CLIENT ALERTS & INSIGHTS

NLRB Decision Makes it Considerably Riskier to Make Honest Statements About the Impact of Unionization

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On November 8, 2024, the National Labor Relations Board (the "Board") handed down its decision in Siren Retail Corp. d/b/a Starbucks, 373 NLRB 135, turning 40-year-old precedent regarding what employers can and cannot lawfully say about the potential impact of unionization on its head.

Starbucks held mandatory meetings to address unionization, at which a Starbucks manager addressed the limitations that unionization would impose on employees' resolving issues directly with management. Specifically, the manager noted that "[i]f you want to maintain a direct relationship with leadership, you'll check off 'no' [in the unionization vote]" and made other general and objectively true statements describing how union representation would curtail employees' ability to seek redress for workplace issues directly with Starbucks.

Congress protected employers' right to convey truthful and objective messaging to employees regarding the potential impact of unionization when it passed the Taft-Hartley Act in 1947, which contains an explicit free speech proviso providing that an employer's expression of views, arguments, or opinions about a union does not constitute an unfair labor practice where such expression "contains no threat of reprisal or force or promise of benefit." Pro union advocates have labeled these as "captive audience" meetings. Captive audience meetings are mandatory meetings held by an employer, which are held during working hours and for which employees are paid, and at which the employer voices its perspective on unionization. (For more context on captive audience meetings in particular, see our prior alert here).

Later, the Board specifically acknowledged employers' right to explain that unionization alters the relationship between employers and employees in its 1985 decision in *Tri-Cast, Inc.*, 274 NLRB 377, in which the Board held that "[t]here is no threat, either explicit or implicit, in a statement which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before." *Tri-Cast* was the law of the land on this particular issue until the Board handed down its decision in *Siren Retail*, upending nearly four decades of settled precedent.

Instead, the Board concluded that the *Tri-Cast* Board had gone too far and had "erred in deeming categorically lawful nearly any employer statement to employees touching on the impact that unionization would have on the relationship between individual employees and their employer". Laying out the new standard of review, the *Siren Retail* Board concluded that "to be deemed lawful, employer predictions about the negative impacts of unionization on employees' ability to address issues individually with their employer 'must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control'" and

that "[e]mployer statements that broadly predict that unionization will necessarily foreclose employees' ability to address issues individually with their employer are not reasonable predictions about the legal consequences of unionization".

Key Takeaways for Employers

This decision underscores the volatility of the Board's legal analysis from one administration to the next. It is not unusual for a lame duck Board to issue a flurry of decisions on hot-button issues on the heels of an election ushering in a new administration. This is the first, but almost certainly not the last, decision on a key issue that will be handed down by the Board in the intervening period between the 2024 presidential election and installation of the new administration in January 2025.

The Board under the Trump administration is likely to roll back the Board's position on captive audience meetings, and a litany of other union-friendly stances that the Board has taken under the current administration-for a number of reasons. First, the Trump administration is almost guaranteed to remove the Board's General Counsel Jennifer Abruzzo in short order, consistent with the Biden administration's summary removal of former Board General Counsel Peter Robb on January 20, 2021. Additionally, the terms of two of the Board's three Democrat members will expire during President Trump's upcoming term in office. The term of the third Democrat Board member, Chairman Lauren McFerran, expires in December of this year. The Senate would need to vote to fill her seat before the next presidential term to keep her on the Board for the next administration. Regardless of their expiring terms, the Trump administration may see fit to attempt to remove politically misaligned Board members before their terms expire (see our alert addressing challenges to the constitutionality of Board members' insulation from removal here).

Employers should expect a more business favorable paradigm shift on a host of labor issues beginning in January 2025.

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