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By Rebecca Rainey

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The US Labor Department's ability to use in-house judges to resolve claims under more than 80 statutes may have to be ironed out by the US Supreme Court, attorneys say, as circuit splits threaten to limit the judges' power.

Businesses have filed at least three lawsuits attempting to rein in administrative law judges at the agency, arguing that they are unconstitutional under both US Court of Appeals for the Fifth Circuit and Supreme Court precedent in *Jarkesy v. SEC*. All three challenges suggest that DOL ALJs are illegally insulated from removal by the president, and that the issues they are overseeing should be heard by a federal judge and jury instead of an in-house judge at the agency accusing it of wrongdoing.

One of those suits successfully shut down an ALJ proceeding involving the Office of Federal Contract Compliance Programs, with a Texas-based judge granting a preliminary injunction Oct. 30 sought by a federal contractor, ABM Industry Group.

In that case, Judge Sim Lake with the Southern District of Texas found that the DOL's ALJs had two layers of protections from removal in violation of Article II of the Constitution, but didn't rule on the contractor's arguments that the in-house judge violated its right to a Seventh Amendment jury trial.

The two other disputes may shake out differently, given divides between the circuits on precedents involving administrative law judges, potentially resulting in ALJ proceedings being permitted in some parts of the country, but not others, attorneys say.

"The circuits are coming out in different ways on this," said Alex MacDonald, a shareholder at Littler Mendelson PC. "Given that the DOL operates nationwide, it's difficult to imagine that we would go years and years with the DOL just having different adjudicatory processes in different circuits."

The ABM case was resolved under a Fifth Circuit case that only applies to the Fifth Circuit, added Dan Altchek, a management-side attorney with Saul Ewing LLP. So "it probably means more questions than answers for those other cases that are pending," he said.

Circuit Splits

The two other cases pending against the DOL's ALJ system brought by Perdue Farms and Comcast are currently pending in district courts in North Carolina and Virginia that would appeal to the Fourth Circuit.

Those lower courts don't have to follow the Fifth Circuit's ruling in *Jarkesy*, like the Texas judge in the ABM case who is within that jurisdiction.

While the Fifth Circuit's ruling in *Jarkesy* addressed removal protections for Securities and Exchange Commission in-house judges, the Supreme Court didn't address that particular issue when it took up the case in 2023, instead only weighing in on Seventh Amendment protections.

Nevertheless, plaintiffs have cited both *Jarkesy* rulings in their challenges to in-house judge regimes at the DOL and other agencies, opening up the opportunity for a circuit split.

"The reason you've seen different results in other circuits is those other circuits aren't following *Jarkesy*," MacDonald said, referring to the Fifth Circuit ruling. "They're looking at their own circuit precedent."

For example, some courts say that plaintiffs can't bring a challenge to administrative law judge proceedings without demonstrating they were actually harmed, relying on the Supreme Court's 2021 ruling in *Collins v. Yellen*.

"There's a dispute about whether being subject to a hearing in front of one of these insulated officers is itself an injury, or whether you have to show that the result would have been different if we didn't have this removal protection," MacDonald said. In order to show harm, the plaintiffs would have to prove that the president tried to remove the ALJ from the proceeding, he noted.

Some circuits are also relying on precedent in *Humphrey's Executor v. US*, a 1935 case that some courts have read to mean that officers who are doing purely adjudicatory work, like an ALJ, can have two layers of removal protections.

SCOTUS Review

The potential for a hodgepodge of rulings across federal circuits in the DOL ALJ cases could invite intervention from the Supreme Court, attorneys say, especially given the limitations such rulings would place on ALJ's ability to operate in certain jurisdictions.

"This kind of circuit split, you would expect is eventually going to have to bubble up to the Supreme Court and get resolved," MacDonald said. "It just does not seem like a long term, tenable situation to have agencies operating with different prosecutorial or enforcement regimes in different circuits. And it's happening fairly quickly."

Altchek cautioned that differing decisions across districts would lead to the law varying by circuit and the specific type of ALJ case at issue in the litigation.

"You can't have a legal framework in this country where a federal agency's administrative law judge proceedings are permissible in some circuits and not in others," he said. "That is unworkable."

But others say courts may just continue to ignore the Seventh Amendment jury trial issues addressed by the Supreme Court in *Jarkesy*.

"It's possible," Christy Kiely, a partner at Seyfarth Shaw LLP, said of SCOTUS taking up the question. "But it's also possible the courts will continue to skirt the Seventh Amendment argument like the court did here."

"It's just the more complicated of the two issues," she added, "especially with the showing of harm. It's hard to show concrete harm in any given situation from the dual removal provisions, courts are always going to take the most narrow route possible in a decision."

Regardless, Kiely predicted that ABM's success in its challenge to the OFCCP's in-house judge will lead to more lawsuits, especially against the contractor watchdog.

"It's going to embolden employers, who have historically been reluctant to challenge the OFCCP in court," she said. "There's very little litigation against the OFCCP, but I think that's going to change as a result of this ruling."

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