Labor & Employment Issues
In Focus

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For Clients and Friends
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REVERSING TRUMP BOARD, BIDEN NLRB STRICTLY LIMITS EMPLOYER PAST PRACTICE DEFENSE FOR UNILATERAL CHANGES IN FIRST OR SUCCESSOR CONTRACT NEGOTIATIONS

Of the more pernicious assaults on union-employee rights under the National Labor Relations Act ("NLRA" or the "Act") engineered by the Trump National Labor Relations Board ("NLRB" or "Board"), expansion of an employer's right to unilateral action may be the most fundamental. In two companion decisions capping the current tenure of Board Member Gwynne Wilcox, the NLRB Democratic majority restored and clarified the longstanding NLRA rule that an employer may not unilaterally change terms and conditions of employment during contract negotiations except where the employer can establish a regular, longstanding non-discretionary practice. *Wendt Corp*., Case no. 03-CA-212225 (Aug. 26, 2023) and *Tecnocap LLC*, Case No. 06-CA-265111 (Aug. 26, 2023).

Robb—Ring—Raytheon

Since *NLRB v. Katz*, 369 U.S. 736 (1962), the NLRA has been applied to prohibit unilateral employer changes in terms and conditions of employment during negotiations for a first or successor collective bargaining agreement except where proven regular and non-discretionary, as in annual automatic wage increases. In *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), the Republican Board led by Chair John Ring and pushed by General Counsel Peter Robb, exploded that rule to permit unilateral employer changes during this delicate open-contract period, so long as the changes had happened before, even intermittently, and were "similar in kind and degree" to those prior changes, regardless of employer discretion. "Regardless of the circumstances under which a past practice developed – i.e., whether or not the past practice developed under a collective bargaining agreement containing a management-rights clause authorizing unilateral employer action – an employer's past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past." In a characteristic cynical twist, the Trump Board explained that its new rule would foster more stable labor relations.

Gone with the Wendt

In *Wendt*, the now Democratic NLRB led by former member, now NLRB Chair Lauren McFerran, joined by Biden-appointed Members Gwynne Wilcox and David Prouty, forcefully rejected *Raytheon*'s reasoning and holding. The Board reviewed the 50-year pre-Raytheon prohibition against unilateral employer changes since *Katz*, summarizing both Board and court decisions as largely consistent in requiring any employer changes be both longstanding, regular *and* non-discretionary. Applying that standard, rather than

Raytheon, the Board held that *Wendt* Corporation violated the Act when it unilaterally instituted layoffs while negotiating a first contract with the Shopmen's Local 576 union.

First, even under *Raytheon*, explained the Board, the evidence showed that *Wendt* engaged in layoffs intermittently over 17 years, with three consecutive years of layoffs followed by five years without layoffs and further layoffs sprinkled in erratically thereafter, not meeting the standard of regular or frequent such that "employees could reasonably expect the practice to reoccur on a consistent basis." Second, the Board rejected *Raytheon*'s "kind and degree" test as incompatible with *Katz*'s holding and subsequent longstanding application that "the Act does not permit a unilateral change where 'informed by a large measure of discretion." Such discretion, explained the Board, undermines the collective bargaining process fundamental to the Act because it "minimizes the influence of organized bargaining" and emphasizes to the employees "that there is no necessity for a collective bargaining agent" that is "ineffectual, impotent, and unable to efficiently represent them." For these reasons, the 3:1 Democratic majority overruled *Raytheon*, and, citing the Trump Boards' divergence from precedent, applied *Wendt* retroactively. Significantly, though not necessary for its holding, the majority also affirmed the precedent "that an employer can never defend unilateral changes ... by invoking a past practice that was developed *before* the union ... represented employees ..." (Emphasis in original). NLRB Republican Member Kaplan concurred in the result only, applying and reasserting *Raytheon*, and decrying what he saw as the majority's unnecessary expansion of *Katz*.

