N.L.R.B. OVERTURNS LONGSTANDING PRECEDENT AND LOWERS THE BAR TO KICK OUT UNIONS

By a 3 to 1 vote, the National Labor Relations Board ("NLRB" or "Board") issued a decision finding that Johnson Controls, Inc.'s anticipatory withdrawal of recognition of a United Auto Workers affiliate ("Union") was lawful. The decision modified the Board's existing legal framework for an employer to cease bargaining prior to the expiration of a collective bargaining agreement ("CBA"). The Board also announced that employers questioning the majority status of an incumbent union may force a Board supervised election. In determining that Johnson Controls, Inc. lawfully withdrew recognition of the Union, the Board overturned portions of its ruling in *Levitz Furniture Company of the Pacific, Inc*., 333 N.L.R.B. 717 (2001), reasoning that elections best protect employees' free choice and resolve disputes regarding representational preferences.

On April 21, 2015, while in negotiations with the Union for a successor CBA, Johnson Controls, Inc. was presented with a union disaffection petition ("petition"). The petition was signed by 83 of the 160 bargaining-unit employees and expressed the employees' desire to no longer be represented by the Union. That same day, Johnson Controls, Inc. notified the Union of the petition and that it would no longer recognize the Union as the employees' bargaining representative upon the expiration of the existing contract on May 7, 2015. The Union responded on April 22, 2015 that it had not received the petition or any other verified evidence it no longer had majority support from bargaining-unit employees and demanded Johnson Controls, Inc. continue bargaining for a new agreement. Johnson Controls, Inc. did not provide the petition or continue bargaining.

Shortly thereafter, the Union solicited authorization cards from bargaining-unit employees and collected signed authorization cards from April 27, 2015 to May 7, 2015, including six that were signed by employees who had also signed the petition, so called "dual signers". The Union stated it had credible evidence that it retained majority support and suggested a meeting with Johnson Controls, Inc. to compare evidence. Johnson Controls, Inc. declined to meet and on May 8, 2015, withdrew recognition from the Union.

Under prior Board precedent, an employer could give notice that it would withdraw recognition from the union when an existing contract expires and could also suspend bargaining or refuse to bargain for a successor contract. To exercise this "anticipatory" withdrawal of recognition, the employer needed to receive evidence, within a reasonable period of time before the existing contract expired, that the union representing the employees no longer had majority support. Under the "last in time" rule, the union could offer evidence of majority status and this later evidence would control the outcome if it postdated the employer's evidence.

In *Johnson Controls, Inc*., the Board modified the "anticipatory" withdrawal of recognition in two ways: (1) the "reasonable time" before the contract expires in which the anticipatory withdrawal can be made is now defined as no more than 90 days prior to contract expiration; and (2) if an incumbent union wants to re-establish its majority status, it must file an election petition within 45 days after an employer effects an anticipatory

withdrawal. 368 N.L.R.B. No. 20 (2019). This 45-day period remains in effect regardless of whether the contract expires within that period of time. Furthermore, pursuant to existing representation law, a rival union may still file its own petition during the 30-day open period regardless of whether the incumbent union files an election petition.

If no post-anticipatory withdrawal election petition is timely filed, the employer may rely on the disaffection evidence it possesses to lawfully withdraw recognition at contract expiration unless there are other grounds which render the withdrawal unlawful. If a post-anticipatory withdrawal election petition is timely filed, the employer may still withdraw recognition at contract expiration and may withhold recognition unless the union establishes its majority status through an election. The existing safe harbor rule remains in effect—an employer may choose to file an RM Petition ("Representation Petition") to demonstrate it has evidence to demonstrate reasonable good-faith uncertainty that the union no longer has majority status. No employer that refrains from withdrawing recognition will be in violation of Section 8(a)(2) and no union that accepts such recognition will be in violation of Section 8(b)(1)(A). The one exception to the safe harbor rule is that if a rival union has filed an election petition or otherwise intervenes in the incumbent union's case, the employer must withdraw recognition from the incumbent to ensure no unfair advantage to the incumbent.

Notably, no party to this case had petitioned the Board to reverse the previous precedent. Nor did the Board provide public notice of its intent to reverse the long-standing precedent and create a new procedure so as to receive briefs on the issue from interested parties. This is another example of the Board using its majority to aggressively and rapidly overturn Board precedent. Asher, Gittler & D'Alba urges its clients to consult their attorney immediately in the event an employer seeks to exercise "anticipatory withdrawal."

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This release informs you of items of interest in the field of labor relations. It is not intended to be used as legal advice or opinion.

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