Fisher Phillips

Transcripts are generated automatically using AI and may contain errors or omissions.

Rich Meneghello (00:00)
Welcome to the FP 5, Five Things for Your 9-to-5. We help employers make sense of the fast-moving world of workplace law and compliance by breaking topics down into five parts. I'm Rich Meneghello, Chief Content Officer here at Fisher Phillips.

About a month ago, the Supreme Court handed down one of the biggest separation of powers rulings in decades, and it's actually going to ripple through a host of federal agencies that impact the workplace. We're talking about the EEOC, the NLRB, and the FTC, the Federal Trade Commission.

I've got Jonathan Crook here with us today to help break down five things employers need to know about the Supreme Court decision in Trump versus Slaughter. Jonathan is a partner in our Charlotte office and he's also a key member of our employee defection and trade secrets practice group. Jonathan, thanks so much for being on the show today.

Jonathan Crook (00:58)
Thanks, Rich. I appreciate you having me come on.

Rich Meneghello (01:00)
For those who don't know you well, why are we having you on this show focused on an FTC decision in front of the Supreme Court?

Jonathan Crook (01:09)
Great question. So a few years ago, I started a legal tech company called Blue Pencil Box, which is completely designed around capturing every development that we could find that touches on restrictive covenants between employers and employees. So that's things like non-compete agreements, non-solicitation agreements, and confidentiality agreements. And over the last I'll say like four or five years, that practice has increasingly involved federal agencies like the FTC and the NLRB, right? Like they've taken a keen interest in these types of agreements recently. And so we've really been tracking closely what the FTC and the NLRB have been doing in this space. And that involves now this decision about how these agencies operate.

Rich Meneghello (01:56)
Okay. Go ahead and give a quick shameless plug here for Blue Pencil Box if people want to learn more. They go to bluepencilbox.com, but what are they going to find there?

Jonathan Crook (02:05)
Sure, yeah. So bluepencilbox.com has daily updates on any decision that we can find that impacts restrictive covenant law. And it also has really robust practice tools, right? So 50-state surveys on a lot of different issues that impact the enforceability of these types of covenants. And then also drafting checklists to make sure that employers are staying compliant. And this is an area of law that is shifting under our feet constantly. And so our goal there is to provide really accurate tools that stay up to date as the law changes.

Rich Meneghello (02:34)
Blue Pencil Box does not have a podcast, does it?

Jonathan Crook (02:36)
Not yet. We're in the works. We're coming for you.

Rich Meneghello (02:40)
Really? Okay, all right.

Jonathan Crook (02:42)
No, I'm just kidding, we could never come for you Rich.

Rich Meneghello (02:43)
Well I was gonna say, I wanna make sure that we're friendly, not even competitors, but you know, friendly peers, I guess, in the online space.

Jonathan Crook (02:42)
I mean I'll just have you sign a non-compete when this podcast is over. It's all good. It'll be enforceable, trust me.

Rich Meneghello (02:56)
Well played. Well played.
All right, so let's dive in. Let's talk about the first thing that our listeners are going to want to know about. As I talked about in the intro, the Supreme Court at the end of this last term just handed down a landmark ruling that dramatically expands the power of the president to fire the heads of independent federal agencies. So, Jonathan, break it down for us. What did the court actually decide? Why is it a big deal? What happened here?

Jonathan Crook (03:30)
So let's set the stage, right? So President Trump fired FTC Commissioner Rebecca Kelly Slaughter. No cause was identified. He just said you're fired. And essentially everyone understood that this was a termination for political reasons because Commissioner Slaughter wasn't gonna carry out, you know, the president's policy initiatives, right? She filed a lawsuit challenging that firing because the FTC Act says that commissioners can only be fired for inefficiency, neglect of duty, or malfeasance, right? Way back in 1935, the US Supreme Court actually took up the constitutionality of that very provision and said that it was constitutional. The Supreme, and that was this is the Humphrey's Executor case.

Rich Meneghello (04:14)
For all you Supreme Court nerds out there, the Humphrey's Executor case. That's, it's a fantastic. for those who really want to do a deep dive, reading about that case is really interesting. But we're not gonna go too far down in the weeds on this podcast, but sure. Super interesting case.

Jonathan Crook (04:29)
I saw someone say that it's also the most metal Supreme Court name, which I agree with., so it's a shame that that's no longer in play. But anyway, without getting into the weeds, in Humphrey's Executor, the court said "this is constitutional, and the reason is it doesn't overstep on the president's authority to carry out the executive function." The court characterized the FTC as not being really part of the executive, but really what it called a quasi-judicial or quasi-legislative body.

