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NLRB Returns to Exacting "Clear and Unmistakable" Waiver Standard for Contractual Waiver of Right to Bargain Over Unilateral Changes

Labor Relations Update on **December 13, 2024**

This week, in an expected decision, the National Labor Relations Board ("NLRB" or "Board") reinstated its prior "clear and unmistakable" waiver standard—a standard that has been much criticized by the courts—for determining when an employer's unilateral change to terms and conditions of employment violates the National Labor Relations Act ("NLRA" or "Act"), asserting that the Board's recent adoption of the "contract coverage" standard was made in "error."

As we recently reported, the future of the Democratic majority at the NLRB remains in considerable doubt as we head towards President-elect Trump's inauguration. NLRB Chairman Lauren McFerran's term is set to expire in 3 days on December 16, 2024. U.S. Senate Majority Leader Chuck Schumer's (D-N.Y.) motion for cloture to proceed to a nomination vote on McFerran's reappointment failed on December 11. Given this uncertainty, this is one of what we expect to be many decisions issued by the NLRB in the coming days that continue its lengthy stretch of overturning existing Board precedent.

Background

In *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141 (2024), the Board reconsidered the standard to apply in Section 8(a)(5) unilateral change unfair labor practice cases when an employer asserts the union contractually surrendered employees' statutory right to collectively bargain over mandatory subjects.

Historically, the Board applied the "clear and unmistakable" waiver test to such contractual defenses, requiring "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." Under this exacting standard, the employer and the union must have explicitly bargained over the employer's right to take unilateral action with respect to a term or condition of employment, and the collective bargaining agreement must have expressly memorialized their agreement as to this right, in order to defend against an unfair labor practice charge. This standard made any contractual language granting employer discretion moot if the language did not contain waivers—which rarely appear in any agreement.

In 2019, the Republican-majority Board under the Trump administration overturned this 70-year-old doctrine in *MV Transportation* and adopted the "contract coverage" test long used by the D.C. Circuit Court, as well as other courts. As we previously discussed, the contract coverage standard "applies ordinary principles of contract interpretation to determine whether a disputed change was within the 'compass or scope' of any contractual provision authorizing unilateral action by the employer." Under this more lenient standard for employers, the Board did not require "that the agreement specifically mention, refer to or address the employer decision at issue." As such, the contract coverage test lowered the previously high bar for employers to establish a contractual defense to a unilateral action unfair labor practice charge.

Reinstatement of "Clear and Unmistakable" Waiver Standard

As anticipated, the Democratic-majority Board has again reversed the Board's position on this standard, stating that the *MV Transportation* decision overturned longstanding Board law "without a sound overriding reason" and was, therefore, made in "error."

In its holding, the Board briefly reviewed and dismissed the rationale provided in the *MV Transportation* Board's opinion, stating that "none of the *MV Transportation* Board's reasons for abandoning the waiver standard withstands scrutiny." Instead, according to the Board, the clear and unmistakable waiver standard "better accomplishes the Board's statutory mandate to promote industrial peace by encouraging the practice and procedure of collective bargaining."

The Board also explained that the reinstated-waiver standard brings Board law in alignment with Supreme Court jurisprudence and Board precedent with respect to the scrutiny applied to alleged contractual waivers of statutory rights, including "the fundamental right of employees to bargain collectively through representatives of their own choosing, which lies at the heart of the Act."

Finding that *MV Transportation* was made in error, the Board determined that retroactive application of the reinstated clear and unmistakable waiver standard was appropriate in the case before it. However, the Board refrained from deciding whether to apply the new standard retroactively in all pending cases.

Takeaway

While the near-term composition of the Board remains in limbo, we expect to see additional precedent-shifting decisions and roll-backs of decisions made by the Board under the Trump administration. The prospect of the institution of new labor policy under the future Trump Board also serves as an incentive for the Biden Board to issue as many key decisions in its remaining days as possible. However, while employers need to be aware of this important change in the Board standard prospectively when such issues arise, if the Board shifts to a Republican majority in the near future, the clear and unmistakable waiver standard may not last as long as it did previously. The D.C. Circuit Court of Appeals in particular has long criticized the standard.

As always, we will continue to monitor the situation and keep you updated with the latest.

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