

SCOTUS DECISION WILL WEAKEN LABOR BOARD'S ATTEMPTS TO IMPOSE FINANCIAL PENALTIES ON EMPLOYERS BUT SPARES NLRB FROM CATASTROPHIC LOSS

Insights
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Perhaps lost in the shuffle of a string of blockbuster Supreme Court decisions was a June 27 ruling that will undermine the National Labor Relations Board's attempts to impose financial penalties on employers – though it didn't go so far as to block the use of administrative law judges to resolve disputes as some employers had hoped. While we predicted that the *SEC v. Jarkesy* decision would set the stage for future challenges to the NLRB, the Supreme Court spared the Labor Board from a crippling outcome that might have utterly transformed the way that union organizing campaigns, elections, workers' rights, and employer private property disputes are decided. What do employers need to know about this under-the-radar decision and how can you adjust your labor relations practices as a result?

What Happened?

You can be forgiven for not following the underlying dispute and the recent SCOTUS decision. After all, it's not a labor and employment case and it probably didn't appear on its face to impact your business. We'll make this quick.

- The Securities and Exchange Commission (SEC) accused George Jarkesy and his advisory firm of certain misrepresentations when they launched several large hedge funds. An SEC administrative law judge (ALJ) agreed and ordered Jarkesy to pay nearly \$1M in penalties.

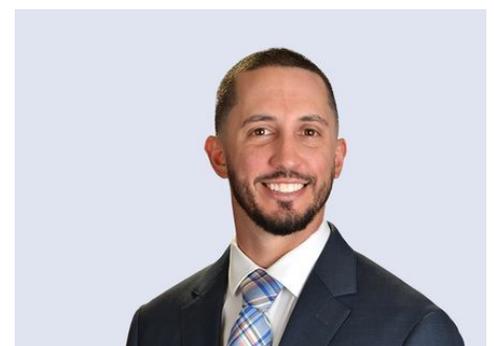
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- Jarkey appealed and argued that the SEC's use of ALJs violated the Constitution. The 5th Circuit agreed, ruling that the agency must go to federal court to receive approval from a judge in any dispute impacting a party's private rights.
- A 6-3 decision from the Supreme Court ruled in Jarkey's favor, but on narrower grounds. It simply found that the agency's use of ALJs to impose financial penalties on a party violated the Seventh Amendment's guarantee of a trial by jury – and did not take a position on the other arguments lobbed against the regulatory state.

What Does This Have to Do With Labor Law?

Many business community advocates had hoped for a SCOTUS win, believing it could reduce the NLRB's power. They hoped for a broad ruling restricting agency ALJs' authority since they don't go through the [Article II process](#) of being appointed like federal judges do. And if judges need to jump over that high of a hurdle to be able to issue substantive rulings, why shouldn't ALJs?

Just think of the impact of curbing ALJ authority when it comes to making key rulings. ALJs are one of the key cogs in the NLRB regulatory machine that help shape day-to-day employee rights and responsibilities in unionized and non-union workplaces across the country.

- They 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.

SCOTUS Keeps NLRB's Core Functions Alive

Those hoping for a momentous decision may be disappointed. The Supreme Court said it was

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unconstitutional for the SEC ALJs to issue monetary penalties because those are essentially **punitive** in nature.

In contrast, the NLRB's approach in cracking down on employer actions has consistently been categorized as **corrective** rather than punitive. NLRB remedies typically aim to restore the status quo – ordering employers to pay back pay and reinstate workers, for example – rather than imposing penalties on employers. For this reason, the ruling doesn't immediately disrupt the NLRB's current practices.

But It Dashes Labor Board's Hopes of Expanded Remedies

Nonetheless, the ruling leaves the door open for future legal challenges to the NLRB's attempts at expanded authority. The last few years have seen the Board attempt to increase the type of compensatory measures it can issue to employees it believes were wronged by an employer. In fact, NLRB General Counsel Jennifer Abruzzo **issued a memo soon after taking office** asking her agency to use "the full panoply of remedies available" in addressing alleged employer misconduct.

Most notably, a 2022 NLRB decision ordering an employer to compensate suspended and discharged workers beyond backpay and other forms of make-whole relief is seemingly now on the chopping block thanks to the SCOTUS decision. **The controversial *Thryv, Inc.* decision** followed GC Abruzzo's request and said that employers should be on the hook for "all direct or foreseeable" damages flowing from any violation of the National Labor Relations Act, such as out-of-pocket medical expenses, restitution for lost credit rating, and missed mortgage and rental payments.

This groundbreaking decision that extended the Board's remedial arsenal to include consequential damages seemingly flies in the face of the SCOTUS decision's reasoning. Odds are high that a court will soon reject the power of the Board to issue such penalties – or the NLRB could even accept its fate and announce that it will no longer pursue such damages.

What's Next?

SCOTUS never directly addressed the larger issues in the case, specifically ducking a ruling on whether agencies can use ALJs to carry out the kinds of functions that the Labor Board uses them for. But this question won't be left

unanswered for long. Employers and business advocacy groups are already actively pursuing litigation to advance further arguments against the NLRB's use of ALJs, and we are monitoring several key cases that could turn the tables in the very near future.

How'd We Do With Our Predictions?

Our author team [took a shot at predicting the outcome of the matter back in February](#) when we previewed this case.

How'd they fare?

- Both of them correctly predicted a 6-3 victory over the regulatory use of ALJs in the *Jarkesy*
- Neither foresaw such a limited ruling, instead expecting a broader decision that would have severely hamstrung the NLRB.

What Should You Do?

There are no immediate changes to be made to your broader labor relations strategy given this ruling. However, there are some steps you can take hand-in-hand with your labor counsel to position yourself well for the future.

- **Fire Back, if Necessary:** First and foremost, if you are actively engaged with the NLRB in a matter involving potential penalties beyond make-whole remedies (for example, any situation involving so-called "direct or foreseeable" damages like out-of-pocket expenses), work with your counsel to immediately cite to this SCOTUS decision and seek to have such arguments stricken from your case.
- **Prepare for the Future:** Knowing that other employers are seemingly ready to line up and take a second crack at the NLRB's use of ALJs, position yourself to be ready for any shift in the status quo. You may want to establish a legal review task force that can rapidly assess and respond to 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.

Conclusion

We will continue to monitor developments related to this issue and provide updates when necessary, 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](#).