Legal Update Article

Uphill Battle for Employer Unilateral Changes as NLRB Returns to "Clear and Unmistakable Waiver" Standard

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Takeaways

- The Board's 12.10.24 decision in *Endurance Environmental Solutions* overturns its current employer-friendly "contract coverage" standard for an earlier, stricter "clear and unmistakable waiver" standard.
- The "clear and unmistakable waiver" standard requires explicit contract language for any waiver of a union's right to bargain over a specific issue.
- Collective bargaining agreements must contain detailed and comprehensive management rights clauses to avoid disputes and potential labor conflicts.
- The decision will be applied retroactively but may lead to enforcement challenges as it conflicts with standards adopted by several circuit courts.

Article

The National Labor Relations Board returned to prior precedent, making it more difficult for employers to defend against unfair labor practice charges alleging a unilateral change in violation of the National Labor Relations Act. *Endurance Environmental Solutions LLC*, 373 NLRB No. 141 (Dec. 10, 2024). Under the new standard, the Board will no longer infer a waiver of a union's right to bargain over a specific issue from the plain language of the contract. Rather, it will require the waiver of that issue to be "clear and unmistakable."

The decision overturns 2019's *MV Transportation Inc.*, 368 NLRB No. 66, which adopted the more employer-friendly "contract coverage" standard and applied ordinary principles of contract interpretation to determine whether a provision, such as a management rights clause, covered the employer's challenged unilateral act.

The decision will be applied retroactively.

The Duty to Bargain and Unilateral Change

Under the Act, employers have a duty to bargain in good faith with the union that represents its employees about mandatory subjects of bargaining (e.g., wages, hours, and other terms and conditions of employment). An employer's unilateral change to a mandatory subject of bargaining without first offering to bargain is a violation of the Act, unless the employer has a valid defense. One valid defense is that the union waived its right to bargain over the term or condition at issue.

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Prior Standard

Under *MV Transportation*'s contract coverage standard, rather than requiring a specific and unequivocal expression of a "mutual intention to permit unilateral employer action," the Board evaluated whether the contract covers the employer's change by "applying ordinary principles of contract interpretation." The Board recognized that a collective bargaining agreement cannot address every possible hypothetical issue and did not require the contract language to specifically "mention, refer to or address the [challenged] employer decision."

Instead, the Board would "find that the agreement cover[ed] the challenged unilateral act if the act [fell] within the compass or scope of contract language that grants the employer the right to act unilaterally." The contract coverage standard encouraged employers and unions to engage in collective bargaining in a comprehensive and practical manner.

New Standard

Endurance Environmental Solutions centered on whether the employer violated the Act by failing to provide the union with notice and an opportunity to bargain over its decision to install cameras in trucks driven by employees without bargaining with the union over the decision. The administrative law judge (ALJ), applying the "contract coverage" standard, determined the employer's decision was lawful because it was "within the compass or scope of contract language granting the [employer] the right to 'implement changes in equipment.'" The ALJ held the employer was not required to bargain with the union about either the decision to install the cameras or the effects of the decision on the employees.

The Board, however, reversed the ALJ and returned to the "clear and unmistakable waiver" standard for analyzing defenses to unilateral change allegations. *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007). Employers will now have a substantial uphill battle to show, through contract language, bargaining history, past practice or a combination thereof, that they and the union representing their employees "unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term."

The Board will therefore evaluate the specific wording of the relevant provisions for whether there is (i) evidence that the specific issue was "fully discussed and consciously explored" during negotiations and that the "union consciously yielded or clearly and unmistakably waived its interest in the matter," and (ii) evidence of a past practice showing that parties understood that the employer had the unilateral right to make the change.

However, the Board has narrowly construed waivers and has been hesitant to imply waivers not expressly mentioned in the collective bargaining agreement. This is clear from the *Endurance Environmental Solutions* case, as the Board found that the right to "implement changes in equipment" was not a clear and unmistakable waiver because neither the CBA nor extrinsic evidence explicitly referenced using audio or visual monitoring of employees or using recordings to potentially discipline employees.

The Board majority noted that the waiver standard puts it in conflict with circuit courts, as some circuits do not adhere to this standard. The D.C. Circuit (where any party can seek review), along with the First, Second, and Seventh Circuits, have instead adopted the contract coverage standard or similar principles.

The Dissent

Board Member Kaplan criticized the clear and unmistakable waiver standard for imposing an irrebuttable presumption against unilateral employer action unless explicitly stated, which he asserted undermines the collective bargaining process and the stability of agreements. Rather, Kaplan argued, the contract coverage standard better effectuates the policies of the Act, aligns with ordinary principles of contract interpretation and respects the parties' negotiated agreements.

He further warned that abandoning the contract coverage standard could render Board decisions unenforceable in the circuits that have rejected the waiver standard. It could also lead to forum shopping and inconsistency for employers.

Going Forward

Employers must ensure their contracts are well documented and contain clear and explicit language waiving the union's right to bargain over certain management decisions. If a contract does not specifically cover the employer's action, the Board will apply the waiver test to determine whether some combination of contract language, bargaining history or past practices establishes that the union waived its right to bargain over the change.

The waiver standard could lead to more frequent bargaining and labor disputes, as unions may challenge unilateral changes made by employers. It is worth noting, however, that this issue is likely an area of change given the incoming Trump Administration in January 2025. President-elect Trump is expected to appoint two Republicans to the Board, which may lead to a return to the "contract coverage" standard.

In the meantime, contracts clearly outlining the scope of management rights may help avoid disputes over whether certain changes require bargaining. Employers will need to place a greater emphasis on negotiating detailed and comprehensive management rights clauses during the bargaining process to avoid future conflicts and maintain the ability to make unilateral changes. A review of existing collective bargaining agreements may be necessary.

Please contact a Jackson Lewis attorney with questions.