

Is Employer's Unilateral Change Protected by Labor Law's 'Contract Coverage' Standard?

By Brian P. Lundgren

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Whether an employer's unilateral change to employee procedures violates the National Labor Relations Act (NLRA) is determined by whether the change "falls within the compass or scope of contract language that grants the employer the right to act unilaterally," the National Labor Relations Board (NLRB) has emphasized in a [recent case](#).

Evaluating *ExxonMobil Research & Engineering Co.*, 370 NLRB No. 23 (Sept. 28, 2020), under the its *MV Transportation "contract coverage" standard*, the NLRB ruled the employer's unilateral change to the rating system used to evaluate employee performance (*i.e.*, meets requirements/does not meet requirements) to a single system is lawful.

In this case, the parties' contract included the following provision: "The performance of employees will be evaluated and reviewed ... [and such] procedures may be revised by the Company as necessary, after Management has consulted with the Union and taken its views into consideration."

The NLRB reasoned that this language expressly conferred on the employer the unilateral right to revise its procedures. While the contract language conditioned that right on management consulting with the union and taking its views "into consideration," this did not render the employer's unilateral action a violation of the NLRA. The NLRB found the employer had consulted with the union and considered its views before implementing the unilateral revision to the evaluation procedures.

The NLRB determined that whether the employer had *sufficiently* consulted with the union or had *sufficiently* considered the union's views was not a question for its proceeding. Instead, that dispute raised issues of contract interpretation, an issue for grievance arbitration rather than NLRB adjudication under the NLRA.

Thus, under the NLRB's "contract coverage" standard, it remains important for an employer to ensure its contract contains express language preserving the employer's right to act unilaterally over issues for which the employer wishes to retain unilateral flexibility.

If you have questions or need assistance, please reach out to the Jackson Lewis attorney with whom you regularly work.

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