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New NLRB Decisions Favor Employers

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With the change to a Republican President and the appointment of new NLRB members, the expectation that more pro-employer decisions will be issued has begun. Several NLRB decisions have re-established prior labor law precedents that were overturned by the Obama era NLRB. A prime example of this is the recent decision involving *Raytheon Network Centric Systems* that restored the 50-year-old precedent regarding the requirement to negotiate certain changes with a union.

In the 1962 Supreme Court case of *National Labor Relations Board v. Katz*, the principle was established that an employer cannot make unilateral changes to the terms of conditions of employment applicable to unionized employees without first informing the union and providing the union with an opportunity to bargain. In 1964 the NLRB refined that principle by stating that an employer does not have to negotiate a change that is consistent with its past practice of making changes. However, in the 2016 case of *E.I. Dupont de Nemours,* the Obama-era NLRB reversed precedent by deciding that an employer was required to bargain with the union regarding any change that involved the employer's exercise of discretion, regardless of whether the change may have been consistent with the employer's past practices.

Enter the new NLRB and its *Raytheon* decision. After its collective bargaining agreement expired but before a new one was executed, Raytheon (without

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obtaining the union's agreement) announced that it would adjust employees' health care benefits. The new NLRB decided that Raytheon could unilaterally make those changes because it had a consistent past practice of unilaterally changing health care benefits applicable to all employees, not just those represented by the union. The NLRB determined that the exercise of the company's discretion was irrelevant. Given the unpredictable nature of health care costs and coverage, this decision could provide relief for employers whose employees are represented by a union.

In another decision favorable to employers, the NLRB authorized its administrative law judges to approve the partial disposition of unfair labor practice charges, even if the NLRB attorney and the charging party do not agree. In *The University of Pittsburgh Medical Center* decision, the administrative law judge granted the employer's motion to dismiss a portion of the unfair labor practice charge alleged against it. Both the NLRB General Counsel and the charging party objected to the dismissal because it did not include a "full remedy." The NLRB disagreed and authorized the administrative law judge to approve the partial resolution of the unfair labor practice charge, provided that the administrative law judge determines that the terms of the disposition were reasonable.

Last, but certainly not least, the new NLRB General Counsel Peter Robb has issued G.C. Memorandum 18-02 announcing possible changes in several enforcement issues. The Memorandum requires NLRB Regional Directors to submit certain identified unfair labor practice charges to Washington for review, instead of allowing the Regional Directors to make that determination based on current precedent. The Washington review process will allow the General Counsel the opportunity to decide whether to enforce the unfair labor practice charge in accordance with current precedent, or take a different approach. Among the unfair labor practices

mentioned, the General Counsel may consider whether to enforce the current precedent of requiring an employer to bargain with the union regarding discipline before the first collective bargaining agreement was executed. Another precedent that the General Counsel may consider changing is the proof required for an employer to unilaterally withdraw recognition of a union. If an employer were allowed to rely on objective evidence that the union was no longer supported by a majority of employees, for example based on employee signatures, then a formal NLRB decertification election would not be required as is the current precedent.

Akerman will continue to monitor these developments as they occur.