Breakout Sessions – Series 5

IT’S NOT YOUR FIRST RODEO (OR MAYBE IT IS)

AVOIDING CRITICAL MISSTEPS AND PROTECTING YOUR BUSINESS THROUGH COLLECTIVE BARGAINING

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Whether you are bargaining a first contract, or have been dealing with the same union for decades, one of the union’s main goals in collective bargaining is to lock you in and limit your options, both during the term of the collective bargaining agreement and following expiration. Savvy employer negotiators realize that, and look for ways to preserve and enhance flexibility, and otherwise protect their business, through collective bargaining. Many key contractual provisions involve a union’s waiver of a statutory right, and the Obama Board made it harder than ever to demonstrate a waiver.

There has been some good news, however, thanks to the U.S. Supreme Court and more recent decisions of the Trump Board. For example, it is now clear that a union can agree that employees will arbitrate their individual employment claims, and unions cannot use non-members’ payments for political activities. We are continuing to watch developments, and remain hopeful that the Trump Board will reverse some of the difficulties the Obama Board imposed on employers. In the meantime, one of the best ways to protect your business in a unionized environment is through careful collective bargaining.

I. MANAGEMENT RIGHTS CLAUSES

One of the main objectives of a good management’s rights clause is to eliminate the need to bargain before taking actions spelled out in the clause. Unfortunately, the Board’s decisions lack clarity and consistency regarding the effect of management rights clauses on the need to bargain mid-term changes.

In *Embarq Corporation*, 358 NLRB No. 134 (2012) the Board ruled that the labor agreement’s management rights clause, which specified the exclusive management right to classify, reassign, lay off and discharge employees, and further provided for two weeks advance notice of any non-emergency layoffs, was insufficient to waive the union’s right to bargain about layoffs because seniority provisions in the layoff clause were not followed.

Employers are cautioned as to the Board’s continued narrow reading of management rights clauses and the limited efficacy the Board’s approach typically gives such clauses. The Board has long rejected the idea that general “reserved rights” language in a management rights clause is sufficient to constitute a “clear and unmistakable waiver” of the union’s right to bargain regarding a topic not specifically addressed in the agreement. See, e.g., *Provena St. Joseph Med. Center*, 350 NLRB 808 (2007) (general management rights language does not constitute “clear and unmistakable waiver” of union’s right to bargain as to the exercise of specific management rights); *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989) (“[i]t is well settled that the waiver of a statutory right will not be inferred from general contractual provisions; rather, such waivers must be clear and unmistakable”). It is notable that some of the federal appeals courts have rejected the Board’s standard for such cases, and instead applied a “contract coverage” standard. See, e.g., *Enloe Medical Center v. NLRB*, 433 F.3d 834, 838 (D.C. Cir. 2005); *Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14, 25 (1st Cir. 2007); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 936-37 (7th Cir. 1992).

The Board, however, took an even more aggressive approach in applying its “clear and unmistakable waiver” standard. In *Graymont PA, Inc.* 364 NLRB No. 37 (2016), the Board majority (Miscimarra dissenting) insisted on a degree of specificity not previously required in order to find a waiver of the union’s right to bargain. The agreement contained a broad and fairly typical management-rights clause, providing in part that the employer:
“[R]etains the sole and exclusive right to manage; to direct its employees; to evaluate performance; . . . to discipline and discharge for just cause; to adopt and enforce rules and regulations and policies and procedures; [and] to set and establish standards of performance for employees.”

Despite this language, the Board (ridiculously) found that “none of the contractual management-rights provisions specifically reference work rules, absenteeism, and progressive discipline,” and therefore the management-rights clause did not constitute a clear and unmistakable waiver by the union to bargain over the changes at issue. Appeal is pending before the D.C. Circuit.

However, several decisions on the positive side have also been issued by the Board. In Virginia Mason Medical Center, 358 NLRB No. 64 (2012), a management rights clause stated that a hospital had the authority “to direct the nurses,” “to determine the materials and equipment to be used [and] to implement improved operational methods and procedures.” The Board found this clause to be a “clear and unmistakable” waiver of bargaining over requirements that nurses who had not been immunized against the flu either to wear a protective facemask or to take antiviral medication.

II. NO STRIKE CLAUSES

One of the main employer benefits of a collective bargaining agreement is a union’s agreement not to strike. Therefore, every agreement should have a good “No Strike” clause. Because waivers of statutory rights must be clear and unmistakable, however, a general “No Strike” clause is not enough to prohibit informational picketing, leafletting, or even sympathy strikes (e.g., refusing to cross a picket line, or going on strike in support of another union’s labor dispute with the employer). Therefore, a good No Strike clause should expressly prohibit all of this activity.

III. CBA ARBITRATION COVERING INDIVIDUAL EMPLOYEE CLAIMS

The Supreme Court’s decision in Epic Systems Corporation v. Lewis, 138 S.Ct. 1612 (2018), held that agreements to arbitrate class actions are enforceable under the Federal Arbitration Act. In it, the Court specifically disagreed with the Board’s conclusion that such agreements violate employees’ rights under Section 7 of the National Labor Relations Act. With that decision, employers are once again taking a close look at agreements to arbitrate employment claims. One option for a unionized workforce is a CBA provision requiring arbitration of individual employee statutory claims and/or class actions.

