

## **Employees Soon May Not Have to Show Any 'Adverse Action' to Prevail at NLRB**

Article By:

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As anyone who follows labor law knows, the National Labor Relations Board (NLRB) and its general counsel, Jennifer Abruzzo, have been quite active in the last 18 months. Indeed, from a groundbreaking change to the union election process to a new rule on joint-employment to a new standard the agency will use to evaluate employer personnel policies – just to name a few – the pace of change has been dizzying.

It appears we can add another potential significant development to the mix: the possible removal of a requirement that an employee claiming discrimination under or violation of labor laws must show, in some cases, that they have suffered an “adverse employment action.”

According to a [recent article from Bloomberg Law](#), “The National Labor Relations Board’s top lawyer wants to eliminate the current requirement that a worker must be fired, disciplined, or suffered other adverse employment actions for agency prosecutors to prove illegal anti-union discrimination. NLRB General Counsel Jennifer Abruzzo asked for the change in legal standard last week as part of a challenge to an administrative law judge’s decision dismissing

allegations that Starbucks Corp. violated federal labor law by denying a worker's transfer requests because of her union activity."

Under most employment and labor law statutes, to set forth a valid discrimination claim, an employee must show that he or she suffered a tangible, adverse employment action - such as termination or discipline. Sometimes this area of the law can be murky. For example, is a negative performance evaluation that is not tied to pay or promotion opportunity an adverse action? Is a forced transfer to another position that pays the same, has the same hours, and requires the same amount of work an adverse action? What about the withholding of an annual performance review discussion?

Arguments can often be made on both sides. While those issues often become the subject of litigation, whether or not an adverse action has taken place typically is not, as it is a standard requirement in most cases.

We'll see if this one gets added to the list of the monumental changes we're seeing from the NLRB. Stay tuned.

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