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INFORMATION MEMO
LABOR AND EMPLOYMENT LAW

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NLRB Adopts Employer-Friendly "Contract Coverage" Standard for Determining Whether Unilateral Changes Violate the NLRA

On September 10, 2019, the National Labor Relations Board issued a favorable decision that makes it easier for employers to demonstrate that a unilateral change in terms and conditions of employment was permitted by the collective bargaining agreement. In M.V. Transportation, Inc., a three-member majority of the Board (over one dissent) abandoned its previous "clear and unmistakable waiver" standard and adopted the more lenient "contract coverage" standard.

When faced with an unfair labor practice charge alleging an unlawful unilateral change in violation of Section 8(a)(5) of the National Labor Relations Act, unionized employers have historically had a difficult burden to meet when defending against the change on the basis that the unilateral action was permitted by the collective bargaining agreement. The "clear and unmistakable waiver" standard, which the Board has historically applied and which was reaffirmed most recently in its 2007 Provena St. Joseph Medical Center decision, "requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." Under this standard, the Board presumes that an employer's unilateral change violated the Act unless a contractual provision unequivocally and specifically grants the employer the right to make the particular change at issue.

Several federal appellate courts, including the U.S. Court of Appeals for the D.C. Circuit (which has jurisdiction to review all Board decisions, regardless of where they originate) and the U.S. Court of Appeals for the Second Circuit (which has jurisdiction to review Board decisions that originate in New York), have criticized this standard. The D.C. Circuit has stated that this standard is "in practice, impossible to meet" and has consistently rejected the "clear and unmistakable waiver" standard when reviewing Board decisions. In fact, as the three-member majority noted in its decision, the D.C. Circuit recently granted an employer's motion to require the Board to pay the employer's attorneys' fees as a result of the Board's "bad faith" in continuing to defend the "clear and unmistakable waiver" standard in enforcement actions.

In M.V. Transportation, Inc., the Board finally abandoned the "clear and unmistakable waiver" standard in favor of the "contract coverage" standard used by the D.C. Circuit. Under the "contract coverage" standard, the Board examines the plain language of the collective bargaining agreement to determine whether the employer's action was "within the compass or scope of contract language that grants the employer the right to act unilaterally." If the plain language of the agreement allows the employer to act unilaterally, then there is no violation of the Act. If the plain language of the agreement does not cover a disputed unilateral change, then the Board will consider (based on other evidence aside from contractual language, such as bargaining history) whether the union clearly and unmistakably waived its right to bargain over the change or whether the unilateral action was privileged for some other reason. The Board concluded that this standard is more consistent with the Act because it gives effect to the plain language of the parties' contract and promotes contractual stability.

The M.V. Transportation, Inc. decision underscores the importance of negotiating strong management rights clauses in collective bargaining agreements that broadly allow the employer to take several types of unilateral actions in order to effectively manage and operate the business, such as: determine staffing levels; assign work; lay off, hire, promote, and transfer employees; schedule work hours and shifts; and promulgate and enforce reasonable work rules, regulations, and policies. Employers should consult with their labor counsel prior to beginning negotiations with the union to ensure that bargaining proposals are developed that will provide as much flexibility as possible in the operation of the business.

If you have any questions about this Information Memo, please contact any of the attorneys in our Labor and Employment Law practice, or the attorney in the firm with whom you are regularly in contact.

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