In 14 Penn Plaza LLC, the Supreme Court held that an arbitration provision in a CBA is enforceable so long as it is freely negotiated by the parties, clearly and unmistakably requires arbitration and the underlying substantive law (ADEA, etc.) does not preclude arbitration. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 248, 129 S. Ct. 1456, 1459 (2009) (“The Union and the RAB, negotiating on behalf of 14 Penn Plaza, collectively bargained in good faith and agreed that employment-related discrimination claims, including ADEA claims, would be resolved in arbitration. This freely negotiated contractual term easily qualifies as a “conditio[n] of employment” subject to mandatory bargaining under the NLRA”).

In order to be “clear and unmistakable,” courts generally require that the CBA “identify the specific statutes the agreement purports to incorporate or include an arbitration clause that
explicitly refers to statutory claims [in order to be arbitrable].” *Ibarra v. UPS*, 695 F.3d 354, 360 (5th Cir. 2012).

A. **No Clear and Unmistakable Agreement to Arbitrate**

For example, in *Manning v. Bos. Med. Ctr. Corp.*, 725 F.3d 34 (1st Cir. 2013), the 1st Circuit held that plaintiffs’ FLSA claims were not subject to arbitration because the CBA did not contain a clear and unmistakable waiver under *Penn Plaza*. The CBAs’ arbitration provisions contained general grievance procedures, but defined “grievances” as “disputes or concerns arising out of the interpretation of the CBAs themselves.” *Id.* at 53. These provisions “did not mention the employees’ statutory claims, much less clearly or unmistakably agree to subject them to arbitration.” *Id.*

In *Lawrence v. Sol G. Atlas Realty Co.*, 841 F.3d 81, 84 (2d Cir. 2016), the 2nd Circuit ruled that a collective bargaining agreement was not clear and unmistakable as to plaintiff’s Title VII, NYSHRL, NYLL and FLSA claims related to racial discrimination, wage violations and retaliation. Relying on *Penn Plaza* and other cases, the court noted that the CBA’s language failed to reference the statutes in question or statutory causes of action:

> Article X, Clause 23 – the “No Discrimination” provision -- clearly prohibits discrimination on the basis of “any characteristic protected by law” and compels arbitration of “[a]ny disputes under [that] provision,” unmistakably creating a contractual right of employees to be free from unlawful discrimination that is [*85] subject to arbitration. J. [**9**] App’x 50. However, a contractual dispute is not the same thing as a statutory claim, even if the issues involved are coextensive. *Wright*, 525 U.S. at 76 (observing that “a grievance is designed to vindicate a ‘contractual right’ under a CBA, while a lawsuit under Title VII asserts ‘independent statutory rights accorded by Congress’” (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49-50, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974))).

The “No Discrimination” provision may plausibly be interpreted to require arbitration of contractual disputes only. It makes no mention of “claims” or “causes of action.” It cites no statutes. It refers to disputes under “this provision,” not under statutes. The references to “law” do no more than define the characteristics on which discrimination is contractually forbidden under the CBA. They do not suggest that statutory discrimination claims based on those characteristics are subject to arbitration.

*Id.* at 84-85.

*See also Harrell v. Kellogg Co.*, 892 F. Supp. 2d 716, 724 (E.D. Pa. 2012) (finding that CBA did not clearly and unmistakably require arbitration of plaintiff’s §1981 claim because the CBA did not “specifically reference the statute.”

In *Ibarra v UPS*, the 5th Circuit Court of Appeals held that the CBA at issue did not “clearly and unmistakably” waive a union member’s right to bring a Title VII claim in a federal judicial forum. 695 F.3d 354 (5th Cir. 2012). Article 51 of the CBA described grievance procedures and defined a grievance as “any controversy, complaint, misunderstanding or dispute arising as to interpretation, application or observance of any of the provisions of this Agreement.” *Id.* at 356-57. It provided that “any grievance, complaint, or dispute” shall be
handled in the manner specified in the Article. *Id.* The procedures culminate in “submission of a grievance to an arbitrator through the Federal Mediation and Conciliation Service, but only if the grievance ‘cannot be satisfactorily settled by a majority decision of a panel of the [Southern Regional Area Parcel Grievance Committee] and Deadlock Panel.’” *Id.*

Article 36 of the CBA was a nondiscrimination provision, which stated:

The Employer and the Union agree not to discriminate against any individual with respect to hiring, compensation, terms or conditions of employment because of such individual’s race, color, religion, sex, sexual orientation, national origin, physical disability[,] veteran status or age in violation of any federal or state law, or engage in any other discriminatory acts prohibited by law, nor will they limit, segregate or classify employees in any way to deprive any individual employees of employment opportunities because of race, color, religion, sex, national origin, physical disability, veteran status or age in violation of any federal or state law, or engage in any other discriminatory acts prohibited by law. This Article also covers employees with a qualified disability under the Americans with Disabilities Act. *Id.* at 357.

