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On A Roll: Board Finds No Bargaining Obligation Attaches to Unilateral Actions Consistent with Past Practice

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On the eve of Chairman Miscimarra's departure, the Board has been churning out decision after decision, many of them reversing precedents from the last 8 years.

Today, the NLRB, in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (December 15, 2017), returned to the longstanding law of the NLRB that there is no duty to bargain over "changes" made pursuant to a past practice. The Board expressly overruled a year-old decision in *E.I. du Point De Nemours*, 364 NLRB No. 113 (2016) (*DuPont*), and reinstated the law that had existed for years. Now, employers may act consistently with an established past practice regardless of whether the parties' collective bargaining agreement is in effect or expired.

In *Raytheon*, the parties had a collective bargaining agreement, as many do, that incorporated the right to change benefit plans and costs. The employer had exercised this right during the term of the contract. In this case, during a contract hiatus period, the employer made unilateral changes to health benefit plans and costs just as it had done in the past. The ALJ found this to be a violation under the reasoning of *DuPont* which held that such past practices triggered a duty to bargain. The employer appealed.

The 3-2 majority (with Members Pearce and McFerran dissenting) reversed *DuPont* and any cases upon which *DuPont* relied. Applying the pre-*DuPont* standard to the facts of the case, the Board held that an employer's modifications to employee healthcare benefits after contract expiration did not violate the Act because similar changes were enacted every year for the last 12 years.

This result was predictable, of course, and this case falls within the category of "low hanging fruit" in that*DuPont* overruled years of past practice law. This result also was foreshadowed in NLRB GC Robb's recent memo outlining one priority of the agency as revisiting cases where the law had been changed over dissent during the last 8 years.

The law of past practice was very well-developed prior to *DuPont* and employers will now be able to make decisions without fear of a bargaining violation so long as it is something that has been a practice.

As Chairman Miscimarra's term is set to expire Saturday (12/16), this may not be the last we hear from the full-Board until then…

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