



A Fox Rothschild Podcast

Labor Law Lineup

Episode 9: The Sixth Circuit's Big Decision, the NLRB General Counsel's Case Handling Memo and a Transportation Industry Dismissal

Featuring Mark Eskenazi and Ian Melinsky of Fox Rothschild

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Mark: Welcome to "Labor Law Lineup." I'm here with guest host and Fox Rothschild partner, Ian Melinsky.

Welcome, Ian.

Ian: Thanks for having me, Mark. Let's start with the U.S. Court of Appeals for the Sixth Circuit. On March 6, that court handed employers a truly remarkable landmark victory. It held that the Biden-era NLRB's bargaining order standard-- which replaced over 50 years of precedent and made bargaining orders the default whenever the board set aside a representation election-- was created through an improper exercise of the board's adjudicatory authority.

Mark: That's right, Ian. This is really major news. The court found that the board standard was not derived from case-specific facts or fashion to resolve the party's dispute, but was instead a rule of general applicability that should have been promulgated through notice and comment rulemaking rather than adjudication.

One judge dissented, arguing that the board's longstanding discretion to develop labor policy through adjudication should have been upheld. But the two-judge majority's decision signals that employers now have a pretty powerful defense against the standard. The majority said pointedly toward the end of the decision that the board's decision has quote, "no precedential value," end quote.

Ian: Next, I think it's important if we go over some new news out of the General Counsel's office. At the end of February, the new General Counsel, Crystal Carey, issued updated case handling guidance aimed at streamlining how the regions process ULP cases. Her guidance also seeks to encourage

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settlement, including by declining to seek certain types of remedies from employers that could stand in the way of settlement, similar to those articulated during the Biden administration.

Mark: Yeah. On remedies, the memo emphasizes that enhanced remedies, things like notice readings, apology letters or nationwide postings, should not be routinely included in settlements or complaints. Those remedies exist for egregious and recidivous situations, not standard cases.

Ian: The memo also talks about handbook rules. That guidance is significant and should further reduce litigation. The GC is directing regions not to pursue cases based solely on the maintenance of a potentially unlawful rule if there's no allegation of enforcement or evidence of actual impact on employees. Even where rules are challenged, regions must consider industry context and legitimate business justifications. And vagueness alone in a rule won't sustain a violation. Only rules with obvious unjustifiable restrictions should be pursued.

Mark: On EAJA letters-- for folks who see these often, EAJA, these are the evidence request letters sent to employers-- the memo from the GC says these should not go out until the board agent is satisfied that the charging party has shown a prima facie case.

Ian: Yes, the GC said that EAJA letters must be concise, specific and limited to what's necessary. For example, if a single workplace rule is alleged to be unlawful, the region should request only that rule, not the entire employee handbook. The GC also said explicitly it will no longer pursue certain expansions of case law that the Biden-era General Counsel championed, which we expected.

Finally, in another significant development from the GC, her office recently dismissed a long-running ULP case involving a space exploration company. She threw out the case after the National Mediation Board claimed jurisdiction over the employer as a transportation company covered by the Railway Labor Act rather than the National Labor Relations Act.

Mark: This jurisdictional shift matters because the RLA, which is administered by the NMB, operates under a different framework and lacks some of the broader protections for employee organizing found under the NLRA. Adding to the shifting landscape, the Fifth Circuit previously had affirmed injunctions halting NLRB proceedings against this employer based on constitutional concerns about the NLRB structure. However, similar challenges remain pending in other courts.

That's it for now. See you next time.

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