

How Will the Fight Over Agency Independence Affect Labor and Employment Law

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April 10, 2025





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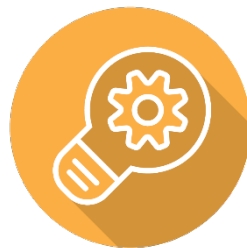
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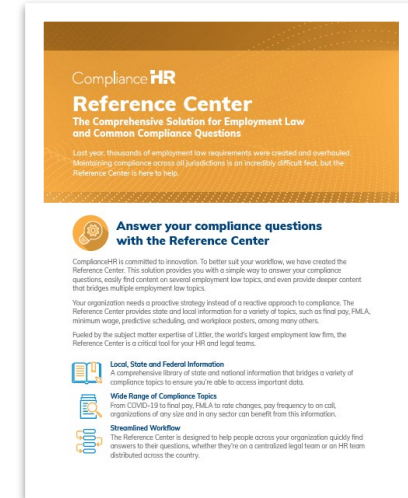
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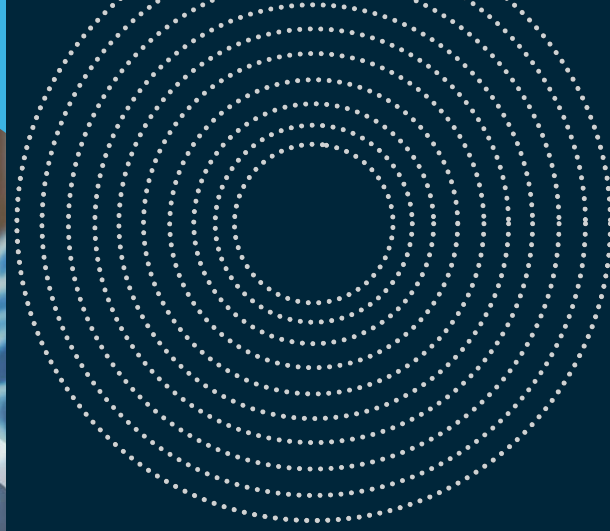
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Outline

- How did we get here?
- What have the courts said?
- What will happen next?
- How should employers respond?



How did we get here?

Independent Agencies

Independent Agencies were created mostly in the Progressive and New Deal Eras

Purpose: To make government more scientific, more professional, and less political

Examples: Federal Trade Commission (FTC), Securities and Exchange Commission (SEC), Interstate Commerce Commission (ICC)

Independent how?

Independent agencies were insulated from political supervision through several tools:

- multi-member bodies
- staggered terms
- “for cause” removal (of some kind)

Early controversy

- Critics argued that these independent structures were inconsistent with the Constitution
- They said the agencies represented a new “fourth branch” of government
- Presidents also pushed back
- For example, FDR fired a member of the FTC, William Humphrey, who had been appointed by FDR’s predecessor, President Hoover

Humphrey's Executor

- After Humphrey died, his estate sued to recover back pay
- The Supreme Court held that his removal had been unlawful
- The Court concluded that Congress could properly protect FTC members from removal because the FTC :
 - performed no executive functions
 - performed only “quasi-judicial” or “quasi-legislative” functions
 - was headed by a multi-member “expert” panel



Agency Independence After Humphrey's Executor

- Over the next few decades, Congress created a multitude of independent agencies, including several labor and employment agencies:
- The National Labor Relations Board (NLRB) (1935)
- The Equal Employment Opportunity Commission (EEOC) (1965)
- The Federal Labor Relations Authority (FLRA) (1978)
- The Merit Systems Protection Board (MSPB) (1978)
- The Office of Special Counsel (OSC) (1979)



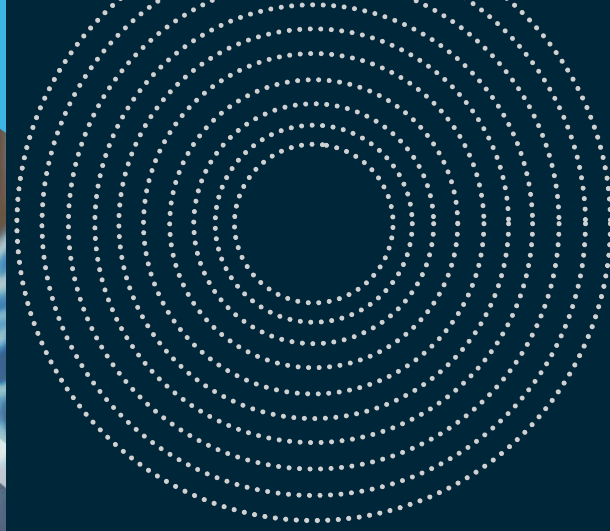
Shifting Legal Ground

- Humphrey's Executor came under increasing criticism in the courts and academia
- Conservative legal theorists popularized the “unitary executive” theory
- The Supreme Court started paring back removal protections for executive officials
- Free Enterprise Fund v. Public Company Oversight and Accountability Board: No double-layer removal protection for “inferior” officers on multi-member agencies.
- Seila Law v. Consumer Financial Protection Bureau: No removal protection for “principal” officers who run single-head agencies.
- Collins v. Yellen: Applies the Seila Law rule to the Federal Housing Finance Agency

A Firing Wave

- After taking office, President Trump fired Democratically appointed officials at the EEOC, NLRB, FLRA, and MSPB
- Those terminations left the NLRB and MSPB without a quorum (i.e., they were legally inert)
- The terminations left the FLRA deadlocked: one Democratic member, one Republican one
- The president also fired the single head of OSC





What have courts said?

