

NLRB Abandons Long-Standing Precedent Regarding Management's Ability to Unilaterally Change Terms and Conditions of Employment

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The National Labor Relations Board (“NLRB”) continued its recent wave of significant decisions on September 10, 2019, when it adopted a new standard for analyzing whether an employer’s unilateral change to terms of employment violates the National Labor Relations Act (“Act”). *M.V. Transportation, Inc.*, 368 NLRB No. 66 (Sep. 10, 2019). The NLRB abandoned its “clear and unmistakable waiver” standard and replaced it with a “contract coverage” standard.

Under its former “clear and unmistakable” standard, a unionized employer violated the Act if it made a unilateral change to working conditions unless the applicable collective bargaining agreement (“CBA”) clearly and unmistakably allowed it to make the specific change without bargaining with the union. Despite being adopted in the 1940s, the NLRB’s standard was largely panned by circuit courts, especially the Circuit Court of Appeals for the District of Columbia, which retains plenary jurisdiction to review NLRB decisions. The NLRB last visited the issue in *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), a decision it expressly overturned in *M.V. Transportation*.

Under the NLRB’s new contract coverage standard, an employer’s unilateral change to a term or condition of employment will be first analyzed under the language of the CBA to determine whether the action was within the scope of contractual language granting the employer the right to act unilaterally. A provision or clause that grants broad employer rights to implement new rules or policies, or revise existing ones, will now not violate the Act. If the CBA does not provide authority for the employer’s unilateral action, and the act materially, substantially, and significantly changed a term or condition of employment constituting a mandatory subject of bargaining, the employer will be found to have violated the Act, unless it can show the union clearly and unmistakably waived its right to bargain over the change or another defense applies.

The NLRB’s new contract coverage standard requires a two-part analysis. First, the NLRB will review the plain language of the CBA provision permitting management’s ability to make unilateral changes and apply ordinary principles of contract interpretation to that provision. Then, if the NLRB determines that the unilateral change is not within management’s rights under the CBA, the NLRB will examine whether management has another defense, such as waiver.

The NLRB derided its past clear and unmistakable standard for several reasons. First, because the clear and unmistakable standard typically resulted in a refusal to honor the plain terms of the CBA, the test required the NLRB to sit “in judgment upon the substantive terms of collective bargaining agreements,” which is a power the NLRB does not possess.

Additionally, although collective bargaining is inherently an exercise in compromise between management and the union to outline the terms of their relationship, the NLRB explained that the clear and unmistakable standard undermined that principle by always granting the union the right to demand additional bargaining, even when the employer acted within the scope of a negotiated provision. In *M.V. Transportation*, the NLRB explained that this standard actually weakens the parties' incentive to reach a comprehensive CBA. It is precisely this point that the D.C. Circuit has criticized for decades.

The NLRB also noted that its newly adopted contract coverage standard will result in better predictability. Although the NLRB had followed the clear and unmistakable standard for many years, courts and arbitrators generally applied the contract coverage test. The divergence prior to *M.V. Transportation* resulted in conflicting interpretations and results. Notably, the D.C. Circuit routinely rejected the NLRB's clear and unmistakable standard when evaluating unilateral changes made by employers and applied its own contract coverage standard for more than 25 years. The NLRB's insistence on applying its own clear and unmistakable test had become futile, which finally resulted in the D.C. Circuit sanctioning the NLRB in 2016 for continuing to apply the test. *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16 (D.C. Cir. 2016) (granting employer's motion for attorneys' fees). That tension should now be in the past.

The NLRB's adoption of the contract coverage test means that employers' unilateral decisions under a management rights clause will receive the benefit of the authority granted by the language of the clause in the CBA. In fact, the NLRB cited precedent stating that when parties "bargain about a subject and memorialize that bargain in a collective bargaining agreement, they create a set of rules governing their future relations [and unless they] agree otherwise, there is no continuous duty to bargain ... with respect to a matter covered by the contract." Under the clear and unmistakable test, these clauses were not always enough to justify management's unilateral changes.

Finally, the NLRB will apply its newly adopted contract coverage standard retroactively, meaning that all pending cases will have the new standard applied. We expect that several pending cases will now be dismissed or otherwise resolved.

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