Legal Update Article

NLRB Overrules Standard on Employer Predictions for How Unionizing Impacts Employer-Employee Relationship

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Takeaways

- The NLRB overturned its 1985 *Tri-Cast* decision, which protected employer statements about the general consequences of unionization on the employer-employee relationship.
- Reversing precedent, the Board will now use a case-specific approach to determine if employer statements are unlawfully coercive.
- The new standard applies only to future cases, not retroactively.

The National Labor Relations Board once again has reversed precedent. It will now use a case-by-case analysis to determine whether an employer's statements about the negative impacts of unionization on the relationship between individual employees and their employer are unlawful threats. The Board's decision prospectively overrules 1985's *Tri-Cast, Inc.,* 274 NLRB 377, which found most employer predictions about the impact of unionization on the relationship with employees categorically lawful.

As a result of the Board reverse of precedent, employer statements regarding how the employer-employee relationship may change if a union were recognized will be subject to closer scrutiny and are more at risk of being found to violate the National Labor Relations Act.

Tri-Cast

Under its 1985 *Tri-Cast* decision, the Board found an employer's statements generally predicting the negative impact unionization will have on employees' ability to directly address issues with their employer categorically lawful. For example, managers' statements that unionizing will change employees' direct relationship with leadership, that access to management would be limited if employees voted to unionize, or that employees would have to use the union as a third-party to speak on their behalf were generally deemed lawful.

The *Tri-Cast* Board explained, "There 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 ...."

The Board's general counsel (GC), however, has long urged the Board to overrule *Tri-Cast.* She argued that such campaign statements threaten employees with the loss of an existing benefit (such as the ability to address issues individually with their

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employer). The GC contended that these statements violated Section 8(a)(1) of the Act.

The Decision

In overturning *Tri-Cast,* the Board concluded *Tri-Cast* was poorly reasoned. The Board noted that application of *Tri-Cast* has "categorically immunized employer campaign statements" that "could reasonably be understood to threaten employees with the loss of an established workplace benefit." The Board also emphasized that *Tri-Cast* failed to address the rationale of prior cases that found similar statements objectionable.

Instead, the Board will now analyze such employer statements under the same test it uses to evaluate other employer statements on the consequences of unionization. That test, established under the U.S. Supreme Court's decision in *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), says that employer predictions of negative impacts from unionization "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond [its] control." If an employer's statement is not based on objective fact — or predicts negative consequences that would result from the employer's own actions — it is "no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion." This case-specific approach, the Board explains, better protects employees' rights and encourages collective bargaining.

In his dissent, Board Member Marvin Kaplan argued, among other things, that the Board cannot overrule *Tri-Cast* in an unfair labor practice case, as *Tri-Cast* was a representation case. Kaplan also contended the Board's decision to overrule *Tri-Cast* prospectively, and changing a standard based on a question neither pled in the complaint nor at issue in the present case, undermines clear guidance and is contrary to the Administrative Procedure Act.

Going Forward

The Board's decision to overrule *Tri-Cast* marks a significant shift in how employer statements during union campaigns will be evaluated. The new case-specific approach seeks to provide a more nuanced and fact-based analysis than under *Tri-Cast* of whether such statements are coercive and violate the Act.

Employers will now need to ensure their statements during organizing campaigns are carefully phrased and any predicted consequences are rooted in objective fact beyond the employer's control.

Please contact a Jackson Lewis attorney with any questions about developing a comprehensive labor relations program.