

RECENT DEVELOPMENTS UNDER THE NATIONAL LABOR RELATIONS ACT

Robert E. Sheeder

Rod Tanner

**27th Annual Labor and Employment Law Conference
May 7-8, 2020 | Austin, Texas**

UT LAW CLE Continuing
Legal Education

CURRENT NLRB MEMBERS



THE BOARD
John F. Ring, Chairman
William J. Emanuel
Marvin E. Kaplan

UT LAW CLE Continuing
Legal Education

NLRB GENERAL COUNSEL



GENERAL COUNSEL
Peter B. Robb

BOARD ADOPTS CONTRACT COVERAGE STANDARD

- ▶ The NLRB previously applied its longstanding *clear and unmistakable waiver* standard in determining whether a contract gives the employer the right to make unilateral changes.
 - ▶ An employer's unilateral change violates the NLRA except in cases where a provision of the collective-bargaining agreement specifically refers to the type of employer decision at issue or mentions the kind of factual situation the case presents.

Provena St. Joseph Medical Center, 350 NLRB 808 (2007)

- ▶ The NLRB overruled *Provena* in *MV Transportation, Inc.*, 369 NLRB No. 66 (Sept. 10, 2019).
 - ▶ A three to one majority of the Board adopted a *contract coverage* standard for determining whether an employer's unilateral change violates the Act.
 - ▶ Under the new standard, the Board will undertake a limited review to determine whether the CBA covers the challenged unilateral act, looking to the plain meaning and ordinary contract interpretation principles. The Board will not require that the CBA specifically mention, refer to, or address the unilateral decision at issue.
 - ▶ If the CBA does not cover the unilateral change at issue, the Board will apply its traditional *clear and unmistakable waiver* analysis to determine whether the union waived its right to bargain over the change.

NLRB RESTORES LONGSTANDING DUES CHECKOFF RULE

- ▶ In *Bethlehem Steel*, 136 NLRB 1500 (1962), the Board established what became a longstanding precedent when it held that because the union's right to the employer's dues check-off is created by contract, it continues to exist only for so long as the contract remains in force.
- ▶ In *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015), a 3-2 majority of the Board overruled *Bethlehem Steel* and held that despite contract expiration, an employer's statutory obligation to check off union dues continues to be enforceable.
- ▶ The Board recently returned to the *Bethlehem Steel* precedent in *Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139 (Dec. 16, 2019), with a 3-1 majority holding that an employer's statutory obligation to check off union dues ends when the CBA containing the dues check-off provision expires.

EXPANDED LEGAL STANDARD FOR DETERMINING PAST PRACTICE

- ▶ An employer's unilateral actions do not constitute a "change" in working conditions and do not violate Section 8(a)(5) of the Act if they are similar in kind and degree with an established past practice consisting of comparable unilateral actions, regardless of whether a CBA existed either when the past practice was created or when the disputed actions were taken.
Raytheon Network Centric Systems, 365 NLRB No. 161 (2017)
- ▶ By a 2-1 majority, the Board recently expanded the legal test for determining what is considered a past practice, making it easier for employers to make unilateral changes to terms and conditions of employment.
Mike-Sell's Potato Chip Company, 368 NLRB No. 145 (Dec. 16, 2019)
 - ▶ The party asserting the existence of a past practice bears the burden of proving that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to reoccur on a consistent basis.
 - ▶ It is sufficient for the employer "to show that frequent, recurrent, and similar actions have been taken, for whatever reasons such that employees would recognize an additional action as part of a familiar pattern comporting with the employer's usual method of conducting its operations."

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Recent Developments Under the National Labor Relations Act

Also available as part of the eCourse

[2020 Labor and Employment Law eConference](#)

First appeared as part of the conference materials for the 27th Annual Labor and Employment Law Conference session "NLRB Update"