

FP SCOTUS PREDICTIONS: SUPREME COURT SET TO LIMIT LABOR BOARD'S REACH OVER EMPLOYERS IN SURPRISING WAY

Insights
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An impending Supreme Court decision is poised to transform how the National Labor Relations Board decides cases and may fundamentally alter the course of labor relations as we know it. We predict that a SCOTUS decision to be released any day now involving SEC administrative proceedings will set the stage for a future challenge to the NLRB's use of administrative law judges. While these agency judges currently wield tremendous power – deciding the fate of union organizing campaigns and elections, a slew of workers' rights, employer private property disputes, and many more issues – we predict that the Court's decision in *SEC v. Jarkesy* will eventually curtail this power and place more authority in the hands of federal judges. What do you need to know about this impending ruling, and what can you do to prepare?

What's Happening?

- You probably weren't following the underlying dispute that made its way to the Supreme Court. After all, it's not a labor and employment case and it doesn't appear on its face to impact your business.
- The Securities and Exchange Commission (SEC) accused George Jarkesy and his advisory firm of certain misrepresentations concerning the launch of several large hedge funds. An SEC administrative law judge (ALJ) agreed with the charges and ordered Jarkesy to pay nearly \$1 million in penalties after a full administrative proceeding.

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- The 5th U.S. Circuit Court of Appeals overturned the decision and ruled that the SEC's use of administrative law judges violated the Constitution.
- The Court said that the agency must head to federal court to receive approval from a judge in any dispute impacting a party's private rights.

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How Does This Relate to Labor Law?

If SCOTUS agrees with the 5th Circuit and knocks regulatory agencies down a peg or two, one of the first targets challengers will attack is the National Labor Relations Board. After all, few agencies impact the lives of employers and workers like the Board. Its administrative law judges are one of the key cogs in its regulatory machine that help shape day-to-day workplace rights and responsibilities across unionized and non-union workplaces alike:

- ALJs determine how union elections will be conducted and have the power to influence the results one way or the other depending on the guardrails they establish.
- They regulate whether and how businesses need to bargain with their own workers over a whole host of significant issues.
- They oversee how a business interacts with their own employees – regardless of whether the business is unionized or not – applying rules related to workplace policies, misconduct rules, severance agreements, whether employees can solicit other workers on company property, whether workers can use company property for their own organizing benefit, and many other topics.

You can be sure that if SCOTUS rules against the regulatory state as we predict, challengers will line up to take aim at the NLRB in short order. **We could see a day in the very near future where NLRB administrative judges would need to head to a federal court to enforce any ruling that would impact an employers' (or union's) private rights, which would be a very significant check indeed.**

Not the Only Case on the Docket

If some of these arguments seem familiar, [you may have read our recent predictions piece about another impending shakeup to regulatory agencies that we expect from](#)

SCOTUS. This other case before the Court right now could have an even bigger impact on regulations across the board.

These cases all stem from the same argument: many believe that regulatory agencies have too much unchecked power. The challengers feel like regulators shouldn't act like courts and inject themselves into disputes between private parties – especially if they get to punish the losing side. After all, courts have guardrails like independent judges and juries while agencies are typically stocked with political appointees who carry out the will of whichever party occupies the White House. This leads to the pendulum swinging back and forth every four or eight years or so, and with it a whole new sweeping set of regulations and the dismantling of a set of rules that businesses had grown accustomed to.

SCOTUS Predictions

Back to the *Jarkesy* case, SCOTUS has been given three options to curb regulatory agencies:

1. They can say agencies can't give authority to an ALJ when it comes to slapping parties with civil penalties because this violates the [Seventh Amendment right to a jury trial](#).
2. They can say that [Congress can't delegate the decision](#) of how to punish alleged misconduct to agencies when the agencies can choose between administrative proceedings or civil court actions.
3. Finally, they can say such regulatory proceedings violate [Article II of the Constitution](#) because ALJs don't go through the same process to be appointed as federal judges (who require presidential appointment and Senate approval).

Our predictions for how the Court will rule?

- **Alex Desrosiers** – I predict a 6-3 decision with the majority knocking back the power of regulatory agencies. Justice Kavanaugh will write a majority opinion relying on argument 2 above, and Justice Gorsuch will write a concurring opinion advocating for argument 1. Justice Kagan will author the dissenting opinion.
- **Mark Ricciardi** – I agree with Alex, it will be a 6-3 decision. But I predict Justice Gorsuch will author a plurality opinion

skewering the SEC and other federal agencies relying on all three arguments above, with Justices Thomas, Alito, and Kavanaugh signing on. Chief Justice Roberts will write a separate opinion, joined by Justice Barrett, concurring on narrow grounds, likely just on argument 1 above. And Justice Kagan will write a blistering dissent predicting a parade of horrors to follow.

How Should You Prepare?

While the *Jarkesy* decision could come down any day now, any future challenge to the NLRB's powers will need to unfold over time. It might take several years to fully play out. So there are no immediate steps to take.

But what can you do to position yourself if challengers start taking broadsides at the Labor Board and their ALJs' power begins to weaken? There are a few steps you might want to consider.

- **Develop a Flexible Response Strategy:** Create an overall labor strategy that allows your organization to quickly adapt to legal changes. This could involve drafting alternative policies that can be implemented if necessary or establishing a legal review task force that can rapidly assess and respond to the implications of the Supreme Court's decision and future rulings. Flexibility will be key in navigating the changing legal landscape.
- **Engage with Legal Counsel:** Work closely with legal counsel sooner rather than later to help monitor developments related to this issue and to receive timely advice on compliance and strategic planning. Your experienced labor counsel can provide insights into how the decision could affect your specific operations and help you to navigate the complexities of labor law.
- **Evaluate Union Relationships:** If your workforce is unionized, consider proactive engagement with union representatives to discuss how potential legal changes might affect collective bargaining agreements and labor relations. A collaborative approach can help mitigate conflicts and foster a constructive dialogue about adapting to new legal realities.

Conclusion

We will continue to monitor developments related to this case and provide an update when SCOTUS issues an opinion, so make sure you subscribe to [Fisher Phillips' Insight System](#) to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Labor Relations Practice Group](#).