Article 36 mentioned “no specific federal or state statutes” and made “no reference to the grievance procedures set forth in Article 51.” *Id.* The CBA contained “no express waiver of a judicial forum for claims brought pursuant to Title VII.” *Id.* Relying on *Penn Plaza*, the 5th Circuit Court of Appeals ruled that “the language of Article 51 and Article 36 is insufficient to waive Ibarra’s right to a judicial forum for statutory discrimination claims.” *Id.* The Court compared the language of the CBA at issue to the CBA in *Penn Plaza* and found that:

The *Penn Plaza* collective bargaining agreement...included a nondiscrimination provision that expressly provided for the arbitration of claims brought pursuant to the ADEA and other federal statutes. Like Article 36, the *Penn Plaza* provision stated that the employer would not discriminate against the employee on the basis of any characteristic protected by law. Unlike Article 36, the *Penn Plaza* provision explicitly incorporated “claims made pursuant to . . . the Age Discrimination in Employment Act” and specified that such claims “shall be subject to the [CBA's] grievance and arbitration procedure . . . as the sole and exclusive remedy for violations,” cross-referencing the relevant CBA articles. Indeed, the *Penn Plaza* respondents — who argued that arbitral forums could not adequately protect statutory nondiscrimination rights — had “acknowledged on appeal that the CBA provision requiring arbitration of their federal antidiscrimination statutory claims ‘[was] sufficiently explicit’ in precluding their federal lawsuit.” *Id.* at 357-58.

Because the nondiscrimination provision in *Ibarra* did not “specifically identify Title VII or state that statutory discrimination claims shall be subject to the Article 51 grievance procedure” plaintiff’s Title VII sex discrimination claim was not subject to arbitration. *Id.* at 358-360.
B. Clear and Unmistakable Agreement to Arbitrate

Where a CBA falls short in being clear and unmistakable, it can be saved by a comprehensive memorandum of understanding read together with the CBA. In Savant, an employee asserted claims against his employer under the ADEA after his job classification and duties were changed. The Fifth Circuit affirmed a summary judgment decision in favor of the employer, because the employee did not exhaust the CBA and MOU’s grievance and arbitration procedures. Savant v. APM Terminals, 776 F.3d 285 (5th Cir. 2014). The Savant CBA did not specifically identify the ADEA or other statutory discrimination claims. It stated:

This grievance procedure and arbitration shall be the exclusive remedy with respect to any and all disputes arising between the Union or any person working under the Agreement . . . and [West Gulf] or any company acting under the Agreement . . . and no other remedies shall be utilized, except those remedies specifically provided for under this Agreement. Id. at 289.

The MOU, however, was clear and unmistakable. It stated: “Any complaint that there has been a violation of any employment law, such as . . . [the] ADEA...shall be resolved solely by the grievance and arbitration provisions of the collective bargaining agreement.” The MOU further clarified that its procedure “shall be a worker’s sole remedy for a violation of any anti-discrimination or employment law.” Id.

Similarly, in Gilbert v. Donahoe, 751 F.3d 303 (5th Cir. 2014), the Fifth Circuit held that a CBA was clear and unmistakable as to Rehabilitation Act claims, but not as to FMLA retaliation and interference claims. Article 15 of the CBA at issue in Gilbert addressed grievances. Section 15.01 provided:

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement . . . .

Id. at 309.

The Court ruled that plaintiff’s claims under the Rehabilitation Act were subject to arbitration because the CBA clearly and unmistakably incorporated the Rehabilitation Act into Section 2.01(B) of the CBA, which provided that, “consistent with the other provisions of this Agreement, there shall be no unlawful discrimination against handicapped employees, as prohibited by the Rehabilitation Act.” Id. at 309-310.

By contrast, the Court ruled that plaintiff’s claims under the FMLA were not subject to arbitration because the CBA did not incorporate the FMLA into the CBA. The CBA only pointed to the “Employee Labor Relations Manual” which states only that “it provides policies to comply with the FMLA.” Id. at 310. Simply providing a policy to comply with the FMLA “fell short of incorporation [of the statute into the CBA’s arbitration provision]. Id. at 310. Therefore, the Rehabilitation Act claim was subject to arbitration but not the FMLA claim.

See also Restea v. Brown Harris Stevens LLC, 2018 U.S. Dist. LEXIS 48362, at *11 (S.D.N.Y. Mar. 23, 2018) (compelling arbitration because “the CBA...explicitly provides that all causes of action arising out of the employee's employment must be submitted to
The CBA also prohibits discrimination “against any present or future employee by reason of . . . national origin . . . or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, . . . the New York State Human Rights Law, [and] the New York City Human Rights Code.”

