



## A Fox Rothschild Podcast

### Labor Law Lineup

#### Episode 10: NLRB Updates: Bargaining Remedies, Captive Audience Meetings, Joint Employer and More

*Featuring Mark Eskenazi and Ian Melinksy of Fox Rothschild*

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**Mark:** Welcome back to "Labor Law Lineup." I'm here with Ian Melinksy going over recent decisions by the NLRB. We recorded this on March 6.

**Ian:** First off, we've received a significant two-to-one decision with member Prouty dissenting. The issue is whether employers who refuse to bargain to test the union certification should have to compensate employees for the so-called lost opportunity to bargain during the litigation process.

**Mark:** The board majority, members Murphy and Meyer, rejected the Biden-era GCs request to overrule precedent from 1970. They explained the courts only have jurisdiction to review a union certification if the employer refuses to bargain. Requiring certification testing employers to pay damages for exercising that right would, the board said, impermissibly burden the right to seek judicial review. The board said bargaining related damages are not only speculative, but improperly force parties to litigate hypothetical past payments while simultaneously negotiating real ones.

**Ian:** And Mark, this is worth noting. This may be the first truly significant pro-employer step the new board members have taken since taking office earlier this year. But it's measured. They're keeping the existing framework in place rather than announcing a new doctrine.

**Mark:** Yeah, that's exactly right. They didn't change the law, they simply declined to change it. And notably, they didn't need three votes because their position is to reserve three-member consensus for overruling precedent, not for maintaining it.

In another key pro-management decision, the board found that a contractual provision requiring parties to keep information disclosed in arbitration proceedings confidential was lawful under precedent issued by a prior Republican board. Applying that precedent, the board found that such provisions must be enforced pursuant to the Federal Arbitration Act when they're limited to rules under which arbitration will be conducted.

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Member Prouty wrote separately expressing his view that the board's precedent fails to give sufficient weight to fundamental employee rights to discuss their working conditions.

**Ian:** We also saw a notable footnote from new board members Murphy and Meyer in a couple of our case orders recently. The employers argued the Biden-era boards controversial decision prohibiting captive audience meetings should be overruled. Members Murphy and Meyer rejected that argument, making clear that they did not participate in the prior decision and express no view on whether it was correctly decided.

**Mark:** Yeah, and as we've said on this podcast previously for situations similar to this, that's really a signal worth watching for employers. It suggests that this new board majority, these two board members, may want to revisit that precedent in an appropriate case down the road.

**Ian:** And finally, a quick note on joint employer, a perennial issue. The board published a federal registered notice formally withdrawing the vacated 2023 joint employer rule and reinstating the 2020 rule as the operative standard.

This was in effect a ministerial action, as the 2020 rule has been in effect since the 2023 rule was vacated a couple years ago. And this is basically just cleaning up the regulatory text.

**Mark:** So there's no immediate change for employers, but there is one twist here: The 2020 joint employer rule is itself under appeal in the DC Circuit. A lot to untangle in this type of litigation with the joint employer status. If that court, the DC Circuit, strikes down the 2020 rule, we could see the joint employer standard thrown back into flux yet again. So stay tuned.

**Ian:** As always, please reach out to us with questions and we'll see you next time. Thanks for listening.

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