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Raytheon No More: NLRB Significantly Cuts Down Employers' Power to Act Unilaterally

A Practical Guidance® Article by Joshua Fox, Michael Lebowich, and David Gobel, Proskauer Rose LLP

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This article discusses recent decisions by the National Labor Relations Board.

In another much-anticipated reversal of existing precedent, as the National Labor Relations Board ("Board") completes its late-summer flurry before the Labor Day weekend, the Board issued a pair of decisions overruling different aspects of the 2017 decision Raytheon Network Centric Systems, 365 NLRB No. 161 (2017) (see our discussion here).

Prior Precedent: Raytheon

In *Raytheon*, the Board held that prior to the execution of an initial contract of a newly-represented workforce or during the contractual hiatus period after a contract had expired, employers could make discretionary unilateral changes, provided that such changes were consistent with past practice.

The Board also found that an employer can unilaterally act after expiration of a collective bargaining agreement if the employer relies on a past practice that was developed under a management-rights clause in the agreement.

Wendt Corp., 372 NLRB 135 (2023) and Tecnocap LLC, 372 NLRB 136 (2023), overruled both aspects of the *Raytheon* decision.

Wendt Winds Back Raytheon

In *Wendt*, the Board held that that unilateral changes can only be made when both "the employer has shown the conduct is consistent with a longstanding past practice **and** is not informed by a large measure of discretion"—undoing the Board's acceptance of employer unilateral "discretionary" changes in *Raytheon*.

The Board sharply criticized the holding in *Raytheon*, noting that the decision was out of line with Supreme Court precedent. The Board also noted that discretionary unilateral changes unfairly weaken a union's bargaining position, contrary to the purposes of the Act.

The Board also reaffirmed the principle that employers cannot cite a past practice of making unilateral changes that was used **before** employees were represented by a

union to justify unilateral changes after the workers select a bargaining representative.

Tecnocap Supplements Wendt

NLRB General Counsel Jennifer Abruzzo petitioned the Board to go further than the decision in *Wendt*, and to undo *Raytheon* by reinstating the test established in E.I. Du Pont de Nemours, 364 NLRB 1648 (2016), which held that any ''unilateral changes made pursuant to a past practice under an expired management rights clause are unlawful.'' In *Tecnocap*, the Board agreed with Abruzzo's recommendation, reasoning that *Raytheon* also was contrary to Supreme Court precedent in permitting discretionary unilateral changes based on past practice after a management-rights clause has expired.

Member Kaplan Concurs and Dissents

Member Kaplan concurred with the Board's ultimate decision in *Wendt*, because he agreed that the unilateral change the employer made was inconsistent with its ''long-standing practice.'' However, he strongly disagreed with the majority's decision to go further and overrule *Raytheon* in *Wendt*, because he believed it was beyond the Board's scope in that case.

Kaplan dissented in *Tecnocap* – and disagreed with the majority's interpretation, stating that the Supreme Court could not have intended to implement an ''impossibly restrictive'' past-practice standard that will always make an employer's unilateral action unlawful when it involves any amount of discretion.

Takeaways

The Board's reversal of *Raytheon* was not unexpected given the composition of the Board and the NLRB General Counsel's prosecutorial agenda. *Raytheon* had been the law since 2017, only briefly interrupted by a reversal for one year in a 2016 case. Now, the leeway provided to employers under *Raytheon* regarding undertaking unilateral changes consistent with past practice prior to execution of a contract or during a hiatus period has been removed.

With respect to management-rights provisions, the *Raytheon* decision paved the way for employers to utilize the benefits obtained under management-rights clauses after expiration of the CBA, if the employers could demonstrate that they exercised those rights as part of a bona fide past practice. Now, under *Tecnocap*, the waivers of the right to bargain over subjects set forth in management-rights clause expire along with the CBA.

Employers should heed Member Kaplan's warning in his *Tecnocap* dissent that many types of employer unilateral change can be seen as ''discretionary,'' and thus prohibited by the Board's standard. Any change made for a newly-represented workforce or during the contractual hiatus period after a contract has expired will likely be viewed with suspicion.

Related Content

Practice Notes

- National Labor Relations Board (NLRB): Examining the Board's Key Functions

Cases

- Raytheon Network Centric Sys. , 365 NLRB No. 161(N.L.R.B. December 15, 2017)
- Wendt Corp. v. NLRB, 456 U.S. App. D.C. 60, 26 F.4th 1002 (2022)
- Tecnocap LLC, 372 NLRB No. 136(N.L.R.B. August 26, 2023)
- Atl. Grp., Inc. v. NLRB, No. 22-60442, 2023 U.S. App. LEXIS 22841 (5th Cir. Aug. 29, 2023)

Treatises

- Labor and Employment Law § 12.02, ''Statutory Framework''

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Joshua S. Fox is a senior counsel in the Labor & Employment Law Department and a member of the Sports, Labor-Management Relations, Class and Collective Actions and Wage and Hour Groups.

As a member of the Sports Law Group, Josh has represented a number of Major League Baseball Clubs in all aspects of the salary arbitration process. Josh also has extensive experience representing professional sports leagues and teams in grievance-arbitration proceedings, and has played a key role in representing professional sports leagues in all aspects of their collective bargaining negotiations with players and officials, including the Major League Baseball, National Hockey League, the National Football League, Major League Soccer, the Professional Referee Organization, and the National Basketball Association. Josh has also represented teams and arenas in all aspects of labor relations involving labor unions representing arena staff.

In addition, Josh has extensive experience representing clients in the performing arts industry, including the New York City Ballet, New York City Opera, Big Apple Circus, among many others, in collective bargaining negotiations with performers and musicians, the administration of their collective bargaining agreements, and in grievance arbitrations.

Josh also represents a diverse range of clients, including real estate developers and contractors, pipe line contractors, hospitals, hotels, manufacturers and public employers, in collective bargaining, counseling on general employment matters and proceedings before the National Labor Relations Board, New York State Public Employment Relations Board and arbitrators.

Josh also serves as an adjunct professor at Cornell University's School of Industrial Labor Relations for several years, teaching a course regarding Major League Baseball salary arbitration.

Prior to joining Proskauer, Josh worked for a year and a half at the National Hockey League, where he was involved in all labor and employment matters, including preparations for collective bargaining, grievance arbitration, contract drafting and reviewing and employment counseling. Josh also interned in the labor relations department of Major League Baseball and at Region 2 of the National Labor Relations Board. He was a member of the Brooklyn Law Review and the Appellate Moot Court Honor Society and served as president of the Brooklyn Entertainment and Sports Law Society.

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Michael acts as the primary spokesperson in collective bargaining negotiations, regularly handles grievance arbitrations, assists clients in the labor implications of corporate transactions, and counsels clients on union organizing issues, strike preparation and day-to-day contract administration issues. He also has significant experience in representation and unfair labor practice matters before the National Labor Relations Board.

His broad employment law experience includes handling of race, national origin, gender and other discrimination matters in state and federal court. A significant amount of his practice is devoted to counseling clients regarding the application and practical impact of the full range of employment laws that affect our clients, including all local, state and federal employment discrimination statutes, the Fair Labor Standards Act, the Family and Medical Leave Act, and state labor laws.

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David Gobel earned his J.D at USC Gould School of Law, where he was a Senior Citations Editor of the *USC Journal of Interdisciplinary Law*, and part of the executive committee of USC's Music Law Society. Prior to law school, David worked as a research executive for a marketing research firm in New York.

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