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Unlocking Labor Success: Understand the Relationship Between the New NLRB and All Employers

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Changing Rules and Interpretations of NLRA

- The National Labor Relations Board ("NLRB" or "Board") is a five-person politically appointed decision/policy making authority.
- General Counsel is also appointed by the President and sets policy and enforcement goals.
- Employers may mistakenly presume that the rules they know about the NLRB for a year or a decade (or more!) ago are still valid.
  - Even simple, straightforward, or consistently applied precedent can change.
- Changes in political affiliation of the executive branch often leads to some change in interpretation of the NLRA. This is often measured (but not always).

The Relationship between Employers and the Board

- **All** private sector employers have a relationship with the NLRB and the NLRA.
- Section 7 of the NLRA relates to the rights of employees.
  - Guarantees ALL employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining ***or other mutual aid or protection***," as well as the right "to refrain from any or all such activities."

Employers Can Violate the Act with or without a Union Present

- The NLRA applies to all employers and protects ALL employees. Non-unionized employers can violate the NLRA in various ways, including:
  - Interfering with Protected Concerted Activity
  - Ignoring demands for recognition (more on that later)
  - Threats, coercion, etc.
- Do NOT fall into these traps!
  - The NLRA is broad, and the NLRB is looking to apply it whenever and wherever it can.

Changes to Election Rules

- Historically, the union relationship is initiated once the union has gathered enough support from employees within a prospective bargaining unit through collection of signed authorization cards.
- The union could then either ***ask*** the employer to ***voluntarily*** recognize or file a petition with the Board for an election.
- The employer was not required to accept the voluntary recognition (as it was ***voluntary***).

Hypothetical One

- A Local Union has asked NLRB to assist in recognition, filing a petition with the Board that claims majority support through signed union authorization cards. Local Union also tells Employer it has majority support so Employer should just voluntarily recognize Local Union!
- Employer ignores the petition, thinking (perhaps correctly) there is no way Local Union has majority support. Employer assumes Union will want employees to have the final word, so there will be an election.
- Fifteen days later, the Union ***demands*** to bargain with the Employer.
- Does the employer have to bargain? Not ***voluntary*** anymore?

Answer: YES! Union Wins.

The NLRB recently made **substantial** changes to the rules governing how a workplace becomes unionized. Now, employers can be obligated to bargain based solely on a union claim of majority support.

- Under *Cemex*, if a union claims majority support of employees in a proposed bargaining unit and seeks voluntary recognition from the employer, the employer ***must*** either:
  1. Voluntarily recognize the union, or
  2. File its own representation petition (an "RM" in NLRB parlance) within 14 days of the union demand
- If the employer does not voluntarily recognize or file an RM petition, the NLRB will order **mandatory union recognition without an election.**

Hypothetical Two

- Employer holds a mandatory “all hands” meeting during the pre-election period, telling employees that things are pretty great as is, providing information about the current terms and benefits the employer provides, and some publicly available information about the dues and costs associated with union membership, and noting that unions cannot guarantee higher wages, or even guarantee a contract (all of which is objectively true). The Employer then clearly states employees should vote and to vote how they like.
- Is this OK?

Answer: NLRB (currently) Says NO!

- The employer has free speech rights, right?
- The NLRB's current position is…not so much. Employer speech rights are secondary to employee protections. NLRA > 1st Amendment.
- NLRB: mandatory meetings (aka captive audience) during an election where any subject of bargaining is discussed, or when an employer says they are against the union, is ***inherently coercive***, and therefore a violation of the Act.
  - Unclear how NLRB would treat ***voluntary*** meetings, as employees could claim they were not really voluntary.
- The current NLRB would likely sustain a ULP charge based on such conduct.
  - This is the Board's position, not necessarily the courts.

Hypothetical Three

- During the election process, Local Union's complaint (ULP) to the NLRB about the prior mandatory meeting by Employer (which was the only time the Employer talked about the union campaign with its employees) leads to the NLRB agreeing with Local Union – that a ULP occurred. After the decision on the ULP, the election for union representation goes forward and Local Union **loses** by a 2:1 margin.
- Now what? Union or no union?
  - Surely no union? They just lost the election!

Answer: Union (probably)

- Under *Cemex* (GC 24-01): If the employer commits a ULP during the election period, the remedy will (in nearly all cases) be a mandatory bargaining order requiring union recognition by the employer.
  - The prior rule: re-run the election if the ULP could have affected the outcome.
- Now, the union wins unless it is ***virtually impossible*** that the ULP affected the result.
  - The NLRB is very unlikely to side with an employer that committed a ULP and will almost certainly issue a bargaining order for every election ULP.
    - Board will even excuse Union's failure to timely file ULPs if it means installing a union.