So in this decision, which was 6-3, the majority opinion was written by Chief Justice Roberts. The court overruled Humphrey's Executor. It's been chipped away at for years in a lot of different cases. But basically, Chief Justice Roberts said, “Look, if you take a look at what the FTC actually does in today's world, they're absolutely carrying out an executive function.” So this idea that they're somehow quasi-legislative or quasi-judicial doesn't really hold water based on the modern realities of how the agency works. And so the president is entitled to terminate those commissioners at will. And the purported limitation on that power in the statute was held unconstitutional.

Rich Meneghello (05:39)
Okay, so big picture taking a step back here. The president now has the sole power, unfettered power, to remove FTC commissioners. And let's make this clear: yes, this is a case started by, sparked by, a decision, a termination carried out by President Trump. But this is gonna carry forward for all future executives in the White House, right? It's this is not just a President Trump thing. This is all future presidents now.

Jonathan Crook (06:06)
Absolutely. Yeah, absolutely. This is this is a case about what power the office of the presidency has. It's not just about President Trump. So yeah, absolutely this is going to apply to presidents of any party going forward.

Rich Meneghello (06:26)
That leads us to our second thing. Our firm's prediction team, the folks who wrote the alert telling people about this case and then reporting on it, months ago, each of you called it, said what the decision would be, said it would be a six three decisions. That was you, Dave Dorey, who's the co-chair of our government relations team, Ben Ebbink, also part of our government relations team, and Reyburn Lominack, a litigator in this area. All of you said. This would be 6-3. Three of you, including you, said that Justice Roberts, Chief Justice Roberts would be writing the opinion. So this didn't come out of the blue like a meteor out of the sky, you didn't expect it. How did you all know this was coming?

Jonathan Crook (07:11)
So again, this is not a situation where the Supreme Court sort of out of nowhere is overturning clear precedent. Again, Humphrey's Executor has been chipped away at in various cases over the years. And so people that have been following this stuff could sort of see this coming. But at the same time, it's a big deal whenever the Supreme Court is sort of going back on something that a previous court said. And so that to me suggests that the Chief Justice is going to be the one to write the opinion. And this also seemed like a situation where it could break along party lines, which is what it did. So just sort of reading the tea leaves, you could sort of see where this one was going.

Rich Meneghello (07:52)
Did you place any money on any bet on like Kalshi, or Polymarket or anything like that?

Jonathan Crook (07:59)
Absolutely. I mean, that's all I do is bet on outcomes on Kalshi, particularly Supreme Court decisions.

Rich Meneghello (08:05)
Yeah, I know. It's its own cottage industry. Is there a moment, is there a moment that you felt especially confident about your decision in the time leading up to the to the case being decided?

Jonathan Crook (08:18)
I mean to be honest with you, I probably would have been shocked if it wasn't this outcome. You read various analyses and if you look at the cases, it seemed pretty clear this is where this was headed, particularly in light of the other orders that the Supreme Court had granted, right? Like they had stayed the NLRB board member Wilcox's lawsuit, right? So there were some indications that this was gonna be happening.

Rich Meneghello (08:43)
Any other predictions for our audience that you wanna give them now that will demonstrate your prognostication prowess here?

Jonathan Crook (08:52)
Yeah, absolutely. The University of North Carolina Tar Heels are gonna win the national title in college football and college basketball this year, believe it not. Go on Kalshi and see what kind odds you can get on that, a nice little parlay.

Rich Meneghello (09:01)
I love it, I love it, the Bill Belichick special.

Jonathan Crook (09:09)
That's right.

Rich Meneghello (09:15)
The third thing we're gonna be talking about is the fact that this ruling has an immediate impact on the FTC, the Federal Trade Commission. And I don't think most employers out there truly understand how much that agency actually touches the workplace and business. Give us an upshot about the impact of what the FTC does and how this case could potentially impact folks.

Jonathan Crook (09:40)
Sure, absolutely. Historically, the FTC was really concerned about competitive conduct that impacts consumers, right? So think about fighting monopolies, fighting businesses that agree to separate market segments with each other, that type of thing. Probably over the last five years, the FTC under both administrations, mind you, so the FTC under Chairwoman Lena Khan and now the FTC under Chairman Ferguson are really focusing on the impact on the labor market of agreements that employers have with their employees, which includes non-compute agreements, it includes employee non-solicitation, no-hire agreements, and it includes business-to-business agreements where employers are agreeing not to hire or solicit each other's employees. So the FTC created a task force with the Department of Justice to investigate how employers use these types of agreements. And they've in fact gone after several employers in the last year over their use of non-compete agreements. So this isn't just some sort of, you know, theoretical policy shift. It is clear that they are taking a serious look at how employers use these agreements. And it's something new, right? We really don't have a lot of precedent for the FTC doing this. So we're, we're sort of learning as we go how much focus the FTC is giving us, and it appears to be a substantial amount.

