PITTA LLP
Labor, Employment & Employee Benefits Law Firm

LABOR & EMPLOYMENT ISSUES

IN FOCUS

FOR CLIENTS & FRIENDS JULY 9, 2025 EDITION

FIFTH CIRCUIT REVERSES LABOR BOARD ON CHARGES AGAINST APPLE BUT DECLINES INVITATION TO REVISIT DEFINITION OF "THREAT"

On June 7, 2025, the United States Court of Appeals for the Fifth Circuit, which sits in Louisiana and covers Texas, Louisiana, and Mississippi, ruled that the National Labor Relations Board ("NLRB" or "Board") lacked substantial evidence to support its determination that tech giant Apple Inc. ("Apple") committed unfair labor practices at its World Trade Center store in Manhattan. Under the National Labor Relations Act ("NLRA" or "Act"), employers appealing Board decisions may do so in any Circuit in which they do business. Specifically, Section 10(f) of the Act provides that

> Any person aggrieved by a final order of the Board . . . may obtain a review of such order in any United States court of appeals in the circuit wherein the labor practice in question was alleged to have been engaged in *or wherein such person resides or transacts business*, or in the United States Court of Appeals for the District of Columbia . . . (emphasis added)

The Fifth Circuit, known for extreme conservativism and hostility toward federal agencies, has become a hotspot destination for employers with sufficient southern ties who hope to shed unfavorable Board decisions and perhaps in the process reverse pesky pro-union NLRB precedent. In this case, although Apple notched a win regarding whether it committed the particular unfair labor practices alleged in Manhattan, the Court declined to entertain Apple's "free speech" push for new legal standards regarding coercive questioning. The case is *Apple v. NLRB*, No. 24-60242 (5th Cir. July 7, 2025).

Back in May 2022, the Communications Workers of America ("CWA" or "Union") had launched a nationwide organizing push following a union election win at an Apple store in Baltimore, Maryland. In the midst of this push, at the Manhattan store, the Union filed an unfair labor practice charge alleging that Apple violated Section 8(a)(1) of the Act by (1) unlawfully interrogating employees about their union support and (2) selectively and disparately enforcing a solicitation and distribution policy by disposing of pro-union flyers left in the breakroom. An Administrative Law Judge sustained both charges, and the Board affirmed the decision on May 6, 2024.

On review, applying an eight (8)-factor test from *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964) and examining the totality of the circumstances, a panel consisting of Judge Don Willett, a Trump appointee; Judge Priscilla Richman, a George W. Bush appointee; and Dana Douglas, a Biden appointee, agreed with Apple that there was not "substantial

evidence" in support of the Board's finding that Apple had unlawfully interrogated employees. The Court also found that it lacked substantial evidence to support the Board's conclusion that Apple managers had unlawfully and discriminatorily removed union flyers from the break room. But in asking the Fifth Circuit to review these determinations, Apple had also invited the Court to revisit precedent regarding First Amendment protections for employer speech. While the Board's authority to regulate coercive employer speech when speech contains a threat of reprisal or promise of benefits is codified in the Act, Apple asked the Court to recognize a subjective requirement to prove employer speech was coercive, where employers would need to subjectively understand that their statements could be viewed as threatening. Writing for the panel, Judge Willett declined the invitation; because the manager's statements to an employee did not constitute illegal questioning, the Court did not need to weigh whether the statements were protected by the First Amendment.

SUPREME COURT PAVES THE WAY FOR TRUMP ADMINISTRATION TO DRAMATICALLY SHRINK THE FEDERAL GOVERNMENT

On July 8, 2025, the United States Supreme Court published a decision that will allow President Donald Trump to implement his plans to significantly reduce the size and capabilities of the federal government. This decision, staying an injunction entered by the U.S. District Court for the Northern District of California in May 2025, allows layoffs and the dismantling of administrative agencies to take place as the underlying litigation makes its way through the courts.

The case is based on a union-led challenge to Executive Order No. 14210, 90 Fed. Reg. 9669 (2025), which was titled "Implementing the President's 'Department of Government Efficiency' Workforce Optimization Initiative." Its stated purpose is to "restore accountability to the American public" by "commenc[ing] a critical transformation of the Federal bureaucracy." The Order gives unprecedented agency hiring oversight to the newly created Department of Governmental Efficiency ("DOGE"), mandating that agencies create "hiring plans" that must be approved by their assigned contacts at DOGE, known as their "DOGE Team Leads." Significantly, the Order directs agencies to "initiate large-scale reductions in force (RIFs)"—in other words, mass firings of agency employees. The Order also instructs the Director of the Office of Personnel Management to begin drafting a new Federal Rule imposing increased limitations on who can be hired to work in the federal government.

The Court's decision was brief, simply explaining that because the Court believes the Executive Order at issue will eventually be found lawful, "and because the other factors bearing on whether to grant a stay are satisfied," the application to stay the injunction is granted. In contrast, Justice Ketanji Brown Jackson, the only Justice who did

not vote to grant the stay, wrote a lengthy dissent. Calling the majority's decision “hubristic and senseless,” Justice Jackson outlined her many concerns, including a lack of facts on which to base this decision and the irreparable harm to the federal government and to American citizens that it may cause. Justice Sonia Sotomayor, who often votes against the Court’s conservative bloc, here concurred with the majority opinion, finding the inclusion in the Executive Order of the phrase “consistent with applicable law” to be sufficient assurance that there will be no unlawful action taken.

The case is *Donald J. Trump v. American Federation of Government Employees*, et al., 24A1174, 606 U.S. __ (2025).

PRESIDENT TRUMP EXTENDS HIRING FREEZE

On July 7th, President Trump issued a memorandum titled “Ensuring Accountability and Prioritizing Public Safety in Federal Hiring.” The memo extended the hiring freeze for civilian federal workers to October 15, 2025. This follows the hiring freeze President Trump began with a January 20th Executive order and which was extended through July 15, 2025.

The hiring freeze extension does not apply to the Office of the President, the military, presidential appointments, or positions related to national security, public safety, or immigration enforcement.

The memo also prohibits federal agencies from contracting outside of the federal government to “circumvent the intent” of the freeze. It also directs that federal agency heads “shall seek efficient use of existing personnel and funds to improve public services and the delivery of those services.”

To Our Clients: If you have any questions regarding any of the matters addressed in this newsletter, or any other labor or employment related issues in general, please contact the Pitta LLP attorney with whom you usually work.

To Our Clients and Friends: To request that copies of this publication be sent to a new address or fax number, to unsubscribe, or to comment on its contents, please contact Aseneth Wheeler-Russell at arussell@pittalaw.com or (212) 652-3797.