Legal Update Article

Labor Board Expands an Employer's Duty to Bargain During Contract Negotiations

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Overruling crucial aspects of precedent, the National Labor Relations Board has expanded an employer's duty to bargain with employees under the National Labor Relations Act following the expiration of a labor contract and during initial collective-bargaining negotiations. *Tecnocap LLC*, 372 NLRB No. 136 (Aug. 26, 2023); *Wendt Corporation*, 372 NLRB No. 135 (Aug. 26, 2023).

The latest decisions overruled *Raytheon Network Centric Systems,* 365 NLRB No. 161 (2017), and its progeny, *Mike-Sell's Potato Chip Co.,* 368 NLRB No. 145 (2019), which provided employers leeway to make unilateral changes during contract negotiations if such changes were based on past practice.

An employer's "past practice" defense in the face of an unfair labor practice (ULP) charge concerning a unilateral change during bargaining will be limited. The new decisions will be applied retroactively.

Background: *Raytheon*

Under *Raytheon,* the Board applied a "past practice" analysis when determining whether a unionized employer's unilateral actions constituted an unlawful change. An employer violated the Act, the Board explained, "if it ma[de] a material, substantial, and significant change regarding a mandatory subject of bargaining without first providing the union notice and a meaningful opportunity to bargain about the change to agreement or impasse, absent a valid defense." An employer could defend itself by showing the change was not material, substantial, and significant or its "actions did not materially vary in kind or degree from the parties' past practice."

The Board ruled:

- To determine whether there was an established past practice, the Board compared the challenged action to the employer's past actions;
- The party asserting the past practice had the burden of proving employees would reasonably consider the action at issue to be consistent with what it has done in the past;
- A past practice finding did not depend on the language of a collective-bargaining agreement;
- Instead, a past practice analysis simply evaluated whether the employer's action varied in kind and degree from what had been customary in the past.

Employers were able to make certain workplace changes without offering to bargain with the union during negotiations following a contract expiration or prior to a first

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New Standard on Unilateral Changes

In *Wendt Corporation,* the Board overruled vesting employers the ability to make discretionary unilateral changes during contract hiatus periods and first contract negotiations based on a purported past practice defense. As a result, employers can no longer make a discretionary unilateral change simply because it is "similar in kind and degree to the changes made in connection with the employer's past practice of such changes," as *Raytheon* allowed.

The Board explained that this concept ran afoul of the U.S. Supreme Court's 1962 ruling in *NLRB v. Katz,* 369 U.S. 736, which required changes be in line with a "long standing practice" of "continuing the status quo," *i.e., automatic* wage increases not based on "a large measure of discretion." Unilateral conduct during bargaining will be permitted only "when the employer has demonstrated a regular and consistent past practice that is not informed by a large measure of discretion."

The Board also reaffirmed the principle that "an employer may not defend a unilateral change in terms and condition of employment that would otherwise violate [the Act] by citing a past practice of such changes before its employees were represented by a union and thus *before* the employer had a statutory duty to bargain with the union." Such action undermines collective bargaining, according to the Board.

In *Tecnocap,* the Board struck down another aspect of *Raytheon,* finding that employers cannot use past practice as a defense for implementing unilateral changes to conduct authorized under an expired management-rights clause (a clause in a labor contract authorizing management to make unilateral changes with respect to certain terms and conditions of employment). Employers, therefore, cannot rely on such a clause after the contract expires unless the clause extends beyond the expiration of the contract. For example, absent evidence to the contrary, employers may violate the Act by adjusting employees' work schedules, pursuant to an expired management-rights provision, if such change is not of the "regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis."

As in *Wendt,* the Board reasserted *Katz* and held employers can only make unilateral changes during bargaining when they are consistent with a long-standing practice and do not require significant discretion.

Going Forward

The Board's decisions restrict an employer's ability to use past practice as a defense to a ULP charge over unilateral changes during contract hiatus periods or while the parties negotiate an initial contract. Examples include unilateral changes relating to layoffs, schedule/shift changes, wage increases, and benefit and leave plans that go beyond the automatic or nondiscretionary. Even if they are "consistent with past practice," unilateral changes nonetheless may be unlawful unless the employer can establish they are "regular and long-standing, rather than random or intermittent," and do not rely on substantial discretion.

Employers should tread carefully when planning to make unilateral changes relating to workplace terms and conditions during contract negotiations or following

expiration of a contract. Consult labor counsel if changes may be beyond those that are automatic or determined based on “nondiscretionary standards and guidelines.”

Please contact a Jackson Lewis attorney with any questions.