Rich Meneghello (11:00)
So probably if I'm listening to this episode and I've sort of gotten my eyes opened now to the impact that this case can have and this agency will have, maybe my first thought is, "Whoa, okay, what do I need to do today in response to this decision when it comes to the FTC's power?" Is there anything?

Fisher Phillips

Jonathan Crook (11:19)
I don't think so. Not right now. So just to catch everyone up, there are currently two commissioners on the FTC. They're both Republicans. A third is waiting in the wings. I don't think there's any immediate shift in policy. I think what employers need to do is not that they weren't paying attention to elections before, but essentially what this Supreme Court decision does is open the door for dramatic policy shifts between presidential administrations.

Rich Meneghello (11:48)
Yeah.

Jonathan Crook (11:48)
That's what employers really need to be on the lookout for is every four years, is there going to be some sort of breakneck change in rules, policy, enforcement priorities? That's not happening now. And I don't foresee anything materially different happening during this administration, but there can be really big changes depending on how these elections play out.

Rich Meneghello (12:11)
And now, I mean, okay, we'll get into the weeds a little bit here for those who care about the wonky stuff. You know, the way things worked prior to this decision coming down is a new president would take office. And of course they would want to implement their priorities at all these federal agencies, but they were sort of hamstrung by the terms that are put in place so that EEOC commissioners, FTC folks you know, they wouldn't automatically all turn over right away. Sometimes it would take a year or two, and then the president would install their preferred people in those positions and then the hard work would begin of overturning all of these decisions that had been put down by their predecessors. So it happened, but it would just take time. And what I'm hearing you say is that if the next time the White House changes hands from one party to another, we're gonna expect these changes to happen immediately.

Jonathan Crook (13:03)
I think that's right. Yeah. So you're describing these structures that are in place to prevent this very thing that we're talking about, right? Like with the FTC, the EEOC, and the NLRB, there's staggered five-year terms. There can be no more than a majority from one party, right? And so like these rules were put in place so that there could be some continuity across presidential administrations for the people whose behavior is being regulated by these agencies. But now a new president can come in and absolutely clean house immediately. But what they can't do is put in new people immediately. You know, it's this is not like where you have a CEO who's allowed to hire and fire people at their at their whim. The president is allowed to fire at will, but he's not allowed to hire at will. so the new commissioners that come in still need to be confirmed by the Senate. Right?

Rich Meneghello (13:59)
Right. Yeah.

Jonathan Crook (14:03)
So let's imagine a situation where the president is in one party and the Senate is controlled by another party. And the president cleans house and eliminates, let's just say, I don't know, the vast majority of the leaders of these agencies. And the Senate is in no hurry to confirm any of the people that the president puts forward to fill those vacancies. What's gonna happen? Right. I don't know. I think it's gonna create some really interesting situations,

and there's probably gonna be a lot of political horse trading about that. So even though the president has the unfettered ability to remove, he does not have the unfettered ability to replace. And so I think that's still a really relevant consideration here that's gonna perhaps temper some of the more drastic changes that could happen.

Rich Meneghello (14:53)
You're listening to the FP 5. I'm Rich Meneghello, and we're here with Jonathan Crook. Jonathan is a partner in our Charlotte, North Carolina office and also a key member of our employee defection and trade secrets practice group. Just as a reminder, you can check out the insight linked in this podcast show notes for more on the Trump v. Slaughter decision.

That brings us to our fourth of five things that we want to talk about today, Jonathan. This decision is not limited to impacting the FTC. It will probably soon reach the EEOC as well, and that's one we're gonna watch closely. Jonathan, can you share with the audience how this ruling connects to what's happening at the EEOC?

Jonathan Crook (15:34)
Absolutely. So again, just a little bit of background. President Trump fired two Democratic EEOC commissioners in January of 2025. One of them, Jocelyn Samuels, sued, similar to Commissioner Slaughter of the FTC. And she also argued that her removal was unconstitutional under Humphrey's executor. That case was paused pending the outcome of the slaughter decision. And a week after the Supreme Court decision came down, Commissioner Samuels dropped her lawsuit. Right. So Yeah. Pretty clear cut that this is also applicable directly to the EEOC.

Rich Meneghello (16:09)
Okay. So practically, what should employers expect going forward? I guess if they paid attention to our third thing, they could probably figure out this fourth thing, but what can we expect now from the EEOC?