Tecnocap Cut

Wendt stated Board opposition to, but technically left open the issue of, unilateral employer changes between contracts assertedly pursuant to an expired management rights clause. The Board firmly stopped that gap in *Tecnocap LLC*, issued the same day immediately following *Wendt.*

The fact pattern was striking: During negotiations following expiration of its collective bargaining agreement that contained a management rights clause for shift changes, and amid multiple unfair labor practice violations and charges, *Tecnocap* unilaterally instituted daily 12 and 11 hour shifts where previous shifts had stretched occasionally to 10 hours maximum. The Administrative Law Judge reluctantly applied *Raytheon*'s "kind and degree" standard to find no unfair labor practice. Chair McFerran, joined by Members Wilcox and Prouty, now overruled the second part of *Raytheon* and held that even a past practice developed pursuant to a contractual management rights clause expires with the contract and does not permit unilateral conduct under that expired term.

The Board's decision in *Tecnocap* relied on *Katz* while extensively citing *Wendt* for background and reasoning. In addition to the general harm of unilateral changes discussed in *Wendt*, the Board delved deeply into the specifics of *Tecnocap*'s violations by its unilateral institution of 12 and 11 hour shifts laden by "a large measure of discretion" and implemented in no regular predictable pattern. Indeed, the employer justified the shifts completely based on its unhindered evaluation of business needs, "entirely undefined and purely within the [Employers]' discretion," the "antithesis of an automatic

non-discretionary action." Accordingly, protested the Board, the union "had no way of knowing, and explaining" to workers, "when or why or how often they will be required to work 12-hour or 11-hour work shifts ... *other than when the [Employer] decided* ..." (Emphasis in original). Denouncing such unilateral discretion as "pernicious" and its harm as "patent" to collective bargaining, the Board noted that the union "is significantly hindered from meaningfully revisiting the issue" or from ever initially agreeing to management's rights, "when an employer is permitted to continue making discretionary changes to those very terms and conditions of employment by virtue of an expired component of the predecessor agreement."

As in *Wendt*, the Board applied *Tecnocap* retroactively. Going beyond *Wendt*, the Board imposed public reading and make whole relief for employees because of the Employer's multiple unfair labor practices since 2017, including unilaterally implementing a new health care plan before impasse. Dissenting Member Kaplan would have upheld the ALJ under *Raytheon* and chided the majority for stretching *Katz* to the "impossibly restrictive past-practice standard that an employer's unilateral action will always constitute an unlawful 'change' whenever the employer's actions involve 'any' discretion."

COURT REJECTS STAFFING FIRMS' ATTACK ON MEMO ISSUED BY THE NATIONAL LABOR RELATIONS BOARD'S GENERAL COUNSEL

At "Captive Audience" meetings, employers express their views on unionization to their employees, whose attendance at the meetings is – as the name suggests – mandatory. Usually held during organizing campaigns, these meetings were mostly tolerated under National Labor Relations Board ("NLRB" or "Board") precedent. But in April 2022, the Board's General Counsel Jennifer Abruzzo issued a memorandum ("Memorandum") in which she urged the Board to consider such meetings unlawful going forward. A group of staffing firms in Texas challenged the Memo by filing a lawsuit in federal district court in Texas. The Board argued that the suit should be dismissed because the court lacked jurisdiction on two different grounds: first, that the National Labor Relations Act ("NLRA" or "Act") precludes review of Memorandums, and second, that the Plaintiffs lacked standing to claim that the Memorandum "chills" their First Amendment rights. On August 31, 2023, the court issued a decision agreeing with the Board on both grounds. *Burnett Specialists et al v. Abruzzo et al*, Docket No. 4:22-cv-00605 (E.D. Tex. Jul 18, 2022).

As to the Board's first argument for dismissal – that the Act precludes review of Memorandums - the court agreed (and the Plaintiffs did not dispute) that Memorandums are part of the General Counsel's "prosecutorial functions." The NLRA is enforced explicitly by the NLRB, and this enforcement is "accomplished through a split-enforcement system, assigning all prosecutorial functions to the General Counsel of the NLRB and all adjudicatory functions to the Board." While the Act provides for judicial review of final orders of the Board, there is no similar provision providing for judicial review of any of the General Counsel's prosecutorial functions. Since the court interpreted the Plaintiff staffing firms' challenge as a challenge to the Memorandum, it held that it was a challenge to a prosecutorial function, and thus was unreviewable.