Post-*Cemex* Takeaways for Non-Union Employers

- If a union makes a claim of majority support, immediately demand to see the evidence of the majority support.
  - Is the union's proposed unit appropriate? Is the union cherry-picking those that signed authorization cards, narrowing the unit to get a foot in the door?
- If the employer knows or believes the union may lack majority support, or the unit is not appropriate, employers should challenge by filing an RM petition within the two-week time limit.
- Have a training plan in place to educate supervisors on how to navigate communications with supervised employees during a union campaign.

Post-*Cemex* Takeaways for Non-Union Employers (cont.)

- After filing an RM petition, employer should take great care to avoid committing a ULP before the election is held. The remedy for a violation will no longer be a rerun of the election, but mandatory recognition and a bargaining order.
  - Contact counsel for guidance on avoiding ULPs.
- If an RM election petition is filed, start your communication campaign with eligible voters promptly. The election timelines are short.
  - Court: Months/Years
  - NLRB: Days/Weeks

Hypothetical Four (Concerted)

- "Employee A" of a non-union employer complained during a small group meeting with their supervisor about their ***personal*** dislike for a new return-to-work policy. Employee A was combative, insulting, and sarcastic. The other supervised employees looked very uncomfortable. At no time did Employee A signal they were speaking on behalf of the team and no one else agreed with their position during or after the meeting. Employee A receives a formal written warning for their bad conduct during the meeting.
- Any problems here?

Answer: NLRB Says Yes

- Overruling past precedent to define Protected Concerted Activity (PCA) based on a broader "totality of the circumstances" test.
  - NLRB is now effectively saying "We will know it when we see it." (and we'll see it everywhere)
- Prior test was a factor-based checklist to determine if an employee's activities were "concerted," even if there were no additional employees involved.
  - Easier for employers to determine concerted activity based on these factors.

Takeaways Regarding the Return to a "Holistic" Approach Regarding Concerted Activity

- It is now more difficult to evaluate whether a particular action undertaken by an individual employee is protected under the NLRA or not.
- Even errant remarks could be protected, if they later induced group action, warranting retroactive protection.
- If the complaint relates to a policy affecting more than just a single employee, it could be PCA.

Hypothetical Five (Protected)

- Employer wants to institute a policy that employees should be civil, courteous, and productive, and avoid from engaging in any conduct that is disruptive or harassing. This policy is recommended by Employer's human resources manager in consideration of federal and state laws on harassment and discrimination.
- Problem?

Answer: Yes

- Workplace rules are presumptively unlawful if the rule ***could be interpreted to limit employee rights.***
  - Prior (better) rules:
    - *Boeing* (2017) – Rules either lawful or subject to balancing test weighing business needs against employee rights.
    - *Lutheran Heritage* (2004) – Rules unlawful if "**would** reasonably be interpreted" by employees as limiting PCA.
- *Stericycle* far broader than both prior standards.
  - "could" vs. "would"
  - Might the NLRB claim that a rule preventing "disruptive" conduct limits an employee's ability to petition for mutual aid and protection? Of course.

The *Stericycle* Standard

- If the General Counsel can establish that a reasonable employee ***could*** interpret the rule to have a coercive meaning, it is presumptively unlawful
  - This analysis must be done from the point of view of a reasonable employee who is subject to the rule, and ***economically relies on the employer***.
    - This language again injects the NLRB's current "economic dependency" (predator/prey) lens of viewing employer/employee relationships.
- Employer must show the rule is for a legitimate business interest **and** as narrowly construed as possible to effectuate interest.
- NRLB's discussion of "*state of economic dependency*" in the workplace indicates that any rule even arguably limiting employee rights is coercive.

Hypothetical Six

- Employer had three employees who were complaining about being assigned by their supervisor to work on the weekend on shorter than normal notice. One of the employees left a note for their supervisor's supervisor demanding the supervisor provide normal notice, listing additional complaints, and calling the supervisor an "incompetent nincompoop" who "couldn't manage themselves out of a wet paper bag."
- Employer terminated the employee who left the note shortly thereafter for insubordination and violation of the company's harassment and bullying policy.
- The employer resisted a recent unionization effort.
- Is the timing of the termination relative to the employees' actions enough for the NLRB General Counsel to bring a ULP against the employer?

Answer: Timing Is Enough

- *Intertape Polymer Corp.* (NLRB Case No. 07-CA-273203 and 07-CA-273901; August 25, 2023) clarifies the standard under which the General Counsel meets the initial burden to prove unlawful activity.
- In cases where an employer has a facially lawful reason to discipline an employee, they may still engage in unlawful decision-making if there is a showing of an anti-union animus in doing so.
- This is called a “mixed motive” case.
- *Intertape Polymer* adapted a test articulated in *Wright Line* case decided in 1980.

