

NLRB Adopts "Contract Coverage" Standard

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New Ruling Makes It Easier for Employers to Introduce Workplace Changes During Term of Collective Bargaining Agreement

On September 10, 2019, in *MV Transportation, Inc.*, Case No. 28-CA-173726, the National Labor Relations Board adopted a new "unilateral change" rule. The new rule permits employers to make unilateral changes in the workplace during the term of a collective bargaining agreement, without first bargaining with the union representing its employees, where the change "falls within the compass or scope of contract language that grants the employer the right to act unilaterally." The new standard, more relaxed than the Board's prior rule in this area, makes it easier for employers to modify certain terms and conditions of employment during the term of an agreement.

MV Transportation, Inc. concerned a union's claim that an employer violated the National Labor Relations Act when it unilaterally implemented several work policies without first bargaining with the union over the changes. The union relied on the Board's long-standing "clear and unmistakable waiver" standard, which permits a unilateral change on a mandatory subject of bargaining made during the term of a collective bargaining agreement only if the contract contained a "clear and unmistakable waiver" by the union to bargain about the change. According to the union, the employer's unilateral changes violated the Act because the union did not waive its right to negotiate over these specific policy changes in its agreement with the employer.

The Board rejected the union's argument, and in doing so adopted a new standard for determining when a unilateral change is permitted under labor law. The new standard, called the "contract coverage" standard, asks whether the employer's change "falls within the compass or scope of contract language that grants the employer the right to act unilaterally." In other words, if a contract contemplates the employer's right to make a unilateral change, then the employer may do so without first bargaining with the union. The Board cited previous federal appeals court decisions rejecting the "clear and unmistakable waiver" standard in its reasoning for reversing precedent. In this case, the Board held that, because the parties' agreement granted the employer the right to institute work assignments and issue discipline, for example, the employer's new work policy requiring employees to undertake a security sweep or face discipline squarely fell within the scope of these rights.

The "contract coverage" standard will undoubtedly relax the rules concerning unilateral changes. Under this new standard, the Board will look more holistically at whether parties intended for a particular subject to be covered by an agreement. This decision also gives effect to parties' collective bargaining agreements and removes the Board from the narrow role of interpreting specific contract provisions negotiated by parties at the bargaining table. However, as with all Board rules, there is no guarantee that the "contract coverage" standard would survive in a different administration. We will, of course, advise on any future developments.

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