NLRB CHANGES STANDARD FOR WHAT CONSTITUTES A "UNILATERAL CHANGE" REQUIRING BARGAINING, OVERRULES *DUPONT* DECISION

Philip A. Miscimarra's term on the National Labor Relations Board ("NLRB") ended on December 16, 2017, less than a year after he was named Acting Chairman of the NLRB (and subsequently named Chairman). Recognizing that the Board would lose its Republican majority (at least temporarily) after Chairman Miscimarra left, the Board issued a flurry of decisions during Chairman Miscimarra's final week in office. Many of these decisions reversed Board precedent and undid the work of the Obama Labor Board, including changes to the joint employer test and the test for workplace rules, among other standards.

One of these decisions, *Raytheon Network Centric Systems*, was issued on December 15, 2017 and dealt with the bargaining obligations that are required before an employer may implement a unilateral change in employment matters. In the 2016 case of *E.I. du Pont de Nemours* ("*DuPont*"), the Obama Board noted that an employer's duty to bargain under the National Labor Relations Act prohibits the employer from making any unilateral changes to established terms and conditions of employment without giving notice to the union and bargaining to an impasse on the issue. In other words, when the parties are negotiating a contract and have not reached impasse, the employer must maintain the status quo. This duty applies both during initial contract negotiations and for successor agreements.

In *DuPont*, the prior Board established, consistent with long-standing Supreme Court precedent, that when an employer takes some unilateral action that is consistent with past practice, this still constitutes a "change" that must be bargained to impasse with the union, if the past practice was created under an expired management rights clause, or if the unilateral action involved some discretion by the employer. This prevented employers from skirting their duty to bargain by claiming that "past practices" allowed them to unilaterally alter their employees' working conditions during contract negotiations.

In *Raytheon*, the employer made unilateral changes to employee medical benefits and related costs following the expiration of a collective bargaining agreement, without first giving notice to the union or bargaining to impasse. The employer argued that these changes were a continuation of a past practice involving similar changes to benefits that it had made at the same time every year from 2001 through 2012. The new Board agreed with the employer and overruled *DuPont*. It held that an employer's unilateral actions do not constitute a "change" if they are similar in kind and degree with an established past practice of the same type of unilateral action, even if no collective bargaining agreement was in place when the disputed actions were taken, and even if the employer's decision involves some degree of discretion (for example, semi-regular decisions to reduce employees' work hours).

The NLRB's decision was joined by Chairman Miscimarra and Members Marvin E. Kaplan and William J. Emanuel, both Trump appointees. Members Mark Gaston Pearce and Lauren McFerran, both Obama appointees, dissented from the majority's opinion. As the dissent noted, in *Raytheon* and other decisions issued the same week, the new Board did not give notice or invite any briefing before deciding to reverse established Board law. This violated norms that the Board usually follows before taking such drastic action. Additionally, the Board offered no real reason for changing Board law other than the fact that the Board had a new composition that included a majority of Republican appointees.

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