LABOR UPDATES

NOTABLE NLRB CASES & REGULATIONS

NLRB UPDATES

NEW STANDARDS BOTH DURING UNION ELECTIONS AND FOR BARGAINING OBLIGATIONS

***Cemex Construction Materials Pacific*, 372 NLRB No. 130 (2023)**

In *Cemex*, the National Labor Relations Board (NLRB) overruled long-standing precedent, paving the way for unions to more easily establish representation. *Cemex* considered the effect of employer unfair labor practices (ULPs) before, during, and after the "critical period" of a unionization campaign—meaning the time between the filing of a petition and the election.

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Pursuant to the Board's decision, if a union claims to have majority support and demands recognition, an employer must either (1) grant recognition to the union or (2) file its own NLRB petition seeking an election within two weeks of the union demand for recognition. If the employer does neither, the NLRB will order mandatory union recognition without an election. The employer can then refuse to bargain and force the union to file a ULP charge against the employer. The employer can at that point attempt to defend and justify the refusal to bargain by proving that the proposed unit was not appropriate or that the union lacked majority support. However, if the Union has presented evidence of majority support by way of signed authorization cards, the employer cannot claim lack of majority support as the basis for refusing to bargain.

If the employer does file an RM petition for an election, but commits a ULP before the election is held, the remedy will (in nearly all cases) be a mandatory bargaining order, which again results in union recognition by the employer. This could be the case even if the union loses the election. In the past, ULPs committed while an election was pending typically resulted in a rerun of the election—absent extraordinary circumstances. However, under the new standard, the results of the election will stand only if the NLRB finds that it was "virtually impossible" that the ULP could have affected the outcome of an election. This is an obviously high bar, and it remains to be seen what type of ULP in the critical period will be seen by the NLRB as having no effect on an election.

KEY TAKEAWAY

Our advice following this paradigm-shifting case is as follows:

1. Consider training employees now about what it means to sign a union authorization form and help them see through misrepresentation or false promises that unions might make when collecting signatures. Such training can also include broader discussions about the pros and cons of union representation and continuing as nonunion.
2. If a union makes a claim of majority support among employees in a proposed bargaining unit, demand to see the evidence of the majority support that the union claims to have and make copies.
3. Determine if the union's proposed unit is an appropriate unit under NLRB case law. Is the union cherry-picking employees or small groups of employees to include or exclude from the proposed unit without a logical basis of distinction? You will likely need legal advice for this determination.
4. If the union lacks majority support or the proposed unit does not constitute "an appropriate unit," you can challenge it either (1) through the filing of an RM petition, or (2) do nothing and wait for the NLRB order to bargain, refuse to bargain, and challenge the mandatory recognition by defending an unfair labor practice case. In most situations, we think it would be most cost effective to file an RM petition.
5. If the union has majority support and the proposed unit is appropriate, decide if you want to force an election to test the strength of that support. If so, you need to file an RM petition within 14 calendar days of the demand.
6. After filing an RM petition, the employer wants to avoid crossing the line of committing an unfair labor practice 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. It is important to train managers on the dos and don'ts of campaign communications.
7. If an RM election petition is filed, start your communication campaign with eligible voters promptly. The election timelines are short and will get even shorter based on new NLRB rules taking effect December 26, 2023.

NLRB CLARIFIES STANDARD IT APPLIES IN MIXED MOTIVE CASES

***Intertape Polymer Corp*, 372 NLRB No. 133 (2023)**

With this decision, the Board clarified the standard of proof the General Counsel must initially demonstrate in cases involving allegations of an employer's mixed motive for adverse employment actions. A mixed motive case is one in which the NLRB first alleges the employer acted unlawfully in making an employment-related decision out of animus for union support or for engaging in protected activities. The employer, in turn, can demonstrate it had legitimate business reasons unrelated to protected conduct for the adverse employment decision. The NLRB's position is that while the employer may have had legitimate reasons for the adverse action, a substantial factor in the decision was *also* the anti-union animus—the employer had an unlawful "mixed motive" behind the adverse action.

The General Counsel satisfies their burden by establishing three things: (1) that the employee was participating in activities that were protected, (2) that the employer was aware of these activities, and (3) that there was some manner of anti-union sentiment in the presence of employees (sometimes referred to as "union animus"). After the General Counsel satisfies their burden by establishing these requirements, the burden shifts to the employer to prove that the adverse employment action it took would have occurred without protected activities being in the mix (i.e., that it was not a substantial factor in the decision).

KEY TAKEAWAY

While the three elements the General Counsel must prove may appear burdensome, these three elements will be satisfied by the most superficial of evidence in most cases, shifting the true burden back to the employer. Therefore, if a mixed-motive case is brought against an employer, the best defense would be the ability to prove that other employees who participated in either the same, or similar, actions were treated the same. This is best done through consistent contemporaneous documentation of employee misconduct and discipline.

EMPLOYER'S ABILITY TO CHANGE UNION WORKER'S TERMS OF EMPLOYMENT GREATLY LIMITED

***Wendt Corporation*, 372 NLRB No. 135 (2023) and *Tecnocap LLC*, 372 NLRB No. 136 (2023)**

In the decisions in *Wendt Corporation* and *Tecnocap, LLC*, the Board created a new and stricter standard concerning when an employer may or may not bargain over changes to terms and conditions of employment based on established past practices.

In *Wendt Corporation*, the Board held that the employer could not rely on its past practice of laying off employees during slower times because the past practice of layoffs was not regular or consistent, and that its decision was largely discretionary. Instead, the employer was obligated to bargain the decision and impacts with the union.

