CLIENT ALERTS & INSIGHTS

Changes at Every Level: Board Announces New Standard for Employer Unilateral Change, Federal Judge Rules that NLRB Administrative Law Judges' Job Protections are Unconstitutional, McFerran Nomination Likely Dead

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On Tuesday, December 10, 2024, the National Labor Relations Board ("NLRB") made it more difficult for employers to make changes to their employees' working conditions without approval from their union. On that same day, the United States District Court for the District of Columbia ruled that NLRB Administrative Law Judges' ("Board ALJs") statutory job protections are unconstitutional under U.S. Supreme Court precedent and ordered that those protections be stricken from the National Labor Relations Act (the "Act").

NLRB Decision Aims to Weaken Management Rights

In *Endurance Environmental Solutions and Teamsters Local No. 100*, the Board issued a decision attacking employers' management rights, making it more difficult for employers to take unilateral action with respect to their unionized workforce. Under the prior "contract coverage" standard established in 2019 by *MV Transportation*, an employer was permitted to exercise management rights and take unilateral action without providing a union notice and an opportunity to bargain over mandatory subjects of bargaining that fell within the "compass or scope" of contract language. The Board would apply ordinary principles of contract interpretation to determine whether a disputed change fell within the coverage of any contractual provision authorizing unilateral action by the employer, including a general reservation of rights in a Management Rights clause that would permit unilateral action for anything not explicitly covered elsewhere in the CBA. If so, the Board would find that the contract authorized the employer to make the disputed change unilaterally, even if the contract did not specifically mention, refer to, or address the employer decision at issue. If it were determined that the unilateral action did not fall within the compass or scope of the contract provision that granted the employer the right to act unilaterally, the Board would then ask whether the union waived the right to bargain over the change by not including specific language preventing such unilateral action pursuant to management rights.

In *Endurance Environmental Solutions*, the Board departed from the "contract coverage" standard and returned to a "clear and unmistakable waiver" doctrine, reasoning that the "clear and unmistakable waiver" doctrine first articulated in 1949 promotes stability within the bargaining relationship. Under this standard, an employer will be found to have violated the Act by either making a change to a mandatory subject of bargaining without first providing the union that represents its employees with

notice and an opportunity to bargain or by failing and refusing to bargain over a mandatory subject upon request by the union. An employer may still defend an allegation that a unilateral change or refusal to bargain violates the Act on the basis that the union contractually surrendered or "waived" the right to bargain. In returning to the waiver standard, the Board criticized the contract coverage standard as one that destabilizes the bargaining relationship, as it encourages employers to insist on broadly worded and ambiguous contract language, specifically Management Rights, that permits the employer to make unilateral changes without bargaining.

NLRB ALJs Lose Two-Layer Job Protection

In *VHS Acquisition Subsidiary No. 7*, a Massachusetts hospital argued that the Board ALJs are unconstitutionally tenured as they have at least two levels of job protection insulating them from presidential oversight, which impermissibly infringes on the President's executive authority. Under the Act, Board ALJs are only removable "for good cause established and determined by the Merit Systems Protection Board [('MSPB')] on the record after opportunity for hearing before the [MSBP]." MSPB officers who preside over removal hearings are only removable by the President for "inefficiency, neglect of duty, or malfeasance in office," and members of the NLRB can only be removed "for neglect of duty or malfeasance in office, but for no other cause." Writing for the Court, Judge Trevor N. McFadden deemed this "dual for-cause limitation" on the removal of inferior officers as inconsistent with Article II of the Constitution, which vests executive power in the President alone.

The Court underscored the historical significance of vesting executive power exclusively with the President, finding that Article II of the Constitution granted the President the power to "take Care that the Laws be faithfully executed" and all necessary incidents thereto. Among the powers reserved solely for the President include the right to remove subordinates at the President's pleasure.

Over time, the Supreme Court has recognized two distinct exceptions to the President's removal power: First, Congress may limit the President's ability to remove inferior officers with circumscribed duties and no policy-making authority; and second, Congress may grant tenure protection to bipartisan, multimember boards who perform legislative or judicial like functions. However, when these two exceptions are combined to create "stacked" layers of tenure protection like those afforded to Board ALJs, such protections impermissibly impede the President's removal power. To highlight the point, the Court explained that to remove a Board ALJ, the President would first have to convince the Board, who would then need to petition the MSPB. The MSPB would, in turn, have to find good cause and inform the Board. Finally, the Board would have to agree with and act on the MSPB's findings.

The Court reasoned that permitting Board ALJs to remain insulated by two or more levels of decision-makers, who themselves enjoy job protection from the removal power of the President, would "poison the soil of Article II and choke off accountability to the President," rendering Board ALJs' tenure protections unconstitutional. To remedy the constitutional issue, the Court ordered that Board ALJs be removable at will by the Board, rather than for cause as established by the MSPB.

McFerran Nomination for NLRB Chair Appears Dead

The day after the DC Court and Board issued their respective opinions, the U.S. Senate voted 50-49 against holding a confirmation vote on the nomination of Board Chair Lauren McFerran, whose term expires on December 16, 2024. The rejection of President Biden's nominee for a new term paves the way for President-elect Donald Trump to select up to two new Board members, cementing Republican control of the agency. While Democrats could attempt to hold another vote in a last-ditch effort to confirm McFerran, the effort would likely be futile.

Takeaways

While the Board's return to the waiver doctrine will make it more difficult for employers to rely on broadly worded Management Rights clauses to take unilateral action, this change, as well as many other recent Board decisions, may be short lived. The DC Circuit's decision in *VHS Acquisition Subsidiary No. 7* reflects current sentiment against the Board and government institutions in general and comes amid an increasing number of suits around the country challenging the Constitutionality of the Board's structure and functions. The cases have yielded mixed results but have proven to be an increasingly effective tool to halt unfair labor practice proceedings in receptive courts. Moreover, these challenges to the Constitutionality of the Board are unlikely to slow down in the judiciary and will likely receive support from President-elect Donald Trump and his administration once it is in power in January. The incoming Trump administration's ability to nominate a new Board Chair to replace McFerran will be the first sign that cases like *Endurance Environmental Solutions* may have a short shelf life.

For more information, contact an attorney in Benesch's Labor & Employment Practice Group.

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