interrogating the employee for his workplace discussions, (ii) issuing an overly broad and discriminatory oral rule barring the employee from discussing workplace issues with coworkers, (iii) threatening the employee with unspecified reprisals if he continued, and (iv) terminating the employee for his actual or perceived NLRA-protected activity.

As a result, the ALJ ordered the employer to reinstate the employee, provide backpay, post a remedial notice, remove discharge references from the employee's files, and otherwise make the employee whole for any loss of earnings or benefits. The NLRB adopted the ALJ's holding.

Ninth Circuit Analysis

On appeal, in addition to arguing that the Board's findings lacked substantial evidence, the employer raised for the first time the following three constitutional attacks on the NLRB:

1. The NLRB's for-cause job removal protections for Board members and ALJs violate Article II of the U.S. Constitution because they unduly restrict the President.
2. The NLRB's adjudicatory system and enhanced remedies violate the Seventh Amendment because they deny employers the right to a jury trial.
3. The NLRB's structure violates the Fifth Amendment's Due Process Clause because it is inconsistent with the separation of powers by combining investigations and adjudications.

First, despite the Trump NLRB abandoning its defense of the constitutionality of Board member and ALJ job removal protections, the Ninth Circuit rejected the employer's argument that Article II vests sole removal power in the President. While noting that the D.C. Circuit is currently reviewing the constitutionality of Board member removal protections in *Trump v. Wilcox*, which we covered here, the Ninth Circuit held that the Supreme Court's landmark ruling in *Humphrey's Executor*, 295 U.S. 602 (1935) remains good law. The Ninth Circuit also held that even if the removal protections were illegal, the employer failed to show how they were harmed by it in the case at bar.

Second, the Ninth Circuit also rejected the employer's Seventh Amendment argument, noting it previously upheld *Thryv* remedies, awarding all "direct and foreseeable pecuniary harms," which we covered here. 372 NLRB No. 22 (2022). While that puts the Ninth Circuit at odds with the Third Circuit—which rejected *Thryv*—the Ninth Circuit reasoned that the enhanced remedies were merely "intended to restore the status quo" and thus were "equitable in nature." As a result, the Ninth Circuit held that the Board's remedies constituted neither legal nor punitive damages and, therefore, "the Seventh Amendment is not implicated."

Third, the employer's Fifth Amendment Due Process Clause argument also failed because of longstanding Supreme Court and Ninth Circuit precedent, holding that administrative agencies with combined investigative and judicial functions did not violate the separation of power principles such that a judicial decision by such bodies violates a party's due process rights. Specifically, the Ninth Circuit noted that federal appellate courts have repeatedly upheld the NLRB's structure, whereby the NLRB General Counsel investigates while the Board adjudicates. Indeed, courts have held that the bifurcated structure reflects congressional intent to differentiate between the investigatory authority of the General Counsel with the Board's final authority. Moreover, the employer failed to show any bias among the ALJ or Board members in this case or why the presumption of honesty granted to them was inapplicable.

Lastly, the Ninth Circuit upheld the Board's finding that the employee's discharge was illegal and was supported by substantial evidence, noting the employer failed to properly raise several of its other evidentiary arguments. On the discharge, the court held that employees discussing compensation is NLRA-protected activity, aligning with longstanding Board law. In doing so, the court noted that the discharge was illegally motivated by such activity based on the supervisor's statements in the meeting's secret recording and that employer claims of poor performance were never raised at the meeting.

Takeaways

While the Ninth Circuit's legal analysis must be cabined to the case's specific facts and only applies within its borders, below are some general takeaways:

- **Employees retain conditional protections to secretly record the workplace.** Under the NLRA, employers cannot issue broad no-recording policies in the workplace that could reasonably chill an employee's protected NLRA activity, including discussing compensation and workplace conditions. However, employers can bar specific recordings if narrowly tailored and based on a substantial and legitimate interest (e.g., protecting trade secrets). Also, the NLRB's current acting general counsel will prosecute secret recordings of collective bargaining negotiations, as we covered here.
- **Employers must not discipline or discharge employees for discussing compensation.** Longstanding Board law and many federal appellate courts have held that the NLRA protects employees who discuss their compensation with

coworkers and cannot be disciplined for it. Employers—both unionized and non-union—seeking to discipline employees who discuss compensation must rely on (and ideally document) other legitimate, nondiscriminatory reasons (e.g., poor performance) for taking adverse action.

- **NLRB enhanced make-whole remedies are available to some employees.** Despite the ongoing circuit split over *Thryv*, which we covered here, employers who violate the NLRA must compensate employees for "all direct or foreseeable pecuniary harms" in the Ninth Circuit, which has jurisdiction over Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, as well as the territories of Guam and the Northern Mariana Islands. *Thryv* remedies include—but are not limited to—out of pocket medical expenses, credit card debt, and retirement account withdrawals that an employee incurs because of an employer's unfair labor practice. That said, if the Trump NLRB regains a quorum with a Republican majority, then it likely will overturn *Thryv*. However, even if it does not, the Supreme Court may ultimately decide the issue because of the ongoing circuit split.
- **NLRB constitutional challenges remain.** While the Ninth Circuit rejected constitutional challenges to job protections for Board members and ALJs, the D.C. Circuit—which can hear all Board decision appeals—has yet to decide the issue on the merits. As a result, unless and until the Supreme Court ultimately settles the matter, employers seeking to issue such challenges should preserve them by asserting them at their first opportunity in a Board proceeding.

We will continue to monitor constitutional attacks on the NLRB, including how the Supreme Court may ultimately decide the fate of job removal protections at the Board.

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