

NLRB Adopts “Contract Coverage” Standard to Apply to an Employer’s Unilateral Changes to Terms and Conditions of Employment

by Jack Sullivan and Jillian Kornblatt

A recent decision by the National Labor Relations Board (the “NLRB” or “Board”) makes it easier for employers to change workplace rules without discussing the change with the union representing their employees.

As employers with unions know, an employer may violate Section 8(a)(5) and (1) of the National Labor Relations Act if it changes certain terms and conditions of employment without first bargaining with the union (called a “unilateral change”). On September 10, 2019, the NLRB adopted the familiar “contract coverage” standard for determining whether an employer’s unilateral change violates the Act. The standard makes it easier for an employer to show that its unilateral changes are within the scope of the parties’ collective bargaining agreement, as explained below.

In the case, *M.V. Transportation, Inc.* (28-CA-173726; 368 NLRB No. 66), the question presented was whether a collective bargaining agreement granted the employer the right to take action unilaterally without bargaining with the union. Abandoning the prior “clear and unmistakable waiver” standard, the Board held that the “contract coverage” standard was the more appropriate standard to answer this question. The Board’s adoption follows years in which the NLRB applied the “clear and unmistakable waiver” standard, despite numerous rulings from the D.C. Circuit and other federal courts of appeals upholding and applying the “contract coverage” standard.

Under the “contract coverage” standard, the Board will first examine the plain language of the parties’ collective bargaining agreement to determine whether a unilateral change made by the employer is proper given the contract terms, using ordinary principles of contract interpretation. If it is determined that the employer’s actions are not covered or within the scope of a contract provision, then the employer will be in violation of the Act, unless it can demonstrate that the union waived its right to bargain over the change, or that the employer was otherwise unilaterally privileged to act. Prior to this, employers had to prove that the agreement unequivocally and specifically referred to the specific

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employer action at issue—a harder standard to meet.

For example, if an agreement contains a management rights' provision that broadly grants the employer the right to implement new rules and policies and to revise existing ones, the Board stated that the employer would not violate the Act by unilaterally implementing new attendance or safety rules, or by revising existing disciplinary or off-duty-access policies.

The new standard therefore provides greater flexibility to employers who need to make changes to terms and conditions of employment that are not specifically spelled out in their collective bargaining agreements. It will also frame how both employers and unions will draft and interpret rights spelled out in an employer's management rights clause in the future, which means employers facing a new round of contract negotiations should remember the new standard during drafting.