Asher, Gittler & D'Alba, Ltd.
Release: Volume 44 No. 36

NLRB STRENGTHENS EMPLOYERS' DUTY TO BARGAIN WITH UNIONS

On August 30, 2023, the National Labor Relations Board ("NLRB") issued decisions in *Wendt Corp.*, 372 NLRB No. 135, and *Tecnocap LLC*, 372 NLRB No. 136. These two decisions address an employer's ability to unilaterally alter terms and conditions of work during contract negotiations. *Wendt* and *Tecnocap* overturn several previous rulings — most notably, *Raytheon Network Centric Systems*, 365 NLRB No. 161 — which had given employers significant leeway to modify employees' working conditions during negotiations without first bargaining with the union.

Under *Raytheon*, employers were permitted to make unilateral changes to workers' conditions during initial contract negotiations or while negotiating a new contract, so long as those changes were "similar in kind and degree" to prior changes imposed by the employer. The standard hinged on whether the affected employees could expect such changes given the employer's past practice. However, the *Wendt* and *Tecnocap* decisions have overturned this standard, making it more difficult for employers to change terms and conditions of work without first bargaining with the union.

In *Wendt*, the employer defended its decision to lay off bargaining unit employees at the start of contract negotiations, stating that this action was in line with its past practice. Under *Raytheon*, the employer may have prevailed on this argument. However, the Board in *Wendt* chose to depart from the *Raytheon* decision, ultimately concluding that the employer's defense was insufficient. The Board emphasized that past practice did not offer adequate justification for such unilateral changes and found that the employer's conduct ran counter to the Supreme Court's 1962 ruling in *NLRB v. Katz*. This landmark decision decreed that employers could not

unilaterally enact changes involving "a large measure of discretion," as this would be detrimental to the collective bargaining process and might dissuade employers from reaching an agreement with unions. Similarly, the Board in *Wendt* also found that the *Raytheon* standard undermined the NLRA's goal of encouraging bargaining.

In *Tecnocap*, the employer altered the work schedules of unionized employees during active negotiations for a new collective bargaining agreement. This action was in line with the employer's past practice, which had been established under the previous contract's management rights clause. Again, while this argument may have succeeded under the previous standard, the Board in *Tecnocap* found it unpersuasive. Overturning an aspect of *Raytheon* not addressed in *Wendt*, the Board declared that past practices grounded in an expired management-rights clause do not grant permission for new unilateral changes amidst ongoing negotiations for a new agreement.

The decisions in *Wendt* and *Tecnocap* have significant implications for both employers and unions. Employers can no longer rely on past practice to make unilateral changes to the terms and conditions of work during contract negotiations, and unions now have additional leverage and a greater ability to bargain on behalf of their members.

ASHER, GITTLER & D'ALBA, LTD.
200 West Jackson Boulevard, Suite 720
Chicago, IL 60606 – 312.263.1500
www.ulaw.com

Dated. September 13, 2023

U.S. News & Report's Best Law Firms Designation is for Chicago Tier 1 rankings in Employment Law (Individuals), Labor Law (Union), and Litigation (Labor and Employment) and a National Tier 2 ranking in Litigation (Labor and Employment).