Alert

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COZEN O'CONNOR

NLRB 10(j) Injunctions Must Meet the Traditional Injunction Test

In an 8-1 decision involving Starbucks, the Supreme Court last week held that district courts must apply the traditional four-factor test for preliminary injunctions to injunctions sought by the National Labor Relations Board (the Board) under Section 10(j) of the National Labor Relations Act (the Act). Section 10(j) of the Act authorizes the Board to seek injunctive relief in a federal district court during the pendency of administrative proceedings for appropriate temporary relief. This decision resolved a split among circuit courts regarding the appropriate test to apply when considering whether to issue a 10(j) injunction.

In *Starbucks*, the U.S. Court of Appeals for the Sixth Circuit granted the Board's petition for an injunction after applying a two-factor test used by several sister circuits, which examines whether the Board has demonstrated that reasonable cause exists to believe that the employer violated the Act, and whether it would be just and proper to issue an injunction. This test essentially created a low threshold for the Board to meet to demonstrate that an injunction was necessary, as it needed only to establish reasonable cause that a violation of the Act had occurred. Other circuits apply the traditional four-factor preliminary injunction standard, in which a district court must examine whether the Board is likely to succeed on the merits, that it is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in the Board's favor, and that an injunction is in the public interest. Still others applied hybrid approaches to these two tests.

The Supreme Court sided with Starbucks, holding that the Board should be held to the same standard as any other petitioner seeking injunctive relief. While the Board initially advocated for applying the two-factor test, it then sought at least to be given deference in applying the criteria and to have them applied in a less exacting way. It suggested that its determination of the merits of the underlying case should be subject to a lower bar. The Supreme Court rejected that view, holding that the Board, like any other litigant, must make a clear showing that it is likely to succeed on the merits. Justice Thomas, writing for the majority, noted that there is an obvious difference between a showing of likelihood of success on the merits and the reasonable cause standard and commented that "it is hard to imagine how the Board could lose" under the latter standard.

Holding the Board to a higher standard of proof on the likelihood of success prong could cause Regions to seek more evidence during the investigation process and possibly result in increased use of investigatory subpoenas. Litigation of the injunction petition could also be more extensive under this heightened standard, including the possibility of employers obtaining discovery of the Board's evidence to be used in the underlying administrative hearing, which could cause more delay in the injunction process.

The Supreme Court's decision is particularly relevant given that the Board's General Counsel announced an initiative in 2022 to increase the Board's use of 10(j) injunctions during organizing campaigns in General Counsel Memorandum 22-02. In GC Memo 22-02, the General Counsel viewed such injunctions as "one of the most important tools available to effectively enforce the Act" and instructed Regions to consider seeking "prompt Section 10(j) relief in all organizing campaigns where the facts demonstrate that employer threats or other coercion may lead to irreparable harm to employees' Section 7 rights." Despite the announcement of that initiative, the Board's filing of injunction petitions has remained static, with the Board filing less than twenty petitions per calendar year since 2021.

While the Supreme Court's decision brings more certainty to the 10(j) injunction process and helps to level the playing field, such injunctions nevertheless can be critical turning points in Board litigation for employers.

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Cozen O'Connor is experienced in 10(j) injunction litigation and can capably defend employers in such proceedings.