IV. UNION DUES DEDUCTION

A. Unilaterally Ceasing Dues Deductions

While an employer typically must retain the status quo following expiration of a collective bargaining agreement, there are several contractual clauses that the Board has held do not survive contract expiration and are not part of the status quo obligation, including no strike/no lockout, the duty to arbitrate grievances, and management rights. An agreement to deduct union dues also had long been among the provisions that did not survive expiration, Bethlehem Steel, 136 NLRB 1500 (1962). However, the Obama Board overruled Bethlehem Steel and held that in light of the Section 8(a)(5) prohibition on unilateral changes, an employer “must continue to honor a dues-checkoff arrangement established in that contract until the parties have either reached a successor collective-bargaining agreement or a valid overall bargaining impasse permits unilateral action by the employer.” Lincoln Lutheran of Racine, 362 NLRB No. 188 (2015) (Miscimarra and Johnson dissenting).

In overruling over 50 years of established precedent, the Obama Board removed an important employer economic tool which had been useful in pushing a recalcitrant union bargaining team towards resolution. The Trump NLRB may have an opportunity to reinstate the holding in Bethlehem Steel but that remains to be seen.

B. Contract Language to Stop Dues Deduction

An employer who wants to have the option to cease dues deduction at expiration of a collective bargaining agreement can still do so, despite the holding in Lincoln Lutheran of Racine. To do so, the employer could propose contract language that either automatically ends dues deduction upon contract expiration, or gives the employer the right to do so, with notice to the union. However, because under Lincoln Lutheran of Racine this would be a waiver of a statutory right, it must be clear and unmistakable. In another case involving ceasing dues deduction after contract expiration, the Ninth Circuit overruled the Board and held that language in the dues deduction clause that said that the provision would be in effect “for the term of the Agreement,” was not adequate to allow the employer to discontinue it upon the agreement’s expiration. Local Joint Exec. Bd. of Las Vegas v. NLRB (Hacienda Hotel), 540 F.3d 1072 (9th Cir. 2008). The court said that in order to be a clear and unmistakable waiver, the language would instead have had to call for termination of the clause upon expiration.

V. UNION ACCESS AND PICKETING

It is well-established that employers generally can prohibit labor organization activities by non-employee union representatives conducted on the employer’s property. Lechmere, Inc. v NLRB, 502 US 527 (1992). The Obama Board attempted to limit this rule to initial organizing activity and exclude activity related to bargaining when the parties have an agreement regarding outside union access. In Fred Meyer Stores, 362 NLRB No. 82 (2015), the parties had an agreement that permitted union representatives to visit the employer’s stores to meet with employees, as long as the union representatives contacted store management first, and did not interfere with service to customers or “unreasonably interrupt employees with the performance
of their duties.” The parties’ practice had been that one or two union representatives could enter the store, check in with store management, and make contact with employees for a minute or two while they were working, with any longer contact taking place during employee breaks and in the employee break room.

Despite these longstanding access rules, during contentious bargaining in 2009, eight union representatives descended upon a single store, and six of them did not check in with store management. They began contacting employees who were working to explain and obtain signatures on a petition related to health care. They refused to move their discussions into a break room upon the employer’s request, and refused to leave the premises when the employer first asked, and then demanded, that they do so. The Obama Board (Johnson dissenting) held that the employer violated Sections 8(a)(1) and 8(a)(5) of the Act by directing the union representatives to the break room, demanding they leave the store, disparaging the union, and calling the police.

The U.S. Circuit Court of Appeals for the District of Columbia Circuit reversed, noting that “the Board’s actions in this matter are more consistent with the role of an advocate than an adjudicator.” The Court held that Lechmere applies to limit access by outside union representatives, and that any such access is allowed “only to the extent that [the outside union representatives] comply with the parties’ contractual access clause.” The Court further held that the Board had erred in requiring the employer to prove that the union violated the access clause. Instead, “the General Counsel of the NLRB carries the burden to show the Union representatives were in compliance with the parties’ Access Agreement.” Fred Meyer Stores, Inc. v. NLRB, 865 F.3d 630 (D.C. Cir.2017). The Court made particular note of the fact that some of the union representatives did not check in when they arrived at the store, and suggested that breach of that part of the parties’ agreement alone was enough to remove any further union access rights during that visit.

The Court also excused statements by a member of the management team that union representatives are “jerks,” unions are “outdated and ridiculous,” union dues are “ridiculous,” employees “did not need a union,” the union stole money from its members, and he did not believe in unions. The Court held that these statements were made out of frustration at the Union’s actions, and not sufficiently coercive to establish a violation of the Act.

In more good news, in December 2017, the Board held that UNITE HERE! violated Section 8(b)(1)(A) of the Act by staging weekly picketing over a period of months, during which it blocked valet employees’ ingress and egress for time periods ranging from 1-2 minutes, up to 5 minutes. Indeed, the Board adopted the decisions of two different Administrative Law Judges that held that blocking employees’ ingress and egress for any period of time is unlawful because it is coercive, even in the absence of any other unlawful activity. UNITE HERE! Local 5 (Aqua Aston Hospitality LLC dba Waikiki Beach Hotel), 365 NLRB No. 169 (2017) (Pearce dissenting).

