

Top Five Labor Law Developments for May 2023

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Labor Relations

1. *The National Labor Relations Board's General Counsel (GC), Jennifer Abruzzo, issued a memorandum asserting that non-compete agreements violate the National Labor Relations Act. [GC Memorandum 23-08](#). The GC argues in the memo that overbroad provisions whether in employment or severance agreements interfere with employees' Section 7 rights and can only be used to restrict individuals' managerial or ownership interests in a competing business or in true independent contractor relationships. Further, the memo states that provisions protecting employers' legitimate business interest, such as proprietary information or trade secrets, can be addressed by narrowly tailored workplace agreements. While not binding, the memo seeks to bring test cases before the Board and make new law generally finding such provisions violate the Act.*
2. *The U.S. Supreme Court ruled the Act does not bar state tort claims against unions for intentional destruction of company property during strikes. The Court ruled in an 8-1 decision that the Act does not preempt a company's state tort claims alleging a union is liable for intentional destruction of its property during a labor dispute. [Glacier Northwest, Inc. v. Int'l Brotherhood of Teamsters Local Union No. 174](#), No. 21-1449 (June 1, 2023). The decision paves the way for state court-awarded damages against unions for their conduct during strikes.*
3. *Board prosecutors seek to revamp employment doctrines for job applicants. An Advice Memorandum urges the Board to extend the "yellow-dog" and "Hobson's Choice" doctrines to recognize refusal-to-hire and refusal-to-consider employer violations when the applicant chooses to withdraw their application. GC Advice Memorandum, [Kona Grill](#), 27-CA-294651 (Jan. 12, 2023) (released Apr. 28, 2023). Expanding the doctrines could create employer liability if an employee reasonably believes the employer placed an unlawful condition on employment, such as prohibiting wage discussions, and the applicant withdraws from the hiring process as a result. In complaints alleging the employer unlawfully refused to hire an applicant, the applicant would have to show they would have been hired but for withdrawing their application. Remedies for such violations include compensation to the applicant and ordering the employer to rescind the unlawful policy.*
4. *The Board's GC provided instructions to regional staff for speedier compliance with and enforcement of Board orders. The GC has directed regional offices to send written communication to the respondent within a "short deadline period" after a Board-issued order, asking if the respondent will comply with the order or contest it. [GC Memorandum 23-07](#). Respondents indicating they intend to comply with the order will move directly to compliance proceedings and receive a packet outlining their obligations, the memo directs. If respondents indicate they will contest the order or fail to respond, the GC directed regions to petition the relevant federal court for a temporary restraining order under Section 10(e) of the Act.*
5. *The Board claims it remains understaffed and underfunded. Despite a \$25 million*

increase to its budget earlier this year, the Board maintains it is still lacking staff and resources. Budget concerns persist as the number of petitions for union elections and unfair labor practice (ULP) charges continue to increase. The Board announced that during the first six months of fiscal year 2023 (October 1-March 31) ULPs increased 16 percent. Union representation petitions also increased, from 1,174 to 1,200. The GC has also issued numerous memoranda outlining her initiatives to reshape Board case law on more than 50 issues, likely contributing to the increase in cases requiring processing. While the Board's total budget exceeds \$299 million, it continues to advocate for a more significant increase.

Please contact a Jackson Lewis attorney if you have any questions about these developments.

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