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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

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FIFTH CIRCUIT FEDERAL COURT HAS UPHELD INJUNCTIONS AGAINST NLRB PROCEEDINGS

On August 19, 2025, the Fifth Circuit Court of Appeals upheld preliminary injunctions against complaint proceedings before the National Labor Relations Board (NLRB). The court held that plaintiffs will likely prevail in their arguments that protections limiting the President's removal powers over administrative law judges (ALJs) and Board members violate the United States Constitution. *Space Exploration Tech. Corp. v. National Labor Relations Board*, No. 24-40533. The concept is that Article II of the Constitution states that executive power rests solely in the President, and thus subordinates who have that power on the President's behalf must remain subject to his control. It is significant, however, that the Fifth Circuit ruling did not determine the outcome of the argument that the court could sever any offending removal protections, and allowing the NLRB case to proceed otherwise. Thus, it is possible that this court and other courts ultimately allow NLRB proceedings to continue as normal and require the removal of the unconstitutional provisions dealing with the litigated protections. It should also be noted that a number of federal district courts in other jurisdictions either upheld the legality of the litigated protections or require an employer to prove that the restrictions will cause actual irreparable harm to particular litigation before the NLRB, a hard standard for an employer to meet. A number of cases are pending addressing these issues which will ultimately have to be determined by the U.S. Supreme Court.

TRUMP NO LONGER TO DEFEND WORKER NON-COMPETE FTC RULE, BUT FTC ISSUES WARNINGS ABOUT NON-COMPETES

During the Biden presidency, the Federal Trade Commission (FTC) adopted a non-compete rule in 2024 that would have barred the use of most non-compete contracts. Former FTC Chair Lina Khan considered the non-compete ban was within the FTC's mandate to prevent the use of unfair methods of competition. The rule was later challenged by the U.S. Chamber of Commerce and others who argued the FTC lacked Congressional authorization to adopt the rule. A district court judge set aside the rule, and the FTC appealed the decision to the U.S. Court of Appeals for the Fifth Circuit. In September of this year, the FTC moved to voluntarily dismiss the appeal. *Ryan v. FTC*, 24-10951 (5th Cir. 9/5/25).

The FTC thereafter, however, issued letters to various entities indicating it is increasing its focus on employers' non–compete agreements to ensure contracts comply with anti-trust laws, with initial letters being primiarily to undisclosed healthcare employers and staffing companies. Those included warnings that the agency will "investigate unfair methods of competition, including non-compete agreements that are unjustified, overbroad, or otherwise unfair or anti-competitive." FTC Chairman Andrew Ferguson also said in a public statement that, despite the agency's withdrawal of support for the previous administration's non-compete ban, the FTC will

continue to enforce "anti-trust laws aggressively against non-compete agreements." Thus, the FTC is shifting away from broad rulemaking and toward case-by-case enforcement. Ferguson stated that the FTC would generally apply the common law reasonableness inquiry, "which asks whether the restriction is no greater than necessary to protect the employer's legitimate interests, and balances those interests against the hardship inflicted on the employee and any potential injury to the public."

In general, non-compete agreements remain governed by state law. There is a trend among the states to limit non-competes but not outlaw them altogether. At least two states, however, Florida and Kansas, recently strengthened the enforceability of non-competes. A few other states totally ban non-competes. Different state laws create concerns for employers as such agreements may be lawful in their own state but invalid in a neighboring jurisdiction. Some employers try to get around these problems by incorporating choice-of-law rules in their non-compete agreements and/or jurisdictional provisions indicating states where such agreements are to be litigated. While these type provisions can help determine which state's non-compete laws govern disputes and where litigation must occur, there are still limits on such provisions as they usually have to have some connection to the parties and not offend the public policy of applicable jurisdictions. A few recent cases illustrate unusual situations where employees have actually moved to certain states supposedly to keep their non-compete agreements from being enforceable. A related issue is that an employee may file a declaratory judgment suit in a more favorable state in an effort to head off an adverse ruling in another state with a less favorable forum.

Some employers are considering as alternatives stronger trade secret protections and compensation changes and alternative arrangements, including garden leave arrangements, repayment agreements, retention bonuses or longer vesting periods for long-term awards.

COMPANY INTRANET POLICIES RAISE LEGAL ISSUES

Many companies like the comradery interest created on company intranets. The idea is to share workplace news and give workers a platform to speak about them. However, controversial postings can create difficult legal issues and other controversy.

Examples include the firing of certain Alaska Airlines flight attendants after responses to an article on the company's intranet explaining its support for the Equality Act, which would add gender identity and sexual orientation as specific protected classes under certain federal civil rights statutes. One of the workers was fired by asking the company if it thought it was "possible to regulate morals," and another posted a comment about how she thought the proposed law would allow sexual predators easier access to victims. The airline interpreted that remark as discriminating against transgender people by equating them with sexual predators. The flight attendants, in turn, considered their posts expressions of their Christian religious beliefs. These type issues are increasing and create difficult legal issues.

