

NLRB Delivers Labor Day Gifts to Unions

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It has been a decision-packed summer at the National Labor Relations Board (“NLRB” or “Board”), and the last weeks of summer were especially active, with a number of significant decisions released at the end of August that could affect employers with non-unionized as well as unionized workforces. The following is a roundup of significant developments, in order of recency:

Board Membership Update: Member Wilcox Confirmed for a Second Term – One Vacancy Remains

On Wednesday, September 6, 2023, the Senate confirmed President Biden’s nomination of Gwynne Wilcox for a second term on the Board. With her confirmation, four of the Board’s five seats are filled, with an outstanding vacancy for a Republican member remaining. Member Wilcox, like Chair McFerran and Member Prouty, is a Democrat and is strongly pro-labor. In the meantime, employers can expect a continuation of the current Board’s agenda, embracing President Biden’s pledge to be the most pro-union president in United States history.

American Federation for Children -An Expansive View of Protected Concerted Activity (Decided on August 26, 2023, Issued on August 31, 2023):

In a reversal of a Trump-era decision, the Board found that concerted advocacy by employees covered under the National Labor Relations Act (“NLRA” or the “Act”) on behalf of non-covered employees, including unpaid interns, is protected under the NLRA. In [*American Federation for Children, Inc.*](#), the Board reasoned that advocacy on behalf of non-covered employees can be for “mutual aid or protection” and is therefore protected by the Act. In doing so, the Board reversed its 2019 decision in [*Amnesty International*](#), where the Board held that employees’ advocacy on behalf of employees not covered by the NLRA did not fall under the protections of the Act. This decision broadens the legal protections available to workers, specifically employees advocating for nonemployees.

Miller Plastic Products –A Further Expansion of Protected Concerted Activity (Decided on August 25, Issued on August 31, 2023):

In [*Miller Plastic Products, Inc.*](#), the Board reembraced its Totality of the Circumstances Test for determining whether an employee acting alone was engaged in concerted activity. The Board again reversed a 2019 decision ([*Alstate Maintenance, LLC*](#)), on the basis that it established “an unduly restrictive test . . . and failed to fully promote the policies of the Act.” The test under [*Alstate*](#) was a checklist of five-factors to determine whether an employee was engaged in concerted activity but *Miller Plastic Products* adopts a broader and fact-intensive test based on the totality of the record evidence. The implication of re-embracing the totality of the circumstances test is that more employee actions are likely to be found to constitute protected concerted activity. Additionally, the totality of the circumstances test is likely to make it more difficult for an employer to predict *which* actions are protected.

Wendt Corporation –New Limits on Employer Ability to Implement Changes Following the Expiration of a Collective Bargaining Agreement or During Negotiations for a First Contract (Decided on August 26, 2023, Issued on August 30, 2023):

The Board overruled its 2017 decision in [*Raytheon Network Centric Systems*](#), which permitted an employer to unilaterally amend employment terms and conditions in accordance with past unilateral actions during (1) negotiations for a first contract or (2) when there is a contractual hiatus period, i.e. while the parties continue to negotiate following the expiration of a collective bargaining agreement. With [*Wendt Corporation*](#), the Board reaffirmed the requirement that employers cannot defend a unilateral change in employment terms and conditions “that would otherwise violate [the NLRA] by citing a past practice of such changes *before* its employees were represented by a union and thus before the employer had a statutory duty to bargain with the union.” Under this decision, the Board has held that employers with unionized workforces may no longer ensure “past practice” from when they were not unionized as a defense to any unilateral changes to employment conditions while negotiating a first contract.

Tecnocap, LLC (Decided on August 26, 2023, Issued on August 30, 2023):

On the same day the Board decided *Wendt*, the Board issued another decision pertaining to unilateral employer actions in [*Tecnocap*](#), overruling a separate holding in [*Raytheon*](#) that was not overturned by *Wendt*. In *Tecnocap*, the Board ruled that an employer cannot rely on a past practice that is authorized in a management-rights clause in a CBA during (1) negotiations for a first contract or (2) when there is a contractual hiatus period.

Intertape Polymer Corp. –Burden Shifting in Unfair Labor Practice Cases Under Wright Line (Decided on August 25, 2023, Issued on August 28, 2023):

According to the Board majority, this decision provides greater clarity to employers surrounding the General Counsel’s burden under the [*Wright Line test*](#), a burden-shifting framework used in mixed-motive unfair labor practice cases. In [*Intertape Polymer Corp.*](#) the Board clarified a 2019 decision, [*Tschiggfrie Properties, Ltd.*](#) as the majority claims it previously caused confusion regarding the General Counsel’s burden under Wright Line. According to the Board majority, *Tschiggfrie* did not modify or augment the General Counsel’s initial burden under the Wright Line test. The Board reaffirmed the Wright Line test, specifically where the General Counsel bears the burden of demonstrating “(1) union or other protected activity by the employee; (2) employer knowledge of that activity; and (3) animus against union or other protected activity on the part of the employer.”

In *Intertape*, the Board underscored the General Counsel's requirements to establish the protected activity was a "motivating factor in the adverse employment action alleged to be unlawful."

Cemex -Major Changes in Representation Law (Decided and Issued on August 25, 2023):

In *Cemex Construction Materials Pacific, LLC*, the Board announced a new framework outlining when employers must bargain with unions without a representation election. Under the *Cemex* framework, an employer is required to recognize and bargain with a union that claims majority status and requests recognition, but does not file a representation petition. Under *Cemex*, an employer will be obligated to either recognize the union or promptly file a petition for an election. Critically, under *Cemex*, if an employer, who requested an election, commits any unfair labor practice that would require setting aside the election, the Board will not re-run an election but rather require the employer recognize and bargain with the Union. This decision modifies the prior *Joy Silk standard*, under which an employer was required to bargain with a union unless it had "a good faith doubt of the union's majority status."

Stericycle -Employer Handbooks and Policies Will Face More Scrutiny (Decided and Issued on August 2, 2023):

The Board announced in *Stericycle* a new standard to assess the legality of work rules and policies under the NLRA, specifically whether they chill employees from exercising their Section 7 rights under the Act. The Board adopted a rebuttable presumption test in lieu of the previous balancing test. Under the new standard, any employer rule, policy, or handbook provision that has a "reasonable tendency to chill employees from exercising their rights" is presumptively unlawful. The test is viewed from the lens "of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activity." To rebut the presumption an employer must prove the rule, policy, or handbook provision (1) "advances a legitimate and substantial business interest" and (2) that it could not be achieved with a more narrowly tailored one. This decision specifically overturned a 2017 decision in *The Boeing Company*, which embraced a balancing test for evaluating the legitimate justifications of employer rules, policies, or handbook provisions against their impact on employees exercising their rights under the NLRA. It is critical that employers review their rules, policies, and handbooks to ensure compliance with this new standard.

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