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nlrb adopts employer-friendly standard regarding what constitutes a unilateral change in violation of the nlra

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Spoiler Alert – unless you regularly deal with collective bargaining agreements you may find this a tad wonky.

The National Labor Relations Board ("NLRB" or the "Board") recently fashioned a new, business-friendly standard for determining when an employer's action taken in reliance on contractual provisions under a collective bargaining agreement ("CBA") constitutes a "unilateral change" in violation of the National Labor Relations Act ("NLRA"). Under the new standard, set forth in *M.V. Transportation, Inc.*, 368 NLRB No. 66, the Board has adopted the "contract coverage" test fashioned and historically applied by the Court of Appeals for the District of Columbia. In doing so, the Board abandoned the "clear and unmistakable waiver" test traditionally applied by the Board. Under the new standard, the Board first determines if the contract provision relied on by the employer covers the employer's action challenged by the union. If so, the Board will conclude that "the agreement … authorized the employer to make the disputed change unilaterally, and the employer will not have violated [the NLRA]." If, on the other hand, there are no provisions in the CBA that covers a disputed unilateral change, the Board then will consider whether the union nevertheless waived its right to bargain over the change. In making this latter determination the Board will continue to apply the "clear and unmistakable waiver… analysis to determine whether some combination of contractual language, bargaining history, and past practice establishes that the union waived its right to bargain regarding a challenged unilateral change."

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