Some of the legal dilemma results from legal considerations that employees should not be punished for expression amounting to religious exercise, balanced against the concern about the posts as the employer has a duty to avoid allowing a hostile work environment.

While it is possible to set forth policies concerning the use of a company intranet "the devil is in the details" in applying such concepts. Further, employers may be accused on their own intranet system of unlawful discrimination or harassment, or unfair treatment, and/or postings may encourage union activity or other concerted activity.

While some employers may react to these issues by shutting down an intranet forum for comment, some employers may desire to ascertain workforce sentiments or promote workplace news. A possible option is to allow comments on some posts and not others. For example, it might be prudent to block responses to posts on the company's diversity programs, with the option of contacting Human Resources directly with any concerns.

NLRB DOWN TO ONE SITTING MEMBER

For just the second time in the National Labor Relations Board's 90-year history, it is down to one sitting member after Board Chair Marvin Kaplan's term expired recently. The Board currently only has a single Democratic NLRB member, David Prouty, appointed by President Biden, and four empty seats. The NLRB has only issued six rulings since President Trump's inauguration. The President has nominated persons to fill two open Republican Board seats, but they first must win confirmation in the Senate. There is also a long-standing NLRB tradition not to change precedent without the vote of at least three members. This means that even routine decisions are being held up. The Board is currently operating with an Acting General Counsel, William Cowen, a former Republican Board Member.

DOES AI HELP IN SELECTING NEW HIRES?

An increasing number of employers use some form of Artificial Intelligence (AI) in their employee hiring process. As a result, some employers indicate that their hiring process has improved in areas such as retention. Some believe that using AI reduces the chance of employment discrimination, but plaintiff groups indicate that AI hiring selection processes can also be discriminatory, even if that result was not intended. A few state and/or local laws also require human input into any AI hiring program.

In August, a study was released from the University of Chicago with findings about AI's ability to predict strong job candidates. The paper indicated that AI-led interviews resulted in 12% more job offers and a 17% higher rate of retention for at least the first month. The paper found that AI voice agents covered significantly more key topics relative to human interviews, largely because the AI spoke less and prompted the interviewee to speak more. Surprisingly, 70% of those applicants who offered feedback indicated that the AI interviews were a positive experience compared to those interviewed by humans, but around 5% of the applicants ended the call because they didn't want to speak to a bot. There were also technical difficulties in 7% of the cases, and applicants rated the AI voice agent as "less natural."

Also, although candidates were able to schedule their interviews a bit faster with the AI voice agents, it took the human recruiters twice as much time to review the AI-led interview results. The results were similar to an MIT study that found that AI voice agent directed recruiting resulted in no measurable returns. A recent study concludes that the savings can vary depending on what kind of jobs are being filled, hiring volume, and how much a company pays its human recruiters.

TPS UPDATE (As of 9/22/2025)

The Trump Administration has acted to terminate TPS status for several countries. Of course, litigation has followed each notice of termination. However, if the Trump Administration continues to follow the law, these

terminations will be upheld because the Secretary of Homeland Security has vast discretion to terminate TPS status and courts do not have authority to review the exercise of that discretion. The following table provides the work authorization expiration dates and TPS status expiration dates. Notably, a person may lose work authorization but still have TPS status.

Country	EAD Auto-Extended Through:	Status Designated Through:
Burma (Myanmar)*	May 25, 2025	November 25, 2025
El Salvador	March 9, 2026	September 9, 2026
Ethiopia*	June 12, 2025	December 12, 2025
Haiti#	February 3, 2026	February 3, 2026
Lebanon*	N/A	May 27, 2026
Somalia*	September 17, 2025	March 17, 2026
South Sudan	November 3, 2025	November 3, 2025
Sudan	April 19, 2026	October 19, 2026
Syria*	March 31, 2025	September 30, 2025
Ukraine	April 19, 2026	October 19, 2026
Venezuela 2021!	November 7, 2025 (see below)	November 7, 2025 (see below)
Venezuela 2023^	April 2, 2026 (see below)	October 2, 2026 (see below)
Yemen*	September 3, 2025	March 3, 2026

*Employees from these countries may not have work authorization unless they have completed registration and application requirements by certain deadlines. Visit www.uscis.gov/humanitarian/temporary-protected-status for more information.

#A federal district court ruled that TPS status and work authorization for Haitians continues through February 3, 2026. The Trump administration is determining next steps.

! The Venezuela 2021 Designation applies to Venezuela 2021 beneficiaries who did not re-register under the January 17, 2025 extension notice on or before September 10, 2025. Venezuela 2021 beneficiaries who re-registered under the January 17, 2025 notice on or before September 10, 2025, are treated as Venezuela 2023 beneficiaries.

^ Because of ongoing litigation, Venezuela 2023 beneficiaries, including Venezuela 2021 beneficiaries who registered under the January 17, 2025 notice on or before September 10, 2025, have TPS status through October 2, 2026, and an automatic extension of work authorization through April 2, 2026. On September 19, 2025, the Trump administration asked the Supreme Court to permit the termination of TPS status for those treated as Venezuela 2023 beneficiaries. We await a decision.

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