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# What To Mull After 9th Circ. Ruling On NLRB Constitutionality

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On Oct. 28, in a unanimous, published decision, the U.S. Court of Appeals for the Ninth Circuit rejected three key constitutional attacks on the National Labor Relations 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 NLRB v. North Mountain Foothills Apartments LLC.

**Background**

In the underlying unfair labor practice case, the Ninth Circuit upheld the board's finding that North Mountain Foothills Apartments violated Section 8(a)(1) of the National Labor Relations Act by illegally interrogating and disciplining an employee who discussed wages, other benefits and workplace conditions with co-workers.

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 allegedly failing to complete his work.

In 2023, an NLRB administrative law judge held that the employer violated the act by (1) interrogating the employee for his workplace discussions, (2) issuing an overly broad and discriminatory oral rule barring the employee from discussing workplace issues with co-workers, (3) threatening the employee with unspecified reprisals if he continued, and (4) terminating the employee for his actual or perceived NLRA-protected activity.

As a result, the ALJ ordered the employer to reinstate the employee, provide back pay, 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:

- The NLRB's for-cause removal protections for board members and ALJs violate Article II of the U.S. Constitution because they unduly restrict the president.
- The NLRB's adjudicatory system and enhanced remedies violate the Seventh Amendment because they deny employers the right to a jury trial.
- 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

First, despite President Donald Trump's NLRB abandoning its defense of the constitutionality of board member and ALJ removal protections, the Ninth Circuit rejected the employer's argument that Article II vests sole removal power in the president.[1]

While noting that the U.S. Court of Appeals for the District of Columbia Circuit is currently reviewing the constitutionality of board member removal protections in Wilcox v. Trump, the Ninth Circuit held that the Supreme Court's landmark 1935 ruling in Humphrey's Executor v. U.S. remains good law.[2]

The Ninth Circuit also held that even if the removal protections were illegal, the employer failed to show how it was harmed by the protections in the case at bar.

Second, the Ninth Circuit also rejected the employer's Seventh Amendment argument, noting that it previously upheld remedies that were established by the NLRB's 2022 decision in Thryv Inc. v. International Brotherhood of Electrical Workers, Local 1269, which awarded "all direct or foreseeable pecuniary harms."[3]

While that puts the Ninth Circuit at odds with the U.S. Court of Appeals for 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."[4]

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 long-standing Supreme Court and Ninth Circuit precedent, holding that administrative agencies with combined investigative and judicial functions do 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 board'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 determined that the finding was supported by substantial evidence, noting that 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 long-standing 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 it is narrowly tailored and based on a substantial and legitimate interest, e.g., protecting trade secrets.

Notably, on June 25, the NLRB's current acting general counsel, William Cowen, indicated in memorandum 25-07 that he will prosecute secret recordings of collective bargaining negotiations.[5]

***Employers must not discipline or discharge employees for discussing compensation.***

Long-standing board law and many federal appellate courts have held that the NLRA protects employees who discuss their compensation with co-workers and that they cannot be disciplined for it.

Employers — both unionized and nonunionized — that are seeking to discipline employees who discuss compensation must rely on, and ideally document, other legitimate nondiscriminatory reasons for taking adverse action, e.g., poor performance.

***The NLRB's enhanced make-whole remedies are available to some employees.***

Despite the ongoing circuit split over Thryv, employers that 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.[6]

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.

***Constitutional challenges to the NLRB remain.***

While the Ninth Circuit has rejected constitutional challenges to removal 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 that are seeking to issue such challenges should preserve them by asserting them at their first opportunity in a board proceeding.

While the constitutionality of removal protections at the NLRB — and other federal administrative agencies — remains arguably the most high-profile current dispute over the board because it implicates Humphrey's Executor, other challenges also loom large in the shadow of the Ninth Circuit's decision.

For example, on Nov. 5, the U.S. Court of Appeals for the Sixth Circuit became the latest federal appellate court to weigh in on — and reject — the NLRB's enhanced make-whole remedies under Thryv in NLRB v. Starbucks Corp.

With the Sixth Circuit now aligned with the U.S. Courts of Appeals for the Third and Fifth Circuits — in opposition to the Ninth Circuit — on rejecting Thryv's expansive remedies, it seems increasingly likely that the Supreme Court will eventually resolve this dispute.[7]

Ultimately, the state of the board — and what remedies the NLRB can award employees — remains a hotly contested and live issue, one that is sure to continue garnering headlines at a time of growing public interest in labor unions and organizing.

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[1] Space Techs. Corp. v. NLRB, No. 24-50627 (5th Cir. Aug. 19, 2025) (consol. with Nos. 24-40533 & 24-10855).

[2] NLRB Stalemate Continues: Supreme Court Keeps Wilcox Sidelined For Now | Labor Relations Update.

[3] Ninth Circuit Buys a Circuit Split on Available Remedies Under the NLRA | Labor Relations Update.

[4] Third Circuit Brews a Limit on NLRB's Remedial Authority - Insights - Proskauer Rose

[5] NLRB Acting GC: Secret Recordings Of Negotiations Violate NLRA | Labor Relations

[6] Ninth Circuit Buys a Circuit Split on Available Remedies Under the NLRA | Labor Relations Update.

[7] Fifth Circuit Denies Enforcement of NLRB's Enhanced Remedies, Widening Circuit Split | Labor Relations Update.

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