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# DO NOT PASS GO: FIFTH CIRCUIT HALTS NLRB FROM PROSECUTING ULP COMPLAINTS AS COURTS DEBATE AGENCY'S CONSTITUTIONAL POWER

Insights  
Aug 26, 2025

A federal appeals court dealt a significant blow to the National Labor Relations Board (NLRB) last week, upholding a preliminary injunction prohibiting it from prosecuting unfair labor practice (ULP) complaints against SpaceX and two other employers while courts debate the underlying constitutional challenges to the agency's structure. While the 5th Circuit's August 19 ruling in *Space Exploration v. NLRB* only decided whether the employers showed a likelihood of success on the merits sufficient to justify injunctive relief – and whether irreparable harm and the equities favored the employers – the opinion foreshadows its ultimate ruling on the merits and sets the stage for a showdown the Supreme Court is likely to resolve in the years ahead. What should employers (especially those in Texas, Louisiana, and Mississippi) do as a result of this critical ruling?

## The Lead Up

In April 2024, [SpaceX filed suit](#) against the Board in a Texas federal court challenging the prosecution of a ULP complaint. Several months later, two other employers filed similar suits. Their main argument: the NLRB's structure is unconstitutional.

Each employer moved for a preliminary injunction.

- They argued that because the NLRB's ALJs are removable only for cause – by officials who themselves are removable only for cause – their removal protections conflict with the President's Article II power.

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- They further argued that the President’s authority to remove NLRB members “for neglect of duty or malfeasance in office, but for no other cause” likewise infringes on his Article II power.

In each case, the district courts granted preliminary injunctions against the NLRB, and the agency appealed to the 5th Circuit.

## **Appeals Court Deals Blow to the NLRB**

The cases were consolidated for review by the 5th Circuit, first tasked with evaluating whether the employers were likely to succeed on the merits of their constitutional challenges.

### ***NLRB ALJ Removal Protections***

The court first addressed the employers’ arguments concerning NLRB ALJs, beginning with a discussion of the [2024 SCOTUS decision in \*Jarkesy v. SEC\*](#). There, the Court examined a dual-layer removal scheme for Securities and Exchange Commission (SEC) ALJs akin to the removal scheme for NLRB ALJs. As SCOTUS there explained, SEC ALJs can only be removed for “good cause” by the US Merit Systems Protection Board (MSPB), and SEC Commissioners and MSPB members themselves can only be removed for “cause.” These dual-layer removal restrictions were unconstitutional, the Court concluded, because SEC ALJs are inferior officers, and SEC Commissioners are unable to intervene in their actions except in rare cases.

Because NLRB ALJs are also inferior officers protected by at least two layers of for-cause protection, the *SpaceX* court applied the same logic and concluded the employers were likely to succeed in arguing that the NLRB ALJ’s removal restrictions were unconstitutional. The Court added that NLRB ALJ’s powers were even “more robust” than those of SEC ALJs because NLRB ALJs also have the power to “admonish or reprimand, after due notice, any person who engages in misconduct at a hearing,” as well as strike witness testimony.

### ***NLRB Member Removal Protections***

The court next addressed the employers’ arguments concerning Board members. Although acknowledging the “merits question for Board Members’ removal protections is

a closer call than for ALJs,” the court concluded the employers were also likely to succeed on the merits of this challenge.

- The Court first observed that Board members “wield substantial executive power,” including by determining bargaining units, directing representation elections, adjudicating ULP cases, seeking enforcement of their orders in federal court, and petitioning courts for injunctive relief. Thus, the Court opined, the President’s inability to remove them except for “neglect of duty or malfeasance in office” was constitutionally suspect.
- The Court added that other “independence-promoting mechanisms,” such as no statutory requirement that the NLRB be balanced along partisan lines, further supported its conclusion.

### ***Irreparable Harm Established***

After concluding the employers were likely to succeed on the merits of their constitutional challenges to the NLRB’s structure, the court considered whether they would suffer irreparable harm absent injunctive relief. The court explained that binding precedent and common sense compel the conclusion that forcing the employers to appear before an unconstitutionally structured agency inflicts irreparable harm.

### ***Equities and Public Interest Also Fall in Favor of Employers***

The court next found that the equities and public interest supported an injunction. The court reasoned that the government suffers no cognizable injury when a court halts unlawful agency action, nor does the public interest suffer when an unlawful agency structure is prevented from subjecting countless individuals and companies to unconstitutional proceedings. In short, the court stated, “the public is served when the law is followed.”

### ***New Administration Weighs In***

Of final note, prior to the 5th Circuit’s decision, the NLRB – now directed by a new Acting General Counsel appointed by President Trump – withdrew its position as to the constitutionality of the Board member and ALJ removal protections. However, it maintained its positions that:

- the district courts lacked jurisdiction to enjoin NLRB proceedings, and
- the employers failed to show irreparable harm sufficient to warrant injunctive relief.

The 5th Circuit observed that this change in executive policy did not alter the reality that those protections were “still on the books.” Consequently, it determined that a live case or controversy was still before it, which justified resolution of the issue.

### **What Does this Mean for Employers?**

While the 5th Circuit’s decision does not technically close the door on the NLRB’s ability to prosecute ULP complaints in Texas, Louisiana, and Mississippi, it strongly suggests that eventuality. To date, no other circuit courts of appeals have addressed the issue, and it remains to be seen whether the NLRB will appeal the 5th Circuit’s ruling to the Supreme Court. It also remains to be seen what impact the Acting General Counsel’s decision to no longer defend against constitutional challenges to the removal protections of NLRB members and ALJs will have.

- **If You Have Operations in 5th Circuit’s Jurisdiction:** What is clear is that employers operating in Texas, Louisiana, and Mississippi should consider aggressively challenging the NLRB’s authority to prosecute any ULP cases against it.
- **If You Have Operations Elsewhere:** At a minimum, employers across the country should preserve any such challenges by raising them at all stages of an NLRB proceeding, because courts have held that constitutional challenges to agency removal provisions are not jurisdictional in nature and may be waived.

### **Conclusion**

We will continue to monitor developments in these cases, as well as the expected new wave of challenges to the NLRB’s rules and positions, 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](#).

