

NLRB STREAMLINES PROCESS FOR EMPLOYERS TO WITHDRAW UNION RECOGNITION

Insights
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The National Labor Relations Board just relaxed its test for determining the legality of an employer's anticipatory withdrawal of union recognition prior to the expiration of the collective bargaining agreement. In the July 3 *Johnson Controls, Inc.* decision, the Board upheld an employer's right to suspend bargaining and serve notice within 90 days prior to CBA expiration of its desire to withdraw recognition from an incumbent union thereafter, upon receiving objective evidence that the union has actually lost majority support.

The 3-1 decision found that such actions would not form the basis of unfair labor practice charges even if the union were to subsequently reestablish majority support through the filing of a new representation petition (within 45 days thereafter). In so holding, the Board overruled conflicting aspects of prior precedent in 2001's *Levitz v. Furniture Co. of the Pacific*, which evaluated an employer's "anticipatory withdrawal" by application of a "last in time" rule that relied extensively on union evidence establishing that it had regained majority support. A Board majority also suggested that it remained open to reexamining other forms of existing precedent governing the decertification process.

THE *LEVITZ* STANDARD FOR ANTICIPATORY WITHDRAWAL

Under *Levitz*, the receipt of objective evidence prior to CBA expiration that a majority of unit employees no longer desired union representation allowed an employer to withdraw recognition and refuse to bargain, but only "at its peril." If the union subsequently produced evidence

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(typically in the form of recent signatures) that a majority had either changed their minds or otherwise wished to retain representation, however, then the employer was subject to unfair labor practice charges for refusing to bargain in the interim.

In last week's *Johnson Controls, Inc.*, decision, the Board found this back-and-forth test to be unworkable. It opined that the test failed to properly safeguard employee free choice, while undermining labor relations stability by subjecting employers to legal exposure for circumstances that arose *after* a good faith decision to withdraw.

THE NEW STANDARD

Under the Board's new test as articulated in *Johnson Controls*, you will now be privileged to withdraw recognition from an incumbent union and refuse to bargain commencing within 90 days of CBA expiration upon receiving evidence that the union has in fact lost majority support.

Although the union may still respond with unfair labor practice charges, the Board will no longer evaluate the merits of those charges by considering evidence that it has reacquired majority status. Instead, the union may present such evidence by filing for a new representation election within 45 days from the date on which you first gave notice of your anticipatory withdrawal.

Under those circumstances, you may lawfully continue recognizing the union without exposure to additional unfair labor practices charges in the absence of another representation petition from an intervening union. As the Board pointed out, "such issues will be resolved as they should be: through an election, the preferred method for determining employees' representational preferences."

WHAT DOES THIS MEAN FOR EMPLOYERS?

Johnson Controls provides you with a roadmap for lawfully withdrawing union recognition prior to CBA expiration. While the Board has removed some impediments to the "at your peril" nature of the *Levitz* anticipatory withdrawal standard, you will want to at least take the following considerations into account if you are exploring such a strategy:

- The Board left other aspects of the *Levitz* standard in place, including a requirement that employers rely upon objective evidence (as opposed to good faith subjective belief) that the union has actually lost majority support. Such evidence has traditionally derived from a proper disaffection petition containing validated signatures (and dates) from a majority of bargaining unit employees; although employee polls or other objective evidence may suffice in limited circumstances,.
- Unilateral changes in wages or working conditions implemented during the intervening period between CBA expiration and an ensuing representation election conducted under the *Johnson Controls* standard could still subject you to additional unfair labor practice exposure.
- Any withdrawal of recognition implemented during the pendency of bad faith bargaining or other unfair labor practice charges deemed to have caused the underlying employee disaffection will likely taint (and therefore invalidate) the withdrawal itself.

We will continue to monitor any impact and provide additional information as it becomes available, so make sure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you need assistance dealing with union activity, unfair labor practice charges, or collective bargaining, please contact a member of the [firm's Labor Relations Practice Group](#).

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