Jonathan Crook (16:22)
A similar potential for dramatic policy shifts. But the difference is the policies I think are much more directly related to the day-to-day sort of employment operations and HR operations for companies, right? So we're talking not about non-compete agreements or competition for workers, but we're talking about these sort of hot button topics in the HR space like DEI policies, disparate impact claims, religious accommodation, the Pregnant Workers' Fairness Act, EEO-1 data collection. These are all really important issues for employers to monitor. And they're also things that have the potential to change drastically from one administration to the next based on the president's new ability to remove EEOC commissioners at will.

Rich Meneghello (17:10)
Yeah, I mean that, you're right. That one, the FTC one is almost more philosophical and will take some time to trickle down. Whereas the ones you mentioned, many of them impact literally day-to-day policies that employers are doing, leave issues or like you said, data collection for EEO-1s. And then from a litigation standpoint, those litigators out there with cases, disparate impact issues, it's really interesting when you talk about it that way to realize if these shifts occur so quickly, how much things will change and how much they'll change really quickly too.

Jonathan Crook (17:44)
Yeah, I mean there are some significant gray areas in the law that the, you know the EEOC enforces. And so big changes in policy directives on how to enforce those laws can have a really outsized impact on employers.

Rich Meneghello (18:00)
Totally. All right, and then thing number five, the other agency that we want to talk about, the NLRB, the National Labor Relations Board, it's very likely next in line to also feel the effects of this ruling. What's the connection to the NLRB, Johnathan?

Jonathan Crook (18:20)
Very similar as between the FTC and the EEOC. President Trump had fired NLRB member Gwynne Wilcox. That firing has already been upheld by a federal appeals court. And in the pendency of that litigation, the Supreme Court entered a stay, essentially permitting President Trump to remove member Wilcox while the litigation continued. That was a pretty strong signal of where the Supreme Court was going to go. And now it's quite clear, right, that the statutory restrictions on the president's ability to remove NLRB members is likely going to be held unconstitutional, just the same as it was in the FTC context.

Rich Meneghello (18:58)
Okay. And I think it's important to note here, there might be some people who might be tuning out right now or zoning out because they think, NLRB, that's unionized workplaces, our company is not unionized. We're not going to be unionized anytime soon. So I'm not really worried about it. I know you're not a traditional labor lawyer, Jonathan, but can you give folks a quick understanding of why the NLRB impacts all employers and not just those who are unionized?

Jonathan Crook (19:28)
I think a lot of employers are surprised to learn that the vast majority of their employees are protected by the NLRA, even if they don't have a unionized workforce. So the NLRA is not limited to workforces that have already unionized. It protects the rights of employees who are covered to engage in concerted protected activity and to explore whether or not they want to unionize, right? So the NLRA has a much broader impact than just those workforces that are already unionized.

Rich Meneghello (19:59)
What are the kinds of things that you think employers should be looking for next when it comes to the changes that we can see with the NLRB?

Jonathan Crook (20:06)
Sure. There's a sort of a laundry list of hot button topics that are within the NLRB's purview. So we're talking about joint employment issues, independent contractor status, handbook policy rules. And this crosses into my practice quite frequently because employees who are covered by the NLRA are pretty often going to the NLRB over their confidentiality policies. So if an employer uses a confidentiality policy or a confidentiality agreement that purports to restrict covered employees from talking about their wages, which is a very common issue, that can be very problematic under the NLRA. But again, you know, different people can have different views as to whether or not that actually is in violation of the law. So that can be something that shifts as the leadership of the NLRB shifts with an incoming new presidential administration.

Rich Meneghello (20:58)
Interesting. This will be another one where, like with the EEOC, these changes can impact employers immediately and cause employers to have to shift all sorts of things immediately: training to your managers about interaction

with employees, your actual literal handbooks and certain policies you have about employee behavior and professionalism and misconduct. Those sorts of things like might need to be changed immediately depending on some of these rulings that come down from a newly fluid and ever-shifting NLRB.

Jonathan Crook (21:33)
Yeah. And it's really tough for employers because when the law changes through the legislative process, you can see it coming, right? Like a bill gets filed, it makes its way through both chambers, it ultimately gets signed. And then usually it will take effect sometime in the future, you know, with a deadline that will allow you to get your ducks in a row and make sure that you're compliant. And it, you know, usually statutes when they're enacted, do not invalidate things that already exist, they're usually operating on a prospective basis.

