New Board, Old Law: NLRB Restores Stability After The Expiration Of Union Contracts

RAYTHEON ENDS BRIEF DALLIANCE WITH UNWORKABLE "CHANGE" STANDARDS

Insights
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The National Labor Relations Board just restored stability for employers attempting to maintain the *status quo* following the expiration of a collective bargaining agreement. In the spirit of giving, outgoing NLRB Chairman Miscimarra and the newly constituted Republican majority Board delivered yet another holiday gift to employers by further balancing the labor law landscape.

In its December 15 decision, the NLRB overruled *E.I. Du Pont de Nemours* by a 3-2 vote and returned to decades of prior Board precedent. The decision confirms that merely continuing a past pattern of unilateral changes following the expiration of a CBA neither disturbs the *status quo* nor creates an obligation to bargain with the union (*Raytheon Network Centric Systems*).

Facts Of The Case
Raytheon operates a facility in Fort Wayne, Indiana, where it designs, manufactures, and tests radars, missile systems, and related equipment for the federal government and other customers. Approximately 35 of the employees at the facility are represented by a union.

Beginning in 2001 and continuing through the expiration of the most recent CBA in 2012, these employees received health care coverage under an employer-sponsored benefit plan. Under the terms of the plan, Raytheon reserved the right to amend the plan; this reservation was incorporated into the CBA.

From 2001 through 2012, Raytheon made certain changes to the benefit plan without objection or a request to bargain from the union, including an annual increase in premiums. During negotiations for a successor contract in the spring of 2012, however, the union proposed eliminating Raytheon's right to make unilateral changes to the benefit plan and to provide that the terms of the benefit plan would remain the same for the duration of the contract. The employer rejected those proposals.

In the fall of 2012, Raytheon informed the union that, consistent with its past practice, open enrollment was about to commence and that it intended to proceed as it had in years prior. Upcoming changes in the plan were communicated to all employees and implemented over the objection of the union in January 2013. The union responded by filing an unfair labor practice charge.

Obama-Era Disruption

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The 2016 *E.I. du Pont De Nemours* decision – commonly referred to as *DuPont* – was one of several decisions from the Obama Board that disrupted or changed years of Board precedent. The then-Democratic majority Board held that, even where an employer continues to do exactly what it had done previously, taking the same action would constitute a "change" that must be preceded by a notice to the union and the opportunity to bargain, even if the employer's actions were permitted under the terms of a CBA that is no longer in effect. *DuPont* also held that, in the absence of a CBA, any employer action that involved "discretion" would likewise require bargaining.

Board Rejects Short-Lived Precedent

The newly constituted Labor Board, controlled by three Republican appointees, wasted little time in flatly rejecting *DuPont,* finding that it contradicted Supreme Court precedent and decades of Board law. It set aside the decision by announcing that *DuPont* "defies common sense."

Raytheon specifically rejected *DuPont*'s holding that all past practices are extinguished following the expiration of a CBA, and held that unilateral employer actions consistent with past practices are lawful, even when the practice may have developed while a prior CBA was in effect. Likewise, the Board squarely rejected *DuPont*'s holding that any decision involving employer discretion is automatically a change to the *status quo*. This, the Board held, was incompatible with established law and the fundamental purpose of the National Labor Relations Act.

The Board's decision noted that it is well-settled that Section 8(a)(5) of the NLRA requires employers to provide notice and the opportunity for bargaining prior to implementing any change in a mandatory subject of bargaining. The issue for the Board to decide then, is what constitutes a "change."

As the majority noted, the Board, prior to *DuPont*, had consistently held there is no violation of Section 8(a)(5) where an employer's action does not change existing conditions or where it does not alter the *status quo*. Moreover, it concluded that established past practices can become part of the *status quo* where the employer simply followed a well-established past practice. While an employer is permitted to make unilateral "changes," it is only because such changes are part of a past practice or pattern of doing so. In essence, the *status quo* incudes the continuation of such practices. So long as the employer's unilateral action does not represent a "substantial departure" from past practice, it is not a "change" in the *status quo* requiring notice and the opportunity to bargain.

The Board was careful, however, to note that its holding has no effect on the duty of employers to bargain upon request by the union. So while employers have the right to take unilateral actions based on past practice, employers are still obligated to bargain over changes – even permissible unilateral ones – upon request by the union.

The Board stated that "nearly everyone would evaluate whether a 'change' has occurred by comparing the challenged action to the employer's past actions," and that the holding in *DuPont* "distorts the long-understood, commonsense understanding of what constitutes a 'change,' and it contradicts well-established court precedent."

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The Board therefore reinstated the pre-2016 standard under which an employer's past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past. As applied to Raytheon, the changes to employee health care benefits were found to be consistent with the company's practice during the previous 11 years and were thus deemed lawful.

What Impact Will This Have On Employers?

This case provides a welcome return to the pre-Obama Board's precedents regarding bargaining obligations following the expiration of a CBA. You are once again permitted to take unilateral action so long as the action is based on an established past practice. This provides clarity for employers, like Raytheon, who maintain consistent benefit plans across both their unionized and non-unionized work force that may require annual changes.

As a reminder, however, where the unilateral change impacts a mandatory subject of bargaining, you are nevertheless obligated to bargain if the union requests to do so.

Despite the welcome deluge of employer-friendly decisions issued over the past week, Chairman Miscimarra's term expired on Saturday, December 16. With the Board now comprised of two Republicans and two Democrats, it is unlikely that any significant decisions will be issued before President Trump's forthcoming nominee is confirmed. Once that occurs, and three Republican appointees once again comprise the majority, you can expect to see further decisions returning balance to the labor law landscape.

If you have questions about this decision, please ask your regular Fisher Phillips attorney or any member of our Labor Relations Practice Group.

This Legal Alert provides an overview of a specific NLRB decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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