District Courts Hew to Humphrey's Executor

- District courts have uniformly ruled against the administration
- The decisions have spanned agencies:
 - MSPB
 - FLRA
 - OSC
 - NLRB
- These courts have reasoned that Humphrey's Executor is still the law; and however much it may have come under fire, it can be overturned only by the U.S. Supreme Court

Circuit Courts Mixed

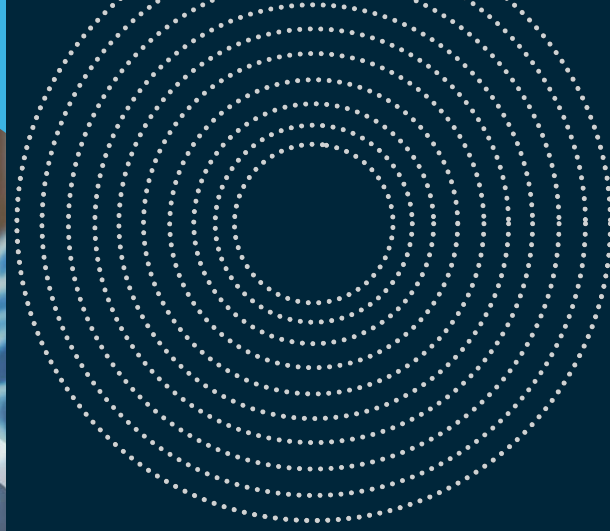
- Circuit courts have been less uniform
- The D.C. Circuit refused to restore the head of OSC to his job
- The same court heard oral arguments in cases involving the NLRB and MSPB firings; questioning was mixed
- The panel struggled with whether Humphrey's Executor could be distinguished or applied on its own terms to modern independent agencies



Circuit Courts Mixed (cont.)

- A D.C. Circuit panel first signaled that it would side with the administration
- The full court (en banc) reversed
- The Supreme Court then stepped in to stay the district court's order (just yesterday!)



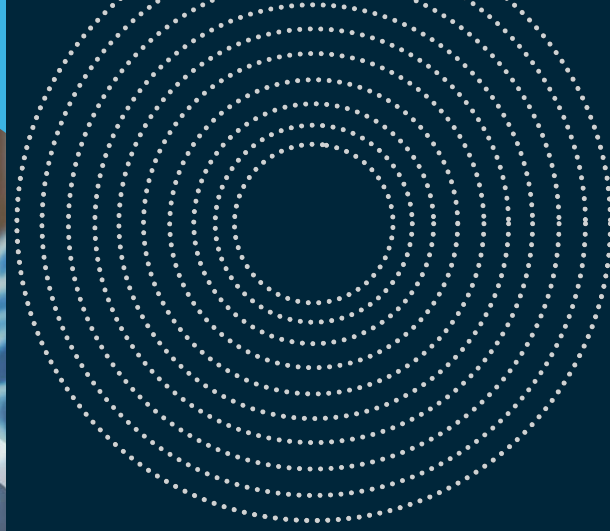


What happens next?

The Supreme Court

- Whatever happens in the lower courts, one or more of these cases is likely to be resolved by the Supreme Court
- Many observers expect the Court to uphold the administration's action in some way
- The Court could do that either by finding that Humphrey's Executor doesn't apply or by overruling the case outright





**How should
employers respond?**

What Does This Mean for Employers?



In the short term, some independent agencies will be frozen by uncertainty



In the medium term, the agencies will likely adopt a more business-friendly stance as the administration's personnel



In the long term, we could see faster policy swings from administration to administration



That means we could have less regulatory stability, but also more responsive administrative government

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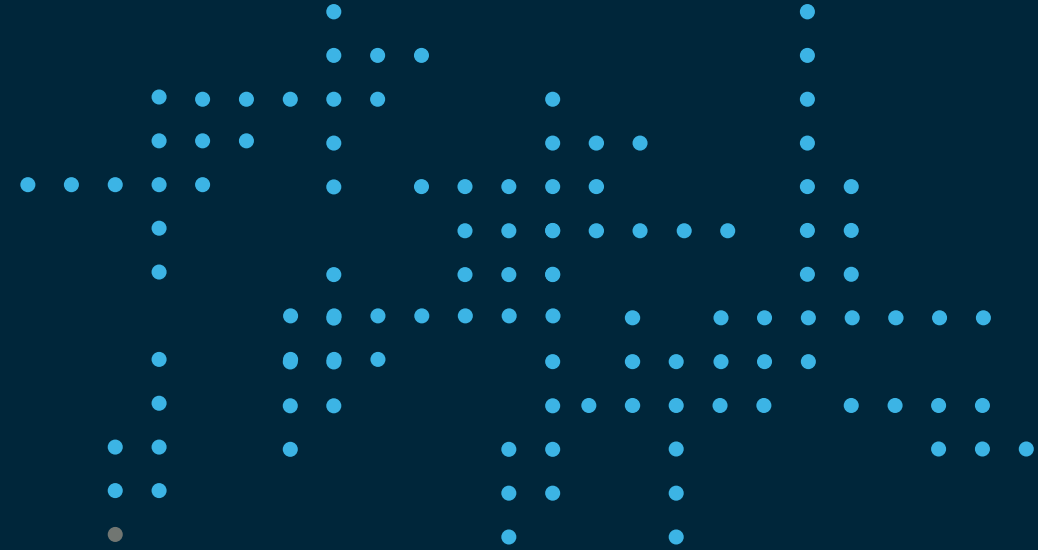
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Thank You



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