Published on *The National Law Review* https://www.natlawreview.com

Raytheon No More: NLRB Significantly Cuts Down Employers' Power to Act Unilaterally

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In another much-anticipated reversal of existing precedent, as the National Labor Relations Board ("Board") completes its late-summer flurry before the Labor Day weekend, the Board issued a pair of decisions overruling different aspects of the 2017 decision *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017) (see our discussion here).

Prior Precedent: *Raytheon*

In *Raytheon*, the Board held that prior to the execution of an initial contract of a newly-represented workforce or during the contractual hiatus period after a contract had expired, employers could make discretionary unilateral changes, provided that such changes were consistent with past practice.

The Board also found that an employer can unilaterally act after expiration of a collective bargaining agreement if the employer relies on a past practice that was developed under a management-rights clause in the agreement.

Wendt Corp., 372 NLRB 135 (2023) and *Tecnocap LLC*, 372 NLRB 136 (2023), overruled both aspects of the *Raytheon* decision.

Wendt Winds Back Raytheon

In *Wendt*, the Board held that that unilateral changes can only be made when both "the employer has shown the conduct is consistent with a longstanding past practice **and** is not informed by a large measure of discretion"—undoing the Board's acceptance of employer unilateral "discretionary" changes in *Raytheon*.

The Board sharply criticized the holding in *Raytheon*, noting that the decision was out of line with Supreme Court precedent. The Board also noted that discretionary unilateral changes unfairly weaken a union's bargaining position, contrary to the purposes of the Act.

The Board also reaffirmed the principle that employers cannot cite a past practice of making unilateral changes that was used **before** employees were represented by a union to justify unilateral changes after the workers select a bargaining representative.

Tecnocap Supplements Wendt

NLRB General Counsel Jennifer Abruzzo petitioned the Board to go further than the decision in *Wendt*, and to undo *Raytheon* by reinstating the test established in *E.I. Du Pont de Nemours*, 364 NLRB 1648 (2016), which held that any "unilateral changes made pursuant to a past practice under an expired management rights clause are unlawful." In *Tecnocap*, the Board agreed with Abruzzo's recommendation, reasoning that *Raytheon* also was contrary to Supreme Court precedent in permitting discretionary unilateral changes based on past practice after a management-rights clause has expired.

Member Kaplan Concurs and Dissents

Member Kaplan concurred with the Board's ultimate decision in *Wendt*, because he agreed that the unilateral change the employer made was inconsistent with its "long-standing practice." However, he strongly disagreed with the majority's decision to go further and overrule *Raytheon* in *Wendt*, because he believed it was beyond the Board's scope in that case.

Kaplan dissented in *Tecnocap* – and disagreed with the majority's interpretation, stating that the Supreme Court could not have intended to implement an "impossibly restrictive" past-practice standard that will always make an employer's unilateral action unlawful when it involves any amount of discretion.

Takeaways

The Board's reversal of *Raytheon* was not unexpected given the composition of the Board and the NLRB General Counsel's prosecutorial agenda. *Raytheon* had been the law since 2017, only briefly interrupted by a reversal for one year in a 2016 case. Now, the leeway provided to employers under *Raytheon* regarding undertaking unilateral changes consistent with past practice prior to execution of a contract or during a hiatus period has been removed.

With respect to management-rights provisions, the *Raytheon* decision paved the way for employers to utilize the benefits obtained under management-rights clauses after expiration of the CBA, if the employers could demonstrate that they exercised those rights as part of a bona fide past practice. Now, under *Tecnocap,* the waivers of the right to bargain over subjects set forth in management-rights clause expire along with the CBA.

Employers should heed Member Kaplan's warning in his *Tecnocap* dissent that many types of employer unilateral change can be seen as "discretionary," and thus prohibited by the Board's standard. Any change made for a newly-represented workforce or during the contractual hiatus period after a contract has expired will likely be viewed with suspicion.

National Law Review, Volumess XIII, Number 249

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