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Recent Developments under the National Labor Relations Act 2019-2020

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A. *Contract Coverage* Standard Adopted

An employer does not violate the NLRA's prohibition against unilateral changes in the terms and conditions of employment if the collective bargaining agreement grants the employer the right to take an action unilaterally without first bargaining with the union. *MV Transportation, Inc.*, 369 NLRB No. 66 (Sept. 10, 2019), slip op. at 1. Until recently, the Board applied a longstanding "clear and unmistakable waiver" standard in determining whether a contract gives the employer the right to make a change unilaterally. *Id*. Under that standard, an employer was be found to have violated the NLRA "unless 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." *Id*. at 1 and n. 1 (quoting *Postal Service*, 306 NLRB 640, 643 (1992). This clear and unmistakable waiver standard was reaffirmed in *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007). However, employers recently gained more leeway to make unilateral changes to the terms and conditions of employment when a 3-1 majority of the Board in *MV Transportation* overruled *Provena*, dropping the "clear and unmistakable waiver" standard and adopting a "contract coverage" standard for determining whether an employer's unilateral change violates the Act. 369 NLRB NO. 66, slip op. at 1.

1. *MV Transportation, Inc.*

The question before the Board was what standard the Board should apply to determine whether a collective bargaining agreement grants the employer the right to take certain actions unilaterally without bargaining with the union. *MV Transportation, Inc*., 368 NLRB No. 66 (Sept. 10, 2019), slip op. at 1. It noted that although the Board currently applied the "clear and unmistakable waiver" standard, that standard has not been applied by courts and arbitrators when interpreting collective bargaining agreements, and that several courts of appeals (including the District of Columbia Circuit) have rejected it and instead applied a "contract coverage" standard. *Id*. at 1 and n. 3. The Board majority consisting of Chairman Ring and Members Kaplan and Emanuel decided to overrule *Provena* and to adopt the "contract coverage" standard.

In overruling the clear and unmistakable waiver standard, the Board found that it (1) did not effectuate the policies of the Act, (2) undermines contractual stability, (3) alters the parties' deal reached in collective bargaining, (4) results in conflicting contact interpretations and between the board and the courts, (5) undermines grievance arbitration, and (6) has become indefensible and unenforceable in light of the disagreement between the D.C. Circuit and the Board over the issue. *Id*. at 4-8. The majority clarified that it did not address any of the employer's potential defenses to a charge based on unilateral changes such as its denial that it made a change at all; its acknowledgement that it made the change, but denial that it acted unilaterally, or its denial that the change involved a mandatory subject of bargaining, or its denial that the change was "material,

substantial, and significant." *Id*. at 11. Rather, the Board stated that it was addressing only those cases in which an employer defends a unilateral change allegation by asserting that contractual language permitted it to make the change. *Id*.

Under the Board's new "contract coverage" standard, the Board will assess the merits by taking a limited review to determine whether the collective bargaining agreement covers the disputed unilateral change at issue, giving effect to the language's plain meaning and ordinary contract interpretation principles *Id*. The Board will find that the challenged act is covered if it falls within the scope of language in the contract that gives the employer the right to act unilaterally. *Id*. It will not require that the contract specifically mention, refer to or address the employer's unilateral decision at issue. *Id*. If the contract covers the disputed act, the employer will not be liable for violating Section 8(a)(5) because the contract will have authorized the employer to make the unilateral change. *Id*. If the agreement does not cover the disputed unilateral change, the Board will then consider whether the union waived its right to bargain over the change. *Id*. at 12. In such a case, the Board "'will ascertain whether the union 'surrender[ed] the opportunity to create a set of contractual rules that bind the employer, and instead cede[d] full discretion to the employer on that matter.'" *Id*. (quoting *Wilkes-Barre Hospital Co., LLC v. NLRB*, 857 F.3d 364, 373 (D.C. Cir. 2017)). The waiver under those circumstances must be "clear and unmistakable." *Id*. (citing *Honeywell International v. NLRB*, 253 F.3d 125, 133 (D.C. Cir. 2001)). Therefore, the Board will continue to apply its traditional waiver analysis if the contract coverage standard is not met "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." *Id*. The Board stated that it would apply the new standard retroactively to the case before it and in all pending unilateral change cases turning on whether contractual language gave the employer the right to make the unilateral change in dispute. *Id*.

Member McFerran vigorously dissented in relevant part, finding the majority's decision to present "a grave threat to the practice of collective bargaining in the United States." *Id*. at 39. She noted that the Board had again abandoned a longstanding Board doctrine without notice or public participation by switching to a new standard that gives employers "a wide berth" to make unilateral changes in the terms and conditions of employment without first bargaining with the union. *Id*. at 25. She argued at length that none of the reasons the majority offered for overturning the 70-year precedent "withstand scrutiny." *Id*. at 26.

2. *Huber Specialty Hydrates, LLC*

In a post-*MV Transportation* case, the three-member Board overturned the decision of the administrative law judge that the company violated the Act by changing its attendance policy without first bargaining with the union to agreement or impasse. *Huber Specialty Hydrates, LLC*, 369 NLRB No. 32 (Feb. 25, 2020), slip op. at 2-4. Applying *Provena*'s clear and unmistakable waiver test, the administrative law judge had determined that the agreement did not waive the

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