CLIENT ALERTS & INSIGHTS

NLRB Overturns Two Major Trump-Era Precedents

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This week, the National Labor Relations Board ("NLRB") issued a series of decisions overturning two major Trump-era precedents. On August 30, 2023, the NLRB overturned Raytheon Network Centric Systems with its decisions in Wendt Corp. and Tecnocap LLC. Raytheon permitted employers to make certain types of unilateral changes to the terms and conditions of employment during negotiations of a first collective bargaining agreement ("CBA") and after a CBA expires. The following day, on August 31, 2023, the NLRB broadened protections of single-worker protests in Miller Plastic Products Inc. by overturning Alstate Maintenance, which held that single-worker protests do not constitute "concerted activity" protected by the National Labor Relations Act ("NLRA"), even if carried out in a group setting. These latest decisions fulfill several of the top priorities for NLRB General Counsel Jennifer A. Abruzzo's activist pro-labor agenda.

The NLRB Overturned Raytheon and Dramatically Curtailed Employer Authority to Unilaterally Change Employment Terms Before a First CBA and After the Expiration of a Previous CBA

In 2017, the Trump-era NLRB in *Raytheon* reversed a controversial 2016 Obama-era NLRB ruling which had departed from more than fifty years of precedent that permitted unionized employers-when no labor contract was in effect-to make unilateral discretionary changes to their employees' working conditions when such changes were similar in "kind and degree" to a past practice in accordance with a management rights provision or otherwise. *Raytheon* applied to employer changes made during negotiations of a first CBA after a union's election and certification or following the expiration of the employer's CBA.

In *Wendt*, the NLRB, by a 3-1 majority, overruled *Raytheon* "insofar as it held that an employer may lawfully make a unilateral change in terms and conditions of employment informed by discretion, so long as the change is similar in kind and degree to changes made in connection with the employer's past practice of such changes." In reaching its decision, the NLRB determined that *Raytheon* conflicted with the U.S. Supreme Court's decision in *NLRB v. Katz*, 369 U.S. 736 (1962), where the Supreme Court held that changes to the terms and conditions of employment that are "informed by a large measure of discretion" cannot be unilaterally made even if they are consistent with a regular past practice The *Wendt* majority also suggested that *Raytheon* undermined the collective bargaining process and the pro-bargaining policies of the NLRA.

Applying its decision in *Wendt*, the NLRB in *Tecnocap* held, again by a 3-1 majority, that an employer's unilateral change to mandatory work shifts during bargaining "is precisely the type of discretionary, irregular unilateral conduct that the Supreme Court forbade in *Katz*." Additionally, and perhaps more significantly, *Tecnocap* overrules a portion of *Raytheon* that the NLRB did not touch on in *Wendt*. The *Tecnocap* majority overruled *Raytheon*

by holding that an employer may no longer rely on a management-rights clause in an expired collective bargaining agreement to authorize unilateral changes during bargaining for a successor collective bargaining agreement. The *Tecnocap* majority also suggested that the management-rights past practice rule from *Raytheon* is incompatible with *Katz* because "it permits an employer to continue to make sweeping discretionary changes in employment terms even after a contractual provision authorizing such changes has expired and while the parties are seeking to reach a new collective bargaining agreement."

With *Wendt* and *Tecnocap*, the NLRB effectively resurrected *Du Pont de Nemours*, the 2016 Obama-era decision that was reversed by *Raytheon* in 2017. The NLRB's decision in *Du Pont* had overturned more than fifty years of precedent established by *Shell Oil*, where the NLRB held that employers could unilaterally change employment terms and conditions during negotiations if such changes were consistent with past practice.

The NLRB Overturned Alstate and Broadened Protections for Single-Worker Protests

In 2019, the Trump-era NLRB held in *Alstate* that single-worker protests were only protected by the NLRA when accompanied by prior group discussions about shared concerns or some other evidence of group activities. The NLRB's ruling in *Miller*, again by the same 3-1 majority, overturned *Alstate* and significantly broadened the meaning of "concerted activity" under the NLRA. In *Miller*, the NLRB held that the NLRA protects single-worker protests that could prompt future group actions. According to the *Miller* majority, determining "whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence." The *Miller* decision will increase the risk of employers committing unfair labor practices for addressing the misconduct of a single employee and will likely lead to an uptick in unfair labor practice charge filings, NLRB investigations, complaints, and hearings.

Implications of Wendt, Tecnocap, and Miller

The NLRB's decisions in *Wendt*, *Tecnocap*, and *Miller* have serious implications for employers. *Wendt* and *Tecnocap* will make it more difficult for unionized employers to operate during periods of negotiations of a first CBA-which can last for years-and negotiations of successor CBAs, while *Miller* provide greater protection to both unionized and non-unionized employees who engage in single-worker protests. Employers should consult with their counsel to ensure that their business practices fully comply with these new rulings and what the NLRB and its General Counsel might do next.

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