But when you install new commissioners of these administrative agencies who just have a completely different philosophy of existing law, they can immediately start executing that philosophy. Right? It's not like they're gonna say, okay, employers, “You have until October 1 to come in line with how I view the law.” You know, it's a much more fluid situation and there's a lot more risk. And that's why employers need to move very quickly when these things happen. It's tough. It's tough for employers to stay on top of things, but that's what we're here for. We're here to help them do that.

Rich Meneghello (22:43)
That sounds like a great way to wrap up this show. Jonathan, thanks so much for taking the time and helping enlighten us.

Jonathan Crook (22:52)
Happy to do it. Thank you, Rich. I appreciate it.

Rich Meneghello (22:54)
But before we let you go, Jonathan, this is the part of the show where we like to get to know you a little bit better in the same five-question format. So I've got five quick questions for you so the audience learns a little bit more about you. Are you ready?

Jonathan Crook (23:11)
Sure, fire away.

Rich Meneghello (23:12)
Okay. This first one is a bit of a gimme. I obviously know you outside of the show and outside of the firm, so I know the answer to this question. But let's get the audience to know you as well as I know you, Jonathan. First question, what's your favorite book?

Jonathan Crook (23:26)
The Lord of the Rings, by J. R. R. Tolkien. And you knew that I was gonna say that.

Rich Meneghello (23:30)
did. I did. When did you first get into Lord of the Rings, Jonathan? What age?

Jonathan Crook (23:36)

My dad bought me a beautiful hardcover version of the book when I was probably 12 or 13. And I just like fell into it, it engulfed me. And coincidentally, the Lord of the Rings films came out right around the same time, right around my birthday. And so for three years in a row, that was like a super-formative experience for me, which is going to the movies to see those films. And yeah, it's just been part of the fabric of my life ever since.

Rich Meneghello (24:05)
All right, love it. We could do I know we could do a whole podcast just on that. We'll do another, we're not going to right now though. Okay. Question two: it's Friday night and somehow you find yourself at home alone, house to yourself. What are you doing?

Jonathan Crook (24:22)
Perhaps related to the answer to the previous question, but almost certainly watching a movie. So my wife and I are huge film nerds. And in the last year we have built out kind of like our dream home theater, which has been an incredible project. And so now we have this kind of silly, like audio setup and projector setup. So almost certainly watching the film up there on a Friday night if I'm alone.

Rich Meneghello (24:43)
Okay, love it. I can't wait for the invite to your house for a Friday night film fest. Third question: Mac or PC?

Jonathan Crook (24:50)
PC for business, Mac for pleasure.

Rich Meneghello (24:52)
All right. Love that answer. Fourth question. What's the last T V show that you binged?

Jonathan Crook (24:59)
Currently on the last season of Mad Men, which I had never seen before, which has been absolutely incredible. Like, you know, and it's always listed as like, you know, one of the top TV shows of all time. But it's actually relevant to the stuff that we do because there's so much interesting employment law stuff in the show. It's basically like a workplace genre, right? But like I I'm sure my wife is tired of me doing this at this point, but like there are so many episodes where it's like, oh man, that really wouldn't fly these days. She's like, I know, I get it. That's the point.

Rich Meneghello (25:28)
That's the point. Thank you. Thank you, Lawyer. Gotcha. Right. Yeah, no, that that show holds up incredibly well.

Jonathan Crook (25:37)
It's unbelievable. I mean, Don Draper's probably like the best character, the most interesting character, right, in like TV history, at least for my money. But yeah, it's awesome.

Rich Meneghello (25:46)
Okay, fifth final question. What's your go-to opening move in rock, paper, scissors?

Jonathan Crook (25:51)

It's gonna depend on my opponent. You know, I really need to look in their eyes and see if they have any tells. You know?

Rich Meneghello (25:57)
No Jonathan. Just straight ... go. What are you doing? What are you doing? Quick.

Jonathan Crook (26:01)
I'm going rock. I'm throwing rock.

Rich Meneghello (26:03)
Of course you are. That's ridiculous. I would go, scissors 'cause I would I would think I'm like outsmarting the person by factor of two, thinking that they think I'm gonna be throwing rocks and then they're gonna throw paper and then I hit scissors, but ...

Jonathan Crook (26:18)
Two of my very close friends in college were adamant about never throwing scissors. And they just, they staked their entire, they said "never scissors" and it was like a political platform that they had built for themselves. To this day, never scissors.

Rich Meneghello (26:32)
Hashtag never scissors, look that up on social media. So you will find Jonathan's friends.
And that is all the time we have. Again, special thanks to our guest, Jonathan Crook, and thank you for listening to the FP 5. One more quick reminder: you can read more about that big Supreme Court decision in the insight linked in our podcast show notes. We will see you next week.