



A Fox Rothschild Podcast

Labor Law Lineup

Episode 14: The NLRB Asks a Court to Strip Its Own Independence

Featuring Mark Eskenazi of Fox Rothschild

The views expressed in this podcast are those of the participants and should not be considered the views of Fox Rothschild LLP or its attorneys. This podcast is for informational purposes only, is not legal advice, and does not create an attorney-client relationship.

Mark: Welcome back to "Labor Law Lineup." This is Mark Eskenazi. Today, I want to talk about a remarkable development at the NLRB. On March 23, 2026, the board did something that I think many labor lawyers never expected: The agency asked a federal court in Texas to declare that the NLRA's removal protections — the job protections — for board members and ALJs are unconstitutional. The agency itself is asking a court to strip away the job protections of the very people who run it.

Let's recap how we got here. A Texas company was facing a ULP case. The company fought back by challenging the constitutionality of the board structure. Last year, in August 2025, an appeals court granted a preliminary injunction halting the board's ULP proceedings, finding that the for-cause removal protection afforded to NLRB board members and ALJs likely violated the constitution.

Then just last week, instead of defending its structure, the NLRB asked the court to sever from the NLRA job protections for board members and ALJs so that the president would have at-will removal authority over those officials. To be clear, the agency did stop defending the constitutionality of the job protections last year, only taking the argument a step further last week.

But the situation is really pretty ironic, all the same. The NLRB made this argument precisely to lift the injunction and move the case forward to lift the injunction on the ULP proceedings. The board said in its brief to the court that severing the offending provisions — rather than permanently enjoining the ULP proceedings against the company — would ensure that the proceedings would no longer be presided over by board officials who are unconstitutionally insulated from presidential supervision. In other words, the NLRB argued that its own provisions were unconstitutional in order to save its power to prosecute the case against the company. A pretty remarkable strategy of conceding independence to salvage its ability to function.

The views expressed in this podcast are those of the participants and should not be considered the views of Fox Rothschild LLP or its attorneys. This podcast is for informational purposes only, is not legal advice, and does not create an attorney-client relationship.

Copyright © 2026 Fox Rothschild LLP. All Rights Reserved.

All content of this podcast is the property and copyright of Fox Rothschild LLP and may not be reproduced in any format without prior express permission. Contact BizDevMarketing@Foxrothschild.com for more information or to seek permission to reproduce content.



So what does all this mean? The board has operated with structural independence for nearly a century. Board members have been removable only for neglect of duty or malfeasance, and ALJs have had good-cause protections. It's conceivable, if not likely, that the Supreme Court will rule that these job protections are unconstitutional, given prior decisions foreshadowing that outcome.

There's also the open question of whether the Texas District Court could analyze whether the NLRA's removal provisions are not severable from the rest of the statute, which could raise the specter of the entire NLRA being declared unconstitutional. If the job protections go away, every new administration could essentially clean house, replacing board members and ALJs with people that they want. That could mean sharper, faster swings in labor law enforcement and policy every time the White House changes hands. There are definitely already swings, but the loss of independence could make those swings even sharper and faster.

There's some other immediate issues. If the court agrees with the NLRB and orders that the president can fire board members and ALJs without cause, the board may apply the court's order only to this particular case.

However, under its longstanding doctrine of refusing to acquiesce in the decision of a court, but instead apply its own board jurisprudence, the board could decline to consider its members and ALJs fireable at-will in other cases. Even assuming the board accepts that its members are fireable at will across cases, former board member Gwynne Wilcox's challenge to her firing is pending in the U.S. Court of Appeals for the DC Circuit and the outcome there could be appealed to the Supreme Court.

Finally, it's unclear how these dynamics could affect the board's adjudication of cases, including fact-dependent ones, in particular. Credibility assessments tend to require careful non-policy-based analysis, and a president's termination of an an LJ because of policy disagreements could be considered inconsistent with that approach.

The adjudicatory process — where ALJs find facts and assess credibility — is distinct from the NLRB General Counsel's prosecution of a case, which by its nature is more closely tied to the discretion and policy priorities of a president. So for employers and unions alike, the takeaway is really you need a plan for volatility, monitor this case and related Supreme Court developments closely and work with experienced labor counsel to build strategies that are resilient no matter which way the political winds blow. Thanks for listening.

The views expressed in this podcast are those of the participants and should not be considered the views of Fox Rothschild LLP or its attorneys. This podcast is for informational purposes only, is not legal advice, and does not create an attorney-client relationship.

Copyright © 2026 Fox Rothschild LLP. All Rights Reserved.

All content of this podcast is the property and copyright of Fox Rothschild LLP and may not be reproduced in any format without prior express permission. Contact BizDevMarketing@Foxrothschild.com for more information or to seek permission to reproduce content.