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Electronic Alert

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Flurry of Activity from the NLRB Creates New Rules for Employers

By Nick Ball & Nicole Elgin

The National Labor Relations Board (NLRB) has issued several decisions and rules in the past weeks that create new standards for covered employers.

Employer's Duty to Bargain Expanded

On August 30, 2023, the Board issued two decisions (Wendt Corporation and Tecnocap, LLC) that modify the standard for when an employer may lawfully make unilateral changes to the terms and conditions of employment for a unionized workforce. The Wendt Corporation decision removes an employer's ability to rely on past practices of making unilateral changes before a workforce was unionized. In Tecnocap, LLC, the NLRB held that an employer's past practice of unilateral changes developed under a management rights clause in a collective bargaining agreement (CBA) cannot beFlurry used as a basis for unilateral changes after that CBA expires. These opinions further restrict what actions employers of unionized workforces can take without providing the union notice and an opportunity to bargain.

Relaxed Standard for Proving Unlawful Employer Conduct

On August 28, 2023, the Board issued Intertape Polymer Corp., clarifying the standard for proving unlawful employer conduct. The current standard comes from a case called Wright Line and requires the General Counsel to establish that (1) an employee engaged in union-related or otherwise protected activity; (2) the employer had knowledge of that activity; and (3) the employer had union or protected concerted activity animus. Intertape states that the Board will evaluate all evidence in the record when determining if there is union animus and that direct or circumstantial evidence can be used. While the NLRB frames the Intertape decision as a clarification, it effectively lowers the General Counsel's evidentiary burden to establish animus.

New Framework for Union Representation Proceedings

On August 25, 2023, the Board issued Cemex Construction Materials Pacific, LLC, providing a new framework for when employers must bargain with a union without an election. This case is a dramatic shift in the union election and representation process. Now, if a union requests recognition based on majority employee support, the employer must: (1) recognize the union and begin bargaining; or (2) immediately file an RM petition seeking an election to verify the union's status as bargaining representative. If an employer commits an unfair labor practice that would require setting aside the election, the NLRB will dismiss the employer's RM petition and order that the employer recognize and bargain with the union.

New Final Rule for Procedures for Representation Elections

On August 24, 2023, the NLRB adopted a Final Rule that changes procedures for representation elections. The NLRB issued this rule to eliminate the "new delays in the election process" created by the 2019 rule amendments. The Final Rule places more pressure on employers to be prepared to respond quickly when faced with a representation petition.

The changes introduced by the new rule include, but are not limited to:

- Shortened timeline for pre-election hearings to occur from 14 business days from service of a Notice of Hearing to 8 calendar days. The deadlines for non-petitioning parties to submit a response to an election petition (the statement of position) corresponds to the date of the hearing, and has therefore been advanced under the new rule. The Regional Director will have discretion to postpone pre-election hearings and the deadline for a party's statement of position for up to 2 business days upon a showing of special circumstances. Additional extensions may be granted for extraordinary circumstances.

- Shortened deadlines for employers to distribute information to employees during elections. Under the new rule, employers must post the NLRB's Notice of Petition for Election within 2 business days of service of the Notice of Hearing.

- Removed disputes over eligibility to vote and the scope of a proposed bargaining unit from the subjects resolved during the pre-election hearing.

- Removed 20-business day waiting period after a decision and direction of election (rendered after the pre-election hearing). The Regional Director must schedule elections for "the earliest date practicable" following its decision in a pre-election hearing.

Employers with questions about compliance with the NLRB's updated standards should contact Nicole Elgin at 503-276-2109 or nelgin@barran.com, or Nick Ball at 503-276-2150 or nball@barran.com.