What Goes Around Comes Around: Labor Board Limits Employer Actions During First Contract Negotiations and After a Contract Expires

Insights
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This week the National Labor Relations Board kept its foot on the gas, issuing decision after decision each further weighing the scales in labor's favor leading up to the expiration of Democratic Board member Gwynne Wilcox's term. Employers should note two new decisions from August 30 that limit their power to implement changes during first contract negotiations and after a collective bargaining agreement (CBA) has expired. These decisions — *Wendt* and *Tecnocap* — overrule a 2017 case that gave employers latitude to make operational changes following the expiration of a CBA. What do employers need to know about these rulings? Here are the answers to your top six questions.

1. How Did We Get Here?

In 2016, the Obama Board decided *E.I. du Pont De Nemours* — commonly referred to as *DuPont* — which held that even when an employer continues to do exactly what it had done previously when the CBA was in effect, taking the same action after the contract expires would constitute a "change" that must be preceded by notice to the union and an opportunity to bargain. *DuPont* also held that in the absence of a CBA, any employer action that involved "discretion" would likewise require bargaining.

Thankfully, the Board reversed *DuPont* the next year in a case called *Raytheon* and held that an employer had no obligation to bargain with a union over changes in working conditions that merely continue its past practices. Under the standard announced in *Raytheon*, "an employer's past practice constituted a term and condition of employment that permitted the employer to take actions that do not materially vary in kind and degree from what was customary in the past."

Now, by overruling *Raytheon* this week, the Board again requires bargaining if an employer exercises any discretion in taking a unilateral action during a bargaining for an initial or successor CBA. Employers may no longer rely on past practices pursuant to a management rights provision, unless such practice is regular and long-standing.

2. What Happened in *Wendt*?

During negotiations for an initial CBA, the employer in *Wendt* laid off employees as it had consistently done before employees organized a union. When challenged, Wendt raised the past

consistently done before employees organized a union. When challenged, Wendt raised the past practice privilege under *Raytheon* to unilaterally implement the layoffs, pursuant to its asserted past practice of doing so during other business downturns.

Relying on *Raytheon*, Wendt argued that the 2018 layoffs were justified by a regular and frequent past practice of layoffs taking place during difficult economic, sales, and industry conditions. Wendt further argued that the layoffs in prior years were of the same kind and degree as the layoff that took place in 2018.

3. How Did the Board Decide *Wendt*?

The Board did not find Wendt's arguments persuasive, and instead found that the prior layoffs failed to establish a practice that was so regular or frequent that "employees could reasonably expect the practice to reoccur on a consistent basis."

Instead, the Board determined that Wendt's discretion to decide whether to layoff shop employees, how many employees to lay off, and for how long, appeared to be unlimited. As a consequence, the Board concluded that employers must give notice of the intended action and provide the union an opportunity to bargain over the intended changes.

4. What Happened in *Tecnocap*?

During the term of a CBA commencing in 2018, Tecnocap routinely exercised its discretion to adjust shift hours under the CBA based upon production needs. Upon expiration of that agreement and while Tecnocap and the union were engaged in bargaining for a renewed contract, Tecnocap exercised its discretion to unilaterally implement 11- and 12-hour shift schedules in response to COVID-19 safety concerns and production needs. Despite Tecnocap's established history and practice of making unilateral changes, the union demanded to bargain – and when Tecnocap refused (relying on *Raytheon*), the union filed a series of unfair labor practice charges.

5. How Did the Board Decide *Tecnocap*?

The Board rejected Tecnocap's past practice defense, reasoning that the defense is limited to situations where the employer's unilateral change is "fixed by an established formula based on nondiscretionary standards and guidelines." In holding that Tecnocap failed to meet this threshold, the Board found that the employer's need for longer work shifts was entirely undefined and purely within management's discretion. The Board noted that because management's discretion is "entirely unlimited," the union had no way of knowing why, how often, or for how long employees would be required to work longer shifts, undermining the union's role and importance in the workplace. Therefore, Tecnocap failed to establish that its practice was "regular and consistent."

The Board specifically overruled *Raytheon's* holding that a past practice developed under or pursuant to an expired CBA authorizing discretionary unilateral conduct constitutes a defense to an unfair labor practice charge alleging unilateral change. In so holding, the Board found that the

management-rights clause is not "transformed into a privilege for the Respondent to act unilaterally effectively in perpetuity."

6. What Do These Rulings Mean for Employers?

Employers should keep the following three points in mind in light of these new decisions:

- Now that *Raytheon* has been overruled, you should examine whether your long-standing unilateral actions are sufficiently "regular and frequent," as your past practices will be closely scrutinized.
- You can no longer rely on past practices developed pursuant to expired management rights clauses, nor may you invoke a past practice that was developed before a union sought representation.
- Finally, the Board's decision could be applied retroactively to pending matters, so you should discuss the potential impact of these decisions with your labor counsel.

Conclusion

We will continue to monitor NLRB and other agency decisions that impact your day-to-day operations and provide updates as necessary, so you should sign up for Fisher Phillips' Insight System to ensure you receive updates directly to your inbox. If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Labor Relations Practice Group.

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