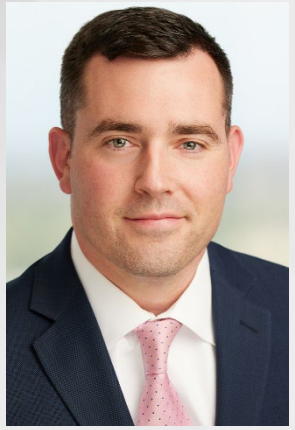
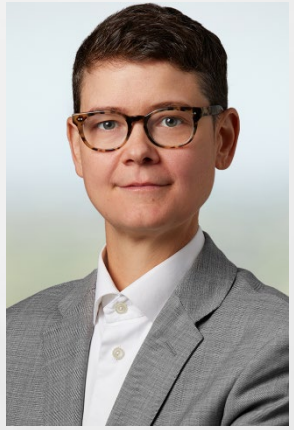
Understanding the “Marriage” between the New NLRB and Private Sector Employers

Presenters



Trevor Caldwell
trevor.caldwell@millernash.com



Jess Osborne
jess.osborne@millernash.com

David Worley
david.worley@millernash.com

Welcome to the Newlywed Game!

- For the next 30 minutes, our two contestants are going to learn about each other, hopefully clear up misunderstandings, and pave the way for a relationship with minimal strife.
- One contestant represents the National Labor Relations Board.
- The other represents a private sector employer.
- Although they have known each other for some time, lets see just how in sync they are.

Why *Newlyweds*?

- Employers may mistakenly presume that the rules they know about their NLRB “partner” for a year or a decade (or more!) ago are still valid.
- With each new administration, and new NLRB, there are things employers have to learn about the evolving “relationship”.
- Both sides must find a way to co-exist and understand each other.

What *Is* this Relationship?

- **All** private sector employers have a relationship, whether they want it or not, with the National Labor Relations Board (NLRB). Thus, employers are “married” to the NLRB.
- The NLRB is a federal administrative agency headed by political appointees, charged with administering the National Labor Relations Act.
  - The NLRB has five appointed members, who serve for five-year terms.
  - With changing administrations, the NLRB can shift drastically from employer-friendly to pro-union/anti-employer through “interpreting” the same laws.
- The current NLRB was predominately appointed by the self-described “most pro-union administration in history.”

Let’s Meet Our Newlyweds

- NLRB—Tell us about yourself.
  - I’ve recently re-discovered a side of myself that is pro-union, and I am looking to explore that.
  - Looking to change ways I have done things in the past, where it helps unions.
  - I know I have done things differently in the past, but I do not care.
  - I also do not care if others disagree, (i.e., overturned by federal courts).
- Employer—Tell us about yourself.
  - Trying to stay profitable, keep employees happy.
  - Looking to maintain the ability to have a say in relationship decision-making.
  - Hard to hire, hard to keep employees.
  - Trying not to break the law.
  - Not particularly pro-union, not particularly anti-union.

How the Game Works

- The Host will ask a question to the contestants. They will write an answer. If the answers match, they will get a point, showing a happy and harmonious marriage.
- For the audience, after each question, either the host or one of the contestants will discuss their perspective, the current state of the law, the changes in the law, or other notable developments.

First Question

- Before the contestants were partnered—before the employer was unionized—did they already have a relationship?

Answer: Yes!

- The NLRA applies to all employers. 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

Next Question

- A Local Union has asked NLRB to assist in recognition, filing a petition 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 there is no way Local Union has majority support. Employer knows that its “partner” wants employees to have a voice through vote so there will be an election soon.
- Fifteen days later, the Union demands to bargain with the Employer.
- Does the employer have to bargain?

Answer: YES!

NLRB recently upended 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.**

Next Question

- Employer holds a mandatory “all hands” meeting during the pre-election period, telling employees that things are pretty great as is, and does not want to spend time with Local Union, plus Local Union cannot guarantee higher wages, or even guarantee a contract (all of which is objectively true), but Employer wants employees to vote and to vote how they like. Local Union goes to NLRB to complain about Employer.
- Is this OK?

Answer: NLRB Says NO!

- The employer has free speech rights, but the NLRB's current position places those right secondary to employee protections. NLRA > First 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.
  - Changes to procedures and law will be subject to federal appellate court review.

Next Question

- During the election process, Local Union's complaint (ULP) to NLRB about the mandatory meeting by Employer (which was the only time the Employer talked about the union campaign with its employees) leads to NLRB (unsurprisingly) agreeing with Local Union. The election goes forward and Local Union loses by a 2:1 margin.
- Now what? Union or no union?

Answer: Union (probably)

- Under *Cemex*: 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.

Post-*Cemex* Takeaways for Non-Union Employers

- If a union makes a claim of majority support, 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 believes the union may lack majority support, or the unit is not appropriate, employers should challenge by filing an RM petition.

Post-*Cemex* Takeaways for Non-Union Employers

- 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 and will get even shorter based on new NLRB rules taking effect December 26, 2023.

Next Question

- An employee of non-union Employer complained during a group meeting about their personal dislike for a new return-to-work policy. The employee was combative, insulting, and sarcastic. Employer issued a formal written warning for their conduct.
- Any problems here?

Answer: NLRB says Yes

- Overruling past precedent to define Protected Concerted Activity (PCA) based on broader "totality of the circumstances."
  - NLRB: "We will know it when we see it."
- Here, the employee's complaint would likely be protected, as it relates to a policy affecting the workplace at large, *could* spur group activity, and was made in the presence of other employees.
- Even errant remarks could be protected, if they later induced group action, warranting retroactive protection.

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.
- If the complaint relates to a policy affecting more than just a single employee, it could be PCA.

Next Question

- 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 unionization previously.
- 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. (*August 28, 2023) clarifies the standard under which the General Counsel meets the initial burden to prove unlawful activity.
- 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.

Next Question

- 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 both "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 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.

Next Question

- Employee frequently petitions management to hire people from their religious group because the workplace could use their “righteous and humble” demeanor. Management is dismissive, and employee begins berating management, calling people 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 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 employee.
- Former employee was ineligible to work in the US
- 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 unsubstantial
- 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.
    - Ex: Employee protesting that the company should "hire less immigrants, as they are driving down wages of American workers." Protected? Under this standard, probably.

Next Question

- 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.
- Problem?

Answer: Yes

- Workplace rules are presumptively unlawful if the rule ***could be interpreted to limit employee rights.***
  - Prior 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"

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.
- Employer must show the rule is for a legitimate business interest and as narrowly construed as possible to effectuate interest.
- NLRB's discussion of "state of economic dependency" in the workplace indicates that any rule even arguably limiting employee rights is coercive.

How Did Our Newlyweds Do?

- Going to be a difficult relationship.
- Seek counseling.