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CLIENT ALERT: The Pendulum Swings Again: NLRB (Re)Adopts "Clear and Unmistakable Waiver" Standard in Duty to Bargain Cases

On December 10, 2024, the National Labor Relations Board issued a decision in *Endurance Environmental Solutions, LLC,* 373 NLRB No. 141 (2024), a case in which it reconsidered and reestablished the standard used to determine whether an employer's failure to bargain over unilateral changes to matters involving a mandatory bargaining subject violates the National Labor Relations Act. Overruling a 2019 decision that held that an employer enjoyed license to make unilateral change if the subject matter of the change came within the "compass or scope" of the parties' collective bargaining agreement, the Board in *Endurance Environmental* has now jettisoned that so-called "contract coverage" standard in favor of a stricter one – namely, one that now requires an employer to show that the union "contractually surrendered" the right to bargain through a "clear and unmistakable" waiver. This decision represents a return to a far more exacting standard under which the NLRB evaluates whether a collective bargaining agreement provides the employer with the ability to make unilateral changes.

Reversal of the "Contract Coverage" Standard and Restoration of the "Clear and Unmistakable Waiver" Standard

In 2019, the Board, in the case of *MV Transportation, Inc.,* 368 NLRB No. 66 (2019), adopted the "contract coverage" test to determine whether a CBA affords employer the ability to lawfully change working terms and conditions without bargaining over that change with the union. Under the "contract coverage" test, an employer could lawfully make a unilateral change to working terms if the subject matter of the change was "within the compass or scope" of the contract. In essence, the standard permitted an employer's unilateral action when the employer's action was "covered by" the contract, such as under a broad management rights clause, even if the disputed employer decision was itself not specifically mentioned in the contract's text. In *Endurance Environmental Solutions, LLC,* the Board has now expressly overruled *MV Transportation* and, in its place, returned to pre-2019 precedent in such cases, re-instituting a much more demanding standard that once again requires the employer to demonstrate that the union has given a "clear and unmistakable" waiver of its right to bargain over the specific change being implemented in order for its unilateral change to withstand Board scrutiny.

In *Endurance Environmental Solutions, LLC*, the employer was charged with committing an unfair labor practice by announcing its intent to unilaterally install cameras that monitored employees in their trucks without bargaining with the union. Noting that such an action was "covered" by the management rights language in the collective bargaining agreement that permitted it to "implement changes in equipment" without the union's acquiescence, the employer argued, and the presiding administrative law judge agreed, that the governing "contract coverage" standard permitted the employer to take the action without bargaining over it. On this basis, the charge was dismissed, and

the union appealed to the full Board.

In returning to the pre-2019 "clear and unmistakable waiver" standard, a divided *Endurance Environmental Solutions* Board ruled that the "contract coverage" test "undermines the [National Labor Relations] Act's central policy of promoting industrial stability by encouraging the practice and procedure of collective bargaining" and that the more demanding standard that its decision has reinstituted "better accomplishes the Board's statutory mandate to promote industrial peace."

What is the Upshot? What's Next?

Although the Board touts its restoration of the "clear and unmistakable waiver" standard as a means by which to "better effectuate" the NLRA's "fundamental policy of encouraging the practice and procedure of collective bargaining to reduce industrial strife," whether the decision will actually have that effect remains to be seen. In the wake of this decision, the Board has created a landscape that makes it more difficult for parties in collective bargaining to reach agreement over language that delineates the bounds of management's contractually reserved prerogatives. For certain, so long as *Endurance Environmental Solutions* remains governing law, employers who are negotiating collective bargaining agreements should carefully consider whether broad reservations of management rights upon which they have comfortably relied in the past will now be insufficient to immunize them from having to negotiate over changes during the term of a contract.

Of course, the ground shift that the *Endurance Environmental Solutions* decision represents may be relatively short-lived. With the imminent change in presidential administrations, yet another sea change in this and other areas of federal labor law may once again may be on the horizon. Though it is unclear exactly when the Board will revert to a Republican-controlled majority (possibly as late as August 2026), when it does, it is likely that a new Republican-majority Board will seek opportunities to once again send the pendulum swinging back in the direction of the more employer-friendly "contract coverage" standard.

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