Wright Line: Test

- The *Wright Line* test involved a two-step shift to determine if the facts of a case demonstrated unlawful motive by the employer where the General Counsel would first demonstrate evidence of anti-union animus based on union activity and the Employer could then rebut that with a showing that it would have taken the same steps in the absence of union activity.

Intertape Test: Changes to Prima Facie Showing

Under the new decision, the General Counsel satisfies her initial burden by presenting merely circumstantial evidence.

- There is no need to "produce separate or additional evidence of particularized animus toward an employee's own protected activity or of a casual 'nexus' between the protected activity and the adverse action to meet her burden."
- Then the employer can rebut that claim by showing evidence to the contrary—that any PCA was unrelated to the activity at issue.

Takeaways

- Watch out if looking to discipline or terminate an employee who engaged in PCA, even if PCA is entirely unrelated.
- An employer could defend by proving that other employees who participated in the same conduct or were engaged in similar conduct were treated the same, even in the absence of protected activity.
- Employers will need to ensure that documentation exists to rebut the claims.
- Although the NLRB has the initial burden, and the employer need not rebut claims until that burden is met, that burden is very easy to satisfy under this standard.

Hypothetical Seven

- Employee frequently petitions management to hire people from their own religious group because the workplace could use their “righteous and humble” demeanor and “hard work ethic.”
- Management is dismissive (and recognizes legal peril)
- Employee begins berating management, calling employees/management bigots, intolerant, racist, etc. Employee is terminated for creating toxic environment.
- Does NLRB think employee was terminated for engaging in PCA?

Answer: Probably

- Return to 50+-year-old standard that PCA on behalf of non-employee is protected by the Act when it *could* benefit the statutory employee.
  - Previous standard was that PCA only existed when advocating for "mutual aid or protection" of ***existing*** statutory employees (including applicants).
- NLRB adopted incredibly broad and vague "solidarity principle."
  - "Whether…employees ***potentially*** aid and protect themselves, whether by directly improving their own terms and conditions of employment or by creating the ***possibility*** of future reciprocal support from others in their efforts to better working conditions."

Factual Background of *American Federation for Children*

- An Arizona-based employee that worked for a national advocacy organization was advocating for the reinstatement of a former non-citizen employee.
- Former employee was ineligible to work in the U.S.
- Current employee met with a new manager about the former employee, current employee was concerned management was not supportive of rehiring former employee.
- Current employee raised concerns about the manager being “anti-immigrant” and asserting manager was racist.
- Investigations into the manager and employee were conducted, and employee’s allegations were unsubstantiated.
- Employee resigned because employer planned to terminate employee for creating a toxic work environment.

The Decision's Potential Impact

- The NLRB found that applicants are statutory employees under the Act. This was enough to find in favor of the employee, but the NLRB did not stop there.
- The "solidarity principle" is reasonably read as protecting any activity directed toward the benefit of non-employees, provided there is some possibility of benefitting the workplace.
  - This would likely include virtually any political activity or policy advocacy that ***could*** have an effect on the workplace – **all of it**.
    - Ex: Employee protesting that the company should "hire less immigrants, as they are driving down wages of American workers." Protected? Under this standard, probably.

Hypothetical Eight

- The CBA between Employer and Local Union has expired, and they are in the process of negotiating a new CBA. Employer makes changes to employee schedules, as was permitted by the expired CBA management rights clause, and consistent with past practice.
- Does NLRB like this?

Answer: No

- An employer can only implement unilateral changes either between contracts or prior to the execution of a first contract when the change is both
  - (i) consistent with longstanding past practice, and
  - (ii) **non**-discretionary
- Unilateral changes made consistent with past practice under an expired management rights clause are likewise unlawful.

Wendt and *Tecnocap* Changes

- *Wendt:* unilateral changes can only be made when "the employer has shown the conduct is consistent with a longstanding past practice and is not informed by a large measure of discretion."
- Past practice from before employees were represented will not justify unilateral changes after the workers select a bargaining representative.
  - Previously, discretionary changes were allowed when no contract was in place.
- *Tecnocap*: "Unilateral changes made pursuant to a past practice under an expired management rights clause are unlawful."

What Is the Problem?

- Many types of unilateral changes an employer may make can now be prohibited because they would be considered “discretionary.”
- An employer is not permitted to even act consistent with the prior CBA and past practice to implement changes during negotiating a new or updated CBA.
  - This effectively creates a new standard of management rights (i.e., very few management rights) unsupported by either the prior CBA or past practice.
- This provides unions significant leverage during the negotiation process (the NLRB’s goal), and employers will have to bargain such changes even when the prior contract and/or past practice allowed such changes.

Thank You

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