VI. UNILATERAL CHANGES

A. First Contract Bargaining (Discipline)

In Alan Ritchey, Inc., 359 NLRB No. 40 (2012), the Board created a modified duty to bargain during first contract negotiations as to any form of discipline or discharge in which the employer’s administration of discipline requires the exercise of discretion. In cases involving suspension, demotion, discharge, or an “analogous sanction,” the NLRB held that the duty to bargain is triggered before the discipline is imposed. The NLRB noted an exception to this rule
in “exigent circumstances.” Where the employer has a “reasonable, good-faith belief that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel,” the employer can discipline immediately, provided that, “promptly afterward,” the union is given an opportunity to bargain about the decision and its effects. In cases involving “lesser sanctions” (such as verbal or written warnings), the employer must still bargain but can wait until after discipline is imposed. Even where there is a pre-imposition duty to bargain, the employer need not bargain before imposing discipline. Upon request, however, the employer must continue to bargain until agreement or impasse is reached with respect to the discipline.

B. First Contract Bargaining (Wage Increases)

Employers have an obligation to maintain the “status quo” with respect to terms and conditions of employment following union certification. Unilateral changes to bargaining unit wages can expose the employer to an unfair labor practice charge. NLRB v. Katz, 369 U.S. 736, 743-744 (1962) (holding that employer which persisted in giving discretionary merit wage increases violated its good faith bargaining obligation); Specialty Steel Treating, Inc., 279 NLRB 670 (1986) (same).

Among the more troubling (and frequent) scenarios for employers is how to handle a wage increase which would normally have been implemented during time that first contract bargaining is ongoing. Both annual across-the-board increases, as well as individual seniority or merit increases, can be implicated by these rules – rules which, indeed, were muddled even before the Obama Board. However, the critical inquiry is whether the increase can fairly be characterized as part of the “status quo” and whether criteria for determining the increase is already fixed or rather requires the employer to exercise discretion – in other words, is the scheduled wage increase an “established practice regularly expected by the employees.” Factors relevant to this determination include “the number of years that the program has been in place, the regularity with which raises are granted, and whether the employer used fixed criteria to determine whether an employee will receive a raise, and the amount thereof.” For example, in United Rentals, Inc., 349 NLRB 853, 854 (2007), the Bush Board found that annual performance evaluations and merit increases were part of the employer’s “practice of conducting merit reviews and adjusting wages based on those reviews and other fixed criteria was an established practice regularly expected by its employees, and consequently a term or condition of employment.” Rather than unilaterally discontinuing such process for a newly certified bargaining unit of employees, the employer was required to provide the union notice and opportunity to bargain over the discretionary elements of its merit increase program (usually, the amount of the increase).

The federal appeals courts have regularly criticized the Board for inconsistent decisions in cases charging employers with unlawfully granting or withholding wage increases during the pendency of first contract bargaining. Acme Die Casting v. NLRB, 26 F.3d 162, 166 (D.C. Cir. 1994) (remanding case involving discretionary across-the-board increases because of “no clear standard for determining whether a wage increase consistent as to timing but discretionary as to amount must be continued”); see also Daily News of Los Angeles v. NLRB (Daily News I), 979 F.2d 1571 (D.C. Cir. 1992) (detailing inconsistent precedent and remanding case involving annual merit based increases for the same reason). While the Board has to some extent attempted to resolve such inconsistencies, issues continue to remain in determining whether past wage increases have created an “established term and condition” of employment which must be continued until otherwise bargained to agreement or impasse. In this regard, distinctions have been typically drawn as follows:
The primary distinction has been based on whether the increases are “non-discretionary” (and thus must continue) or whether they are “discretionary” (and, thus, typically must not continue). The Supreme Court and Board have also distinguished between “fixed,” “automatic,” or previously “committed” increases (which must continue), and other types of increases. See Katz, 369 U.S. at 746 (“automatic increases to which the employer has already committed” must be continued); Oneita Knitting Mills, 205 NLRB 500, 502 (1973) (“fixed” or “automatically determined” increases must be continued).

Distinctions are also drawn between “established” increases based on fixed or defined factors which must be maintained. See, e.g., Daily News of Los Angeles v. NLRB (Daily News II), 73 F.3d 406 (D.C. Cir. 1996), and discretionary, across-the-board increases that are not based on any fixed or defined factors. See, e.g., Arc Bridges, Inc. v. NLRB (Arc Bridges I), 662 F.3d 1235 (D.C. Cir. 2011). Significantly, the timing of past annual increases, standing alone, has been held to be insufficient to create an established term or condition of employment. Daily News II, 73 F.3d at 412, n. 3; Arc Bridges I, 662 F.3d at 1239.

And, the Board has long held, with approval of the courts, that in the context of bargaining over wages between an employer and union, an employer may withhold wage increases from unionized employees as part of its overall bargaining strategy, provided the decision is not motivated by anti-union animus. See Arc Bridges, Inc., 355 NLRB No. 199, at p. 2 (2010), enf. denied, 662 F.3d. 1235 (D.C. Cir. 2011); Shell Oil Co., 77 NLRB 1306, 1310 (1948).