As to the staffing firms' argument that the Memorandum violates their First Amendment right to present their opinions on unionization, the Board argued that the Plaintiffs lacked standing, and the court agreed. Pursuant to Article III of the Constitution, a plaintiff must allege (1) an injury in fact, (2) a sufficient "causal connection" between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. To show an injury in fact in cases claiming "First Amendment chill," a plaintiff must show that (1) he intends to engage in a course of conduct affected by the challenged policy, (2) the conduct is arguably proscribed by the challenged policy, and (3) the threat of future enforcement is substantial. The court held that the Plaintiffs here could not satisfy the third element concerning the threat of future enforcement, in part because the Memo is not, in and of itself, a legally binding document. The staffing firms have indicated that they intend to challenge the decision at the Fifth Circuit Court of Appeals.

U.S. DEPARTMENT OF LABOR PROPOSES INCREASING OVERTIME PAY THRESHOLD

In a significant move for American workers, the U.S. Department of Labor ("DOL") has unveiled a proposal to increase the salary threshold, making more employees eligible for overtime pay. The threshold under the Fair Labor Standards Act ("FLSA") would rise from $35,568 to $55,068 annually. If approved, this proposal would restore and extend overtime protections to 3.6 million more workers.

The proposed rule, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees," determines who is exempt from the FLSA's minimum wage and overtime requirements based on their salary and duties. The DOL's proposed salary figure is derived from the 35th percentile of weekly earnings of full-time salaried workers in the Southern U.S., the nation's lowest-wage region. Highly compensated employees would see their salary threshold increase from $107,432 to $143,988. A key feature of this proposal is that the salary threshold would adjust every three years, reflecting current earnings data.

Julie Su, the Acting DOL Secretary, stated that this rule aims to restore economic security to millions of salaried workers earning below $55,000 annually. The DOL has engaged in extensive consultations, conducting 27 sessions with over 2,000 participants. This isn't the DOL's first attempt to address the overtime pay threshold and the Biden administration's proposal is still higher than the Obama-era threshold of $47,476, which never took effect due to legal challenges. Worker advocates, such as the National Employment Law Project ("NELP"), praise the proposal, while business groups express concerns.

Following this announcement, there is now a 60-day window for public commentary, emphasizing the importance of stakeholder feedback. While the final ruling could take weeks, there could be litigation against the rule, though it may withstand legal challenges since the Biden administration proposal might be deemed more reasonable

than the proposed alternatives. Further, If the proposal is finalized and employers have not adapted to it, they could face legal repercussions, including back pay for employees, fines, and potential lawsuits. The financial implications of non-compliance might outweigh the costs of early adaptation. However, if employers believe the rule will be blocked or significantly altered, they may choose to wait to adjust their payroll practices.

GROUNDBREAKING U.S. TREASURY REPORT HIGHLIGHTS GLOBAL BENEFITS OF UNIONIZATION

The U.S. Treasury Department, under the Biden administration, recently unveiled a report, reinforcing a belief long held by the broader organized labor community: strong unions not only benefit their members but also fortify the economy as a whole. For example, union members generally earn about 20% more than their non-union counterparts, and surging up to 35% in the construction sector, unionized workplaces often offer superior fringe benefits, including health care and retirement provisions, and union households often have better health care coverage, reducing the burden on public health systems and taxpayer money. Further, the Treasury Department's validation brings an unprecedented level of credibility to the positive effect of unionization, and recent polls by the AFL-CIO underscore the public's faith in unions, boasting a 70% approval rating. A copy of the Treasury report can be accessed here.

To Our Clients: If you have any questions regarding any of the matters addressed in this newsletter, or any other labor or employment related issues in general, please contact the Pitta LLP attorney with whom you usually work.

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