Legal Update Article

Labor Board Adopts 'Contract Coverage' Standard in Unilateral Change Cases, Overturns Precedent

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Labor Relations

The National Labor Relations Board (NLRB) has made it easier for employers to defend against unfair labor practice charges alleging a unilateral change in violation of the National Labor Relations Act (NLRA).

As suggested by Chairman John Ring and Member Marvin Kaplan in *E.I. du Pont de Nemours & Co.,* 368 NLRB No. 48 (Sept. 4, 2019) (see our blog post, NLRB Members Intend to Revisit Applicability of 'Contract Coverage' Standard in Unilateral Change Cases), the Board has adopted the "contract coverage" standard in "unilateral change" cases in which the employer defends its actions by claiming it was privileged to make the change pursuant to a provision of the parties' collective bargaining agreement (CBA). *MV Transportation, Inc.,* 368 NLRB No. 66 (Sept. 10, 2019). Chairman Ring and Members Kaplan and William Emanuel joined the majority opinion. Member Lauren McFerran dissented in relevant part.

The Duty to Bargain and Unilateral Change

Under the NLRA, employers have a duty to bargain in good faith with the union that represents its employees about mandatory subjects of bargaining (*e.g.,* wages, hours, and other terms and conditions of employment). An employer's unilateral change to a mandatory subject of bargaining without first offering to bargain is a violation of the NLRA, unless the employer has a valid defense. One valid defense is that the union waived its right to bargain over the term or condition at issue.

Previous Standard — *Provena*

The NLRB's primary standard for analyzing defenses to unilateral change allegations since 2007 was the "clear and unmistakable waiver" criterion. *Provena St. Joseph Medical Center,* 350 NLRB 808 (2007).

Showing the existence of a clear and unmistakable waiver has been challenging for employers. Under *Provena,* employers had a substantial uphill battle to show, through contract language, bargaining history, past practice, or a combination that they and the union representing their employees "unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term." The NLRB has been hesitant to imply waivers not expressed in the CBA.

New Standard

Under the contract coverage standard, rather than requiring a specific and unequivocal expression of a "mutual intention to permit unilateral employer action," the NLRB will evaluate whether the contract covers the employer's change by "applying ordinary principles of contract interpretation." Recognizing that a CBA cannot address every possible hypothetical issue, the Board will not require the contract language to specifically "mention, refer to or address the [challenged] employer decision." Instead, it

"will find that the agreement covers the challenged unilateral act if the act falls within the compass or scope of contract language that grants the employer the right to act unilaterally."

This standard is different from that which former-chairman Robert Battista appeared to champion in his *Provena* dissent, in which he argued in favor of a contract coverage test. Battista appeared to contemplate a process where unilateral change allegations would be litigated through the grievance and arbitration procedure. The standard adopted in *MV Transportation* leaves it to the Board to interpret the CBA and decide whether it covers the employer's alleged unilateral action.

The Board's Reasoning

The NLRB gave several reasons for adopting the new standard.

It noted that the clear and unmistakable waiver standard undermined several of the goals of the NLRA — contractual stability, the collective bargaining process, and the grievance-arbitration process.

The contract coverage standard is more consistent with the goals of the NLRA, the NLRB noted, by encouraging employers and unions to engage in collective bargaining in a comprehensive and practical manner, ending the NLRB's practice of sitting in judgment on contract terms, establishing a common standard between the NLRB and the courts, and discouraging forum shopping by adhering to the same standard that arbitrators apply.

In addition, the NLRB acknowledged the "futility" of adhering to the clear and unmistakable waiver standard in the U.S. Court of Appeals for the D.C. Circuit, which has sanctioned the NLRB for applying that standard. It also noted that, in addition to the D.C. Circuit, the First, Second, and Seventh Circuits have adopted the contract coverage standard or similar principles.

The clear and unmistakable waiver standard is not completely dead, however. If an agreement does not cover the employer's action, the NLRB will apply the test to determine whether some combination of contract language, bargaining history, or past practices establishes that the union waived its right to bargain over the change.

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The new standard is more employer-friendly than the previous test. However, the new standard means that employers will have to be even more diligent at the bargaining table and in drafting contract language to ensure that when the NLRB "appl[ies] ordinary principles of contract interpretation," it "will find that the agreement covers the challenged unilateral act ... [and] grant[] the employer the right to act unilaterally."

Please contact a Jackson Lewis attorney if you have any questions about *MV Transportation,* its implications, or the NLRB.

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