The Obama Board added a new twist to this analysis in the long-running Arc Bridges litigation, where on remand from the D.C. Circuit, the majority (Miscimarra dissenting) found the employer’s withholding of a yearly wage increase for newly-represented employees during negotiations was motivated by anti-union animus and was therefore unlawful under Section 8(a)(3) – though not Section 8(a)(5). 362 NLRB No. 56 (2015). In this case, which was already on remand from the D.C. Circuit, the Board majority relied on four facts: (1) the company intended to give the represented employees a 3 percent wage increase until they voted for the union; (2) managers at Arc Bridges made statements that seemed to encourage employees to blame their lack of raises on the union; (3) the company’s stated legitimate business reasons for the decision were “implausible;” and (4) the timing of later wage increase to non-union employee seemed pegged to the end of the union’s certification year. In dissent, then-Member Miscimarra noted the obvious tension in the analysis that makes most employers “damned if they do, and damned if they don’t.” Fortunately, earlier this year, the D.C. Circuit again took issue with the Board’s analysis and simply vacated the Board’s decision as unsupported by substantial evidence. Arc Bridges, Inc. v. NLRB (Arc Bridges II), 861 F.3d 193 (2017).

Regardless, the analysis in Arc Bridges and other cases underscores the obvious potential conflict in legal obligations between the duty to refrain from granting unilateral increases post-certification and the duty of an employer to continue to do what it otherwise would in the absence of the union vote.
C. Past Practice and the “Dynamic” Status Quo During Successor Bargaining

The challenges associated with scheduled pay increases and other benefit changes do not disappear after the first contract negotiations are concluded, however. Thus, in The Finley Hospital, 359 NLRB No. 9 (2012), the Obama Board majority (Hayes dissenting) held that the employer was required to continue to grant 3% wage increases to bargaining unit nurses on their anniversary dates after the expiration of the collective bargaining agreement – even though the agreement itself said (not once, but twice) that such increases would be granted “for the duration of the agreement.” According to the majority, the employer was required to continue to grant such increases as part of the “dynamic status quo” and either get the union’s agreement to end the increases post-expiration, or bargain to impasse. Of course, then Member Hayes said the contract meant what the contract said. (The Eighth Circuit agreed with Member Hayes, and held that the employer was not required to grant wage increases as part of the status quo. The Finley Hospital v. NLRB, 827 F.3d 720, 726 (8th Cir. 2016)).

However, apparently the Obama Board concluded that the “dynamic status quo” only operates in one direction – i.e., the union’s favor. Thus, in E.I. du Pont de Nemours, Louisville Works and E.I. du Pont de Nemours and Company, 364 NLRB No. 113 (2016), it reversed prior precedent in Courier-Journal I and II, 342 NLRB 1093 (2004) and 342 NLRB 1148 (2004), Capitol Ford, 343 NLRB 1058 (2004), and Beverly Health & Rehabilitation Services, 346 NLRB 1319 (2006), and held that the employer violated Section 8(a)(5) and (1) by unilaterally changing the terms of its health insurance plans after the collective-bargaining agreements had expired and the parties were negotiating for successor agreements and were not at impasse. The employer had a long established past practice of making annual modifications to its health insurance plans under both agreements. The Board majority (Miscimarra dissenting) held that employers may act unilaterally pursuant to an established practice (i.e., the status quo) only if the changes do not involve the exercise of managerial discretion. Applying this standard, the majority held that the employer's benefits changes, made without fixed criteria, did not establish a past practice that the employer was permitted to continue when the applicable collective-bargaining agreements had expired. As such, the employer was required to maintain the terms that existed on the expiration date until it bargained to agreement or reached a good faith impasse in overall bargaining for a new agreement.

Thankfully for employers, the Trump Board decided a case involving these issues just before Chairman Miscimarra’s term ended in December 2017. In Raytheon Network Centric Systems, 365 NLRB No. 161 (2017), the majority returned to the prior meaning of “past practice” and overruled Du Pont.

Raytheon and the United Steelworkers had a long bargaining history, and the 35 bargaining unit members had been on the Company’s health plan since 2001. Subsequent collective bargaining agreements between the parties provided that the employer could modify the health care benefits, as long as the changes applied to all 65,000 employees who were on Raytheon’s health plan.

During bargaining for a successor agreement, the union attempted to eliminate the language regarding health plan changes, and instead demanded the company bargain over the changes each year. The parties’ bargaining continued following expiration of the CBA, and into open enrollment for the 2013 plan year. The company did what it had done for 12 years – it sent out open enrollment notices to all employees, including bargaining unit employees. The notices explained minor changes in the health care plans. The union demanded bargaining
over these changes. The company refused, and implemented the changes effective January 1, 2013, consistent with past practice and the expired contract language.

