NLRB Shifts to Favor Unions

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As referenced in our prior *Client Alert* regarding the National Labor Relations Board's (NLRB) union-friendly shift**,** the past month has seen multiple substantive changes to the NLRB's processes and procedures. Almost all of these make unionizing a non-union workplace less onerous, including:

- Decreasing the time between filing a petition and actually holding a union election;
- Putting the onus on employers to seek an election when presented evidence that a union has majority support within a bargaining unit;
- Limiting the unilateral changes an employer can make after expiration of a CBA; and
- Expanding the universe of actions that can constitute protected activity under the NLRA.

Because the NLRB has jurisdiction over both unionized and non-unionized workforces — Employers should review their current practices and keep these changes in mind moving forward. As always, contact your Vorys attorney with questions about the impact of these recent decisions.

NLRB Final Rule Decreasing Time for Union Election Procedures

On August 24, 2023, the NLRB adopted a Final Rule amending its procedures governing representation elections to take effect on December 26, 2023. This Rule will reduce the time it takes to get from petition to election in contested elections and will expedite the resolution of post-election litigation. Notable changes include:

- Pre-election hearings will now open 8 calendar days from service of the Notice of Hearing, instead of 14 business days, reducing employers' time to prepare.
- Reducing Regional directors' discretion to postpone a pre-election hearing by limiting the length of a possible postponement and increasing the showing required for such a postponement from

"good cause" to "special" or "extraordinary" circumstances.

- Petitioners are no longer required to file and serve a written response to the non-petitioning party's Statement of Position; now, a petitioner shall only respond orally at the start of the pre-election hearing.
- Employers now have only two days, instead of five, after service of the Notice of Hearing to post the Notice of Petition for Election.
- Requiring special permission for employers to file written briefs regarding pre- or post-election issues.

New NLRB Framework for Representation Proceedings

On August 25, 2023, the NLRB announced in *Cemex Construction Materials Pacific, LLC* the new framework for determining what happens when an employer is given evidence of majority support for unionization in a potential bargaining unit. Going forward, when an employer is faced with union recognition based on a purported majority, the employer can either recognize and bargain with union, or file an RM petition within two weeks in order to comply with Sections 8(a)(5) and (1). Employers may no longer reject evidence of majority support by way of authorization cards. This decision overrules the 40-year precedent first delineated in *Linden Lumber*, which allowed employers to refuse to recognize a union and insist that the union file a petition with the NLRB.

Further, the NLRB held in *Cemex* that if an employer commits an unfair labor practice during the election's critical period that requires setting aside the election, the Board may dismiss the RM petition and issue a bargaining order requiring the employer to recognize and bargain with the union.

NLRB Decisions Redefine Unilateral Actions during Bargaining

On August 26, 2023, the NLRB issued two decisions regarding Section 8(a)(5) and unilateral actions during bargaining. Previously, employers operated under the guidelines set forth in the Trump-era decision, *Raytheon Network Centric Systems*, which allowed employers to take unilateral action if it was "similar in kind and degree" to that taken in the past, regardless of the amount of discretion utilized by the employer. Under the new precedent outlined in *Wendt Corp.*, a unilateral action during bargaining is lawful only if the employer has a long-standing or established regular and consistent practice, and the action is not directed by a large measure of discretion. "Established" or "long-standing" is a practice that occurs with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis.

The NLRB overruled the remainder of *Raytheon* in *Tecnocap LLC* by extending its *Wendt* reasoning to unilateral actions taken in light of management-rights clauses. In *Tecnocap*, the Board held that the unilateral action taken by an employer pursuant to an expired management-rights clause was nevertheless unlawful because it permitted an employer to make discretionary changes to the terms and conditions of employment even after the contractual provision authorizing such changes had expired and while the parties were bargaining.

NLRB Lowers Bar for Protected Activity

Single worker actions: Utilizing a holistic approach, the NLRB recently adopted a totality-of-the-circumstances test to determine whether a single worker engages in activity protected by Section 7. Going forward, a single worker's actions constitute protected activity if the totality of the record supports the contention that the worker sought to initiate, induce, or prepare group action.

Non-employees: Covered employees who advocate for non-employees (e.g., interns or volunteers) are protected by the National Labor Relations Act (NLRA) so long as they engage in activity meant for the "mutual aid and protection" of the workforce. This is a departure from prior precedent, which held that such advocacy was not protected.