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NLRB issues reprieve for unionized employers seeking to make unilateral changes

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Many employers loathe the prospect of unionization due to the potential of a union hampering such employer's ability to make operational changes to adapt to business demands. Many employers signatory to a collective bargaining agreement experience firsthand the restrictions of antiquated contract language that prohibit unilateral operational changes.

For decades, the National Labor Board ("NLRB" or "Board") utilized a narrow interpretation of the National Labor Relations Act ("NLRA" or "Act") when evaluating whether an employer was required to negotiate with a union about a particular topic. Called the "clear and unmistakable waiver" standard, that approach generally hindered an employer's ability to make changes.

In *MV Transportation, Inc.*, the Board dispatched with the "clear and unmistakable waiver" standard and adopted the broader "contract coverage" standard previously championed by the D.C. Circuit Court of Appeals.[1]

LEGAL BACKGROUND

As a backdrop, under the NLRA, an employer has a duty to bargain with a union representing its employees over mandatory subjects of bargaining — *i.e.*, wages, hours, and other terms and conditions of employment. This duty to bargain over mandatory subjects continues during the term of the collective bargaining agreement. An employer violates the NLRA if it unilaterally changes a mandatory subject without first providing the union notice and an opportunity to bargain about the change.

This decisional bargaining obligation can be satisfied by: (a) the union waiving its right to bargain via terms in the applicable collective bargaining agreement; (b) the union not requesting to bargain after receiving the employer's notice; or (c) the parties bargaining to impasse. This Insight focuses on the contractual waiver only.

Prior to *MV Transportation*, when an employer argued that its collective bargaining agreement with the union authorized it to take unilateral action without bargaining, the Board applied the "clear and unmistakable waiver" standard. Under that waiver standard, "the employer will be found to have violated the Act unless a provision of the collective-bargaining agreement 'specifically refers to the type of employer decision' at issue 'or mentions the kind of factual situation' the case presents."[2]

The "clear and unmistakable waiver" standard "requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply."[3]

THE *MV TRANSPORTATION* DECISION

In *MV Transportation*, the Board was tasked with deciding what standard it should apply when determining whether a union expressly waived its right to bargain in a collective bargaining agreement — *i.e.*, whether the historically utilized "clear and unmistakable waiver" standard or the "contract coverage" standard should apply.

An employer violates the NLRA if it unilaterally changes a mandatory subject without first providing the union notice and an opportunity to bargain about the change.

The Board in *MV Transportation* determined that this standard "in practice, is impossible to meet." The Board opined that the "clear and unmistakable" standard: (1) "results in the Board impermissibly sitting in judgment upon contract terms;" (2) "undermines contractual stability;" (3) "alters the parties' deal reached in collective bargaining;" (4) "results in conflicting contract interpretations between the Board and the courts;" (5) "undermines grievance arbitration;" and (6) "has become indefensible and unenforceable."

Accordingly, the Board abandoned the "clear and unmistakable wavier" standard and adopted the "contract coverage" standard endorsed by the D.C. Circuit in *Department of Navy v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992).[4]

Under the "contract coverage" standard,

> [T]he Board will examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally ... In other words, under

> contract coverage the Board will honor the parties' agreement, and in each case, it will be governed by the plain terms of the agreement.[5]

Following the D.C. Circuit, the Board in *MV Transportation* determined that "the Board will give effect to the plain meaning of the relevant contractual language, applying ordinary principles of contract interpretation; and the Board 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."

In turn, because the standard requires an examination of the plain language of the agreement only, the Board "will not require that the agreement specifically mention, refer to or address the employer decision at issue."

By way of example, the Board stated that,

> [I]f an agreement contains a provision that broadly grants the employer the right to implement new rules and policies and to revise existing ones, the employer would not violate [the Act] by unilaterally implementing new attendance or safety rules or by revising existing disciplinary or off-duty-access policies. In both instances, the employer will have made changes within the compass or scope of a contract provision granting it the right to act without further bargaining.

Furthermore, according to the Board, "[u]nder contract coverage, *the parties*, as opposed to the Board, are firmly in control of negotiating the parameters of unilateral employer action."

Employers with extant collective bargaining agreements should review their agreements with the assistance of experienced labor counsel to re-assess their existing contractual rights.

If, however, a collective bargaining agreement does not cover a disputed act, the Board will determine if the union waived its right to bargain over the change. "Accordingly, if the contract coverage standard is not met, the Board will continue to apply its traditional waiver analysis to determine whether some combination of contractual language, bargaining history, and past practice establishes that the union waived its right to bargain regarding a challenged unilateral change."

Succinctly stated, under the new standard, the Board will review alleged unlawful unilateral changes in the following manner:

> [T]he Board will first review the plain language of the parties' collective-bargaining agreement, applying ordinary principles of contract interpretation, and then, if it is determined that the disputed act does not come within the compass or scope of a contract provision that grants the employer the right to act unilaterally, the analysis is one of waiver.

In adopting this standard, the Board reasoned that the "clear and unmistakable waiver" standard "is not the standard applied by courts (or arbitrators) when interpreting collective-bargaining agreements, and several courts of appeals have expressly rejected the Board's" waiver standard.

Indeed, the Board noted that since the D.C. Circuit decided *Department of Navy* in 1992, the Circuit had so roundly rejected the "clear and unmistakable waiver" standard that the Circuit recently began sanctioning the Board for arguing the court should use it.

As is often the case, the Board decided to apply this new standard retroactively to interpret existing contract language. In doing so, the Board approved all five of MV Transportation's allegedly unlawful unilateral changes.

The Board focused on a management-rights clause that included "the right to determine staffing size, to decide and assign all schedules, work hours, work shifts, machines, tools, equipment and property to be used to increase efficiency; to hire, promote, assign, transfer, demote, discipline and discharge for just cause; and to adopt and enforce reasonable work rules" and also granted the company "the right to issue, amend and revise policies, rules and regulations and the issuance, amending or revision of such policies."

Relying primarily on these terms, the Board found that the company lawfully: (1) added assignments to its light duty policy; (2) created a new safety policy; (3) amended its attendance policy; (4) added additional tasks to employee driving assignments; and (5) amended its DriveCam policy. Notably, the amendments to the preexisting policies also changed the manner in which the company could discipline employees if such policies were violated.

Member McFerran (D) mounted a vigorous dissent, arguing that not only did the majority usurp 70 years of Board precedent but also 50 years of U.S. Supreme Court precedent. According to Member McFerran, the Board had followed the "clear and unmistakable" waiver standard since 1949, not 2007 as the majority suggested, and that the U.S. Supreme Court had endorsed the waiver standard since 1967.

Member McFerran further argued that the "contract coverage" standard the Board adopted from the D.C. Circuit's *Department of Navy* decision was inapplicable because the D.C. Circuit there was reviewing a federal employer's actions under the Federal Labor Relations Act, not a private employer's actions under the NLRA. Member McFerran also asserted that eight federal courts of appeals had approved the "clear and unmistakable waiver" standard, as opposed to three federal courts of appeals rejecting the standard.

PRACTICAL IMPLICATIONS

Employers with extant collective bargaining agreements should review their agreements with the assistance of experienced labor counsel to re-assess their existing contractual rights to effectuate changes and to discuss whether such rights adequately provide the business with ample latitude to adapt to future business needs.

> It remains prudent for employers to seek broad management rights language that includes the express right to implement unilateral changes across as many areas as needed.

Similarly, all employers with collective bargaining agreements should consider implementing a plan to prepare for upcoming negotiations at least six months before contract expiration.

As part and parcel of such preparations, employers should assess the operational challenges that occurred during the past contract term, whether the business was able to unilaterally implement changes to address such challenges, whether the union facilitated or hindered the need to implement changes, and what operational challenges may arise during the next contract term.

Even with the *MV Transportation* decision, it remains prudent for employers to seek broad management rights language that includes the express right to implement unilateral changes across as many areas as needed.

While an employer's unilateral actions may not violate the NLRA under the "contract coverage" standard, employers should be mindful that unions still have recourse to challenge such actions through a contract's grievance and arbitration procedure or through judicial intervention. For this reason (and because the *MV Transportation* standard may be challenged in federal court or overruled by the Board under a subsequent administration), employers should continue to seek detailed examples of management's express rights.

For example, instead of merely seeking the broad right to "implement new rules," which passes muster under the "contract coverage" standard, an employer may wish to seek the right to "implement new rules, including but not limited to, attendance, drug and alcohol usage, discipline, and performance standards." Doing so may further protect an employer's right to make unilateral change if such changes are challenged before an arbitrator or court.

Of course, being able to achieve such language will depend on labor strategy and the give-and-take of negotiations. Employers should expect unions to take exacting looks at management-rights clauses during upcoming negotiations and seek language to protect their members in exchange.

While *MV Transportation* is a "win" for employers and their ability to implement change to meet business demands, it remains subject to partisan forces and may not be the Board's position permanently. This decision serves as a reminder for employers to prepare for upcoming contract negotiations and seek language that protects their interests into the future, regardless of how the political winds may blow.

NOTES

[1] *MV Transportation, Inc.*, 368 N.L.R.B. No. 66 (Sept. 10, 2019). The majority consisted of Chairman Ring (R), Member Kaplan (R), and Member Emanuel (R), with Member McFerran (D) concurring in part and dissenting in part.

[2] The seminal case outlining this standard was articulated by the Board in *Provena St. Joseph Medical Center*, 350 N.L.R.B. 808 (2007).

[3] *Id.* at 811.

[4] Dissenting Board members advocating the "contract coverage" have often cited to *Department of Navy* in support of their position.

[5] *MV Transportation, Inc.*, 368 N.L.R.B. No. 66, slip op. at 2.

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