Shortly after *Wendt* was decided, the Board issued its ruling in *Tecnocap* that also curtailed the use of past practices in the context of bargaining. Under *Tecnocap*, an employer is not able to rely on past practices created under a "management rights" clause to circumvent bargaining in the time between when a contract has expired and the implementation of a successor contract. In *Tecnocap*, the employer made a series of changes to shift schedules in the interim time between contracts. The Board found these changes were not past practice because the unilateral changes to the schedules were not done according to an established formula based on nondiscriminatory standards and guidelines.

Under the Board's new standard, a reliable past practice only exists when the practice does not involve a "large measure of discretion," and must be "longstanding." However, these practices may only exist after the commencement of a bargaining relationship—meaning any practices that were in existence before the certification of a union may not be used as a basis for unilateral changes. Importantly, the same is true for practices

created under a management rights clause that allowed employers to unilaterally make changes to mandatory subjects of bargaining. Such practices are also considered irrelevant.

KEY TAKEAWAY

The Board's decisions in *Wendt Corporation* and *Tecnocap, LLC* make it exceptionally difficult for employers to make unilateral decisions consistent with past practice.

EXPANDED SECTION 7 ACTIVITY PROTECTIONS

***American Federation for Children*, 372 NLRB No. 137 (2023)**

This decision expands the National Labor Relations Act (NLRA) Section 7 scope of protections to statutory employees who advocate for non-employees. The Board found that a current statutory employee of the company engaged in protected activity when she advocated fervently to her employer to rehire a former employee who was no longer employed because her work authorization had lapsed, and who had recently reapplied to be rehired after she obtained valid work authorization.

In this ruling, the Board:

- Overruled the Amnesty *International* standard which held that when an employee advocates for someone who is not considered an employee, that advocacy is not considered protected under Section 7 of the NLRA.
- Expanded the concept of "mutual aid and protection." It was broadened to include circumstances where advocacy by a statutory employee on behalf of a non-employee is considered a protected activity if the advocacy could benefit the statutory employee as well. Prior decisions included applicants within the scope of the NLRA protections, however this decision expanded those protections to those that advocate on behalf of third parties entirely unconnected to the employer.

KEY TAKEAWAYS

Employers should be exceptionally careful when disciplining employees who have participated in potentially concerted and protected activity, regardless of the employment status of the people who could benefit from the actions. Employers should be aware that employees who are advocating for either non-employees or various other causes (anything ostensibly related to wages, hours, or working conditions) create a legal risk that necessitates careful consideration and evaluation. This is a significant concern given the rise in employees bringing personal and political positions into the workplace, given that many of these positions have some connection to working conditions.

NEW STRICTER STANDARD FOR EVALUATING WORKPLACE RULES

Stericycle, Inc., 372 NLRB No. 113 (2023)

On August 2, 2023, in *Stericycle, Inc.*, the NLRB adopted a new legal standard for employer work rules that may have the effect of restricting employees' protected concerted activity. Employers will recall that Section 7 guarantees 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." These rights exist regardless of whether an employee is a member of a union. Section 8(a)(1) of the NLRA makes it an unfair labor practice to interfere with employees who are exercising these rights.

Overturning prior precedent in *Boeing* and *LA Specialty Produce*, the NLRB will now presume an employment policy or rule is an unlawful labor practice if it "has a reasonable tendency to chill employees from exercising of their Section 7 rights." In determining whether any employment policy has such a tendency to chill employee exercise of Section 7 rights, the NLRB will consider only the "perspective of an economically dependent, layperson employee," regardless of employer intent or whether an alternative interpretation that does not violate Section 7 is also a reasonable interpretation.

Once the NLRB finds that an employer policy or rule is presumptively an unfair labor practice, the employer has an opportunity to rebut this presumption, but only by showing the policy or rule "advances a legitimate and substantial business interest," and then only if the employer shows that a more narrowly tailored rule could not achieve that same interest. The employer cannot rebut the presumption by showing there is a reasonable alternative interpretation that does not violate Section 7 rights.

The new *Stericycle* rule strongly tips the balance in favor of employees, while disregarding employer intent or other reasonable interpretations of the rule or policy at issue. In essence, if an employee could read the rule or policy to chill their Section 7 rights, then the NLRB will find that it does so, regardless of evidence to the contrary.

Importantly, the NLRB determined this new rule would apply retroactively, including to all pending cases. The NLRB general counsel has yet to apply this new standard in a case because the *Stericycle* case was remanded for further proceedings.

KEY TAKEAWAY

What this means for employers is that all workplace policies and rules should be reviewed to consider whether an employee could read the policy or rule language to have any tendency to chill exercise of Section 7 rights. Additionally, it is important to revise the language accordingly so that it is "narrowly tailored" to avoid "unnecessary overbreadth." In practice, employers should also consider posting (and including in their handbooks) language expressly stating that nothing contained in the employer's policies or rules is intended to, or will, affect an employee's rights under NLRA Section 7. Although this will not save overbroad rules and policies, the language added to any policies or rules that could conceivably affect employee's Section 7 rights could minimize the potential that

it could be perceived to chill such rights. Further, in practice, employers should continue to be very cautious in meetings or investigations of employee conduct that involves any type of "concerted activity" or activity potentially aimed at "mutual aid or protection." The current leanings of the NLRB are not inclined to be generous towards employers—well-intentioned as they may be.

Disclaimer: This summary is not legal advice and is based upon current statutes, regulations, and related guidance that is subject to change. It is provided solely for informational and educational purposes and does not fully address the complexity of the issues or steps employers must take under applicable laws. For legal advice on these or related issues, please consult qualified legal counsel directly.