The NLRB issued a complaint, and an Administrative Law Judge held that Raytheon had violated the Act, following the reasoning of Du Pont. The case then lingered for four years, until the December 2017 NLRB decision overruled Du Pont, and returned to a more common-sense definition of past practice. The Board held that because Raytheon had always made minor modifications to the health care plan, continuing to do so during bargaining for a successor agreement did not constitute a “change” in the employees’ terms and conditions of employment. The fact that the actions involved management discretion was irrelevant, because they were consistent with the parties’ past practice. The Board thus held that Raytheon had not violated the Act.

In overruling Du Pont, the Board removes a significant weapon unions had used to put employers in an impossible position in bargaining – the employers had a choice of (a) carving out small groups of unionized employees from broader company-wide benefit plans while bargaining continued; (b) agree to union demands to try to reach agreement before open enrollment; or (c) move to declare impasse on all remaining issues. Raytheon restores the more sensible approach of continuing to apply company health plans to unionized employees, even during bargaining, as long as any changes to the plan are consistent with the parties’ prior practice.

D. Use of E-Verify a Mandatory Subject of Bargaining

The NLRB recently issued a decision that reminds employers that the use of governmental systems can be a mandatory subject of bargaining, in the same way as employer-generated policies and rules. In The Ruprecht Co., 366 NLRB No. 179 (2018), the Board held that the employer violated the Act by unilaterally enrolling in E-Verify, and refusing to give the union unredacted copies of letters from US Immigration and Customs Enforcement agency Homeland Security Investigations identifying bargaining unit members with suspect immigration status. The Board held that enrollment in E-Verify is a mandatory subject of bargaining despite the fact that it is undertaken at the outset of employment. Under the E-Verify system, employers make conditional offers of employment and do not get the results until the employee has already started work – and become a member of the bargaining unit.

VII. CONCLUSION

While the decisions issued by the Obama Board have been particularly frustrating to many employers, understanding them and their impact on contractual provisions provides a useful framework for collective bargaining to protect your business.
It’s Not Your First Rodeo (or Maybe It Is): Avoiding Critical Missteps and Protecting Your Business Through Collective Bargaining

Presenters
Maria Anastas (Los Angeles), Eric C. Stuart (Morristown)

Moderator
Jacqueline M. Damm (Portland, OR)

Avoiding Critical Missteps and Protecting Your Business Through Collective Bargaining

- Today we will:
  - Analyze Initial and Successor Contract Bargaining
  - Review Key Contract Clauses
  - Evaluate Bargaining Scenarios
  - Suggest Strategies to Help You Get It Right Every Time
Avoiding Critical Missteps and Protecting Your Business

- Initial Contract vs. Successor Agreement
- What are your labor relations goals?
- What are the issues of central importance?
- What does “winning” look like?
- Leverage: hold onto it

Avoiding Critical Missteps and Protecting Your Business

- Before You Begin
  - Know Company Rules and Policies
  - Understand the Law of Good Faith Bargaining
  - Avoid Self-Inflicted Wounds
  - Know Why You Want a Clause in the Contract
  - What Language Satisfies Your Needs?
Whose Contract Is It, Anyway?

- Employer goals with CBA language:
  - Maintain or enhance flexibility
    - Operating flexibility
    - Benefits and policy changes
  - Obtain statutory waivers
    - Waiver of right to strike, picket, etc.
    - Waiver of duty to bargain over changes
    - Agreement to arbitrate statutory claims
- Protect the business by focusing on clauses that benefit management

Risky No Strike Clauses

Poll: What’s so risky about this Union proposal?

During the term of this agreement, the Union will not engage in any picketing, leafleting, strikes, sympathy strikes, sit-downs, slowdowns or any other work stoppage and the Employer will not lockout employees. However, it shall not be a violation of this Agreement nor cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a lawful primary picket line at the Employer’s place of business provided such lawful primary picket line is sanctioned by Joint Council # ___.


Risky No Strike Clauses

Options to Consider:

- Insist on removing the language impacting the No Strike commitment
  OR
- Propose alternate language minimizing harm to the business

“However, in the event of a labor dispute directly related to a [Name of Company and specific location] bargaining unit’s labor agreement, bargaining unit employees will not be required to cross a Joint Council # __ sanctioned primary picket line unless a secondary gate has been established at [Name of Company] property.”

Risky No Strike Clauses

Q: What can employees still do under this no strike clause?

“During the term of this agreement, the Union agrees it will not engage in a strike and the Employer agrees it will not lock out its employees.”
Arbitration

- Trade for no strike clause

Considerations:
- Limit to contractual violations only?
- Limit arbitrator’s authority to modify contract
- Selection of arbitrator/arbitrator pool
- Procedural issues – timeliness, statement of the grievance, etc.

CBA Arbitration of Statutory Claims – Good Idea?

Pros:
- No jury
- Quicker resolution
- Private proceeding

Cons:
- Union involvement and/or assistance
- Arbitrator pool
- Limited review
Arbitration of Statutory Claims

- Waiver of a statutory right
- Clear and unmistakable
- Be specific and explicit
- Non-discrimination clause paired with contractual arbitration is not enough

Arbitration of Statutory Claims

- Agreements to arbitrate class actions do not violate the NLRA
- Be aware of state laws
Management Rights Clauses

Can the Employer implement new policies—regarding work rules, absenteeism, and progressive discipline—based on the below language from its MR clause, without bargaining?

“[R]etains the sole and exclusive right to manage; to direct its employees; to evaluate performance, . . . to discipline and discharge for just cause, to adopt and enforce rules and regulations and policies and procedures; [and] to set and establish standards of performance for employees.”

Management Rights Clauses

RULE #1: Be Specific as to Rights Reserved

- Graymont PA, Inc., 364 NLRB No. 37 (June 29, 2016)
  - An employer must meet a very high level of specificity in a management-rights clause before the Board will find that the union unequivocally waived its right to bargain over the action in question.
  - Evidence of a “clear and unmistakable waiver” required
  - Draft your MR clause with as many specific rights as possible—anticipating future needs of the business (i.e., cameras in the workplace, handbook changes, etc.)
Management Rights

Excerpts from a strong management rights clause:

- The above Management Rights and all other matters not covered by the express language of this Agreement shall be administered by the Company on a unilateral basis in accordance with such policies and procedures as it shall from time to time determine.

- Except as explicitly provided herein, the Union by and on behalf of its members hereby expressly waives its right, if any, to bargain over any Management decision made pursuant to this Article. Management shall bargain with the Union regarding the impact and effect of the exercise of its rights on employees’ terms and conditions of employment, if such effects have not been addressed in this Agreement. The decisions which result in such impacts and effects are the exclusive right of management to make, and shall not be a subject of bargaining with the Union, unless the Parties mutually agree to bargain. The Parties shall bargain in good faith and attempt to reach agreement when bargaining over the impacts and effects of management’s decisions, but if no agreement is reached, management’s continued implementation of its decisions result in no violation of this Agreement.

Union Security and Dues Checkoff

- Right-to-work states
  - Union security is permissive subject
  - May not require dues payment as a condition of employment

- Non-right to work states
  - Lawfully bargain/enforce union security agreements
Union Security and Dues Checkoff

- Answer: *Lincoln Lutheran of Racine* 362 NLRB No. 188 (2015)
- Changes in legal landscape
  - Union must provide non member (Beck) objectors with information that the dues calculation has been independently verified, *Kent Hospital*, 367 NLRB No. 94 (March 1, 2019)
  - U.S. Supreme Court – Unions cannot compel non members to pay union dues (public sector)

Bargaining Strategy – Union Security and Dues Checkoff

- Seize the initiative
  - Recognize the importance of the issue to the union
  - Initial contract – refuse to agree or trade for management rights or other issues of central importance
  - Propose language that terminates dues deductions upon expiration of CBA
  - Successor contract – more difficult to modify
Health Insurance – *Don’t Fence Me In*

- Avoid specificity at all costs
- Draft language in broad terms
  - Avoid bargaining obligations during the term of the CBA
  - Permit the employer to make changes consistent with rising costs, plan design changes, or other factors
- Consistency across the company
- Plan document controls

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Health Insurance

- Participation in multi-employer health trust
  - Focus on employer contribution
  - Creates known cost; employees pay any difference
  - *But* – watch ACA affordability issue
    - Applies to “employee only” coverage
    - Composite rates may trip you up
Health Insurance Language

- Is this an effective waiver?

“The Employer will provide bargaining unit employees with the same benefits that it provides to non-bargaining unit employees in the same or similar classifications.”

Health Insurance Language

The Employer will provide medical, dental, vision, life insurance, short-term disability insurance, long-term disability insurance, and flexible spending accounts. It is the intent of the Employer to maintain these or comparable plans for the life of the Agreement. However, if, during the term of the Agreement, the Employer increases, decreases, or eliminates the benefits listed in this Article for substantially all of the balance of the employees of the Employer, the employees subject to this Agreement will be affected by the change to the same extent as the other employees. The Union will be promptly notified of any such change.

Yes, definitely a waiver!!!
Other Policies – *Don’t Fence Me In*

- Same considerations apply to CBA Articles regarding other benefits (i.e., leaves of absence, PTO, jury duty, etc.)
- Evaluate whether there are any state law exemptions for CBAs regarding overtime requirements, sick leave, or other mandates

The Immigration Debate Impacts Your Bargaining

- “No Match” Letters returning Spring 2019
  - Issued by SSA when a SSN does not “match” SSA’s records, or
  - By DHS when the Form I-9 information is suspect
No Match Letters

- Unions seek to prevent employers from acting on no match letters
  - Clauses in contract that restrict employers’ right to discharge/take affirmative action
  - Drag out the procedure/create new “rights”
  - SEIU, Unite, service sector

No Match Letters

- Just say no
- Issue already covered by law
- Employers must provide worker a “reasonable” period of time to correct
- E-Verify is a mandatory subject, *The Ruprecht Company*, 366 NLRB No. 179 (August 27, 2018)
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