Updates

NLRB Changes Standard for Evaluating Employer Statements on Employee Access to Management in a Unionized Environment

The National Labor Relations Board (NLRB or Board) overturned decades of precedent on November 8, 2024, by announcing a new, stricter standard to determine the lawfulness of employer statements regarding employee access to management in a unionized environment.

In *Siren Retail Corp.*, 373 NLRB No. 135 (2024), a majority of NLRB members held that statements that a union would come between employees and their employer could be viewed as unlawful threats to end the workers' existing direct relationship with management. Now, employer statements regarding employees' direct access to management are lawful only if they are based in fact and "carefully phrased" to "convey an employer's

belief as to the demonstrably probable consequences beyond [its] control."

In reaching this conclusion, the Board relied on Section 9(a) of the National Labor Relations Act, which allows unionized workers "to present grievances to their employer and have such grievances adjusted … as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect … ." Since 1985, employers have relied on the Board's decision in *Tri-Cast* to evaluate the lawfulness of these types of statements. 274 NLRB No. 377 (1985). There, the Board held that the employer had not made an unlawful threat when it said, "We have been able to work on an informal and person-to-person basis. If the union comes in this will change. We will have to run things by the book, with a stranger, and will not be able to handle personal requests as we have been doing."

The current Board noted that it "takes no issue with the general observations that the *Tri-Cast* Board made[,]" including that, "'[t]here is no threat, either explicit or implicit,' in an employer statement that *merely* says to employees that 'when they select a union to represent them, the relationship that existed between the employees and the employer *will not be as before*.'" The current Board did, however, "fundamentally disagree" that the "specific employer statement at issue in *Tri-Cast* was such a statement, and . . . that, as a categorical matter, *all* employer statements on the general subject of employees' ability to address issues individually with the employer after unionization are always lawful."

The Board stated that its decision affirmed that employers are free to express views about unionization to employees but that "all such predictions must be grounded in objective fact." The Board determined that its new standard would be applied only prospectively. It also stated that the statements at issue in *Siren Retail*, including that voting "yes" for a union meant "giv[ing] your right to speak to leadership through a union" or "[t]hat a third party comes in and speaks for you[,]" would be considered lawful under *Tri-Cast* but likely unlawful under the newly announced standard.

Notably, Member Marvin Kaplan dissented from the Board's decision to overrule *Tri-Cast*, asserting that the Board was unable to overturn *Tri-Cast* because the issues arose in a representation case (whereas *Siren Retail* involved an unfair labor practice) and that *Tri-Cast* had been properly decided.

Given the upcoming change in presidential administrations, we can expect challenges to the *Siren Retail* decision and a push to reinstate *Tri-Cast*. In the meantime, employers should exercise caution when commenting on the impact a union could have on its workforce and contact experienced counsel for guidance.

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