NLRB Makes 'Unilateral' Less of a Dirty Word

Labor & Employment Law Update

By Beverly Alfon on October 8, 2019

The National Labor Relations Act (NLRA) requires employers with a unionized workforce to bargain in good faith with the union over mandatory subjects of bargaining (e.g., wages, hours, and other terms and conditions of employment). The duty to bargain continues during the term of a collective bargaining agreement (CBA) with respect to mandatory subjects of bargaining that are not covered by the agreement. An employer who makes unilateral changes to these terms without satisfying its bargaining obligations violates the Act, unless it can establish a valid defense. Until now, the only available defense that was available to an employer who made such unilateral change was a union's "clear and unmistakable" waiver of the right to bargain over the precise matter at issue – a standard which the D.C. Circuit has characterized as an "impossible to meet" burden for an employer.

Overturning 37 years of precedent, however, the NLRB, in a recent 3-1 decision, changed the standard that the Board applies to determine whether a CBA grants the employer the right to take unilateral actions without violating the Act. In M.V. Transportation, Inc. (28-CA-173726; 368 NLRB No. 66), a local of the Amalgamated Transit Union (ATU) alleged that the employer, MV Transportation Inc., violated the Act by unilaterally adopting several policies, including ones related to safety and attendance, without bargaining with the union. The Board accepted the employer's argument that the CBA contained language, including a broad management rights clause referring to adoption and enforcement of work rules, that allowed it to unilaterally adopt the policies.

Under this new "contract coverage" standard, the Board will examine the plain language of the parties' collective-bargaining agreement to determine whether or not the change made by the employer was within the scope of CBA language granting the employer discretion to act unilaterally. For example, if the CBA gives the employer the ability to implement and revise work rules, then it may now lawfully implement new safety rules or revise an existing attendance policy, without further bargaining.

Key Takeaways: Although this new standard relaxes an employer's burden in defending against charges of a failure to bargain, it does *not* give an employer full license to take such unilateral actions. The extent to which an employer can take unilateral action will depend on the scope and clarity of the language of the CBA. If there is no CBA language that grants the employer the right to take unilateral

action, the Board will consider whether or not the union "clearly and unmistakably" waived its right to bargain over the change. Also, keep in mind that unions will still have the option of filing a grievance and proceed to arbitration on the matter.

Now more than ever, given the Board's approach in these matters to honor the parties' agreement, CBA language must be carefully crafted. Employers should review their rights in current CBAs and seek to strengthen rights in negotiations for the next contract. At negotiations, employers should expect much scrutiny and pushback on management rights clauses and other CBA language that can be interpreted